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285	Bansi Ram v. Kunj Behari	...	1 U P L R (B. R.) 36.
285	Uttam Chand Saligram v. Mahmood Jewa Mam-mooji	...	23 C W N 704; 46 C 534.
292	Babu Khan v. Bhairon Prasad	...	1 U P L R (B. R.) 33.
292	Konda Siddhia Chetty v. Venkataroya Chetty	...	10 L W 555; 37 M L J 659; 26 M L T 440; (1920) M W N 155; 43 M 282.
293	Ram Narain v. Muhammad Hashim Ali Khan	...	1 U P L R (B. R.) 33.
294	Domarsingh v. Hirondibai	...	*Nagpur Judicial Commissioner's Court.
299	Bismillah Begam v. Chuttan	...	1 U P L R (B. R.) 34.
300	Pratapsingh v. Raja Dattaji Rao	...	*Nagpur Judicial Commissioner's Court.
303	Mubarik Fatima v. Muhammad Quli Khan	...	1 U P L R (B. R.) 33.
304	Ramdayal v. Jagrani	...	*Nagpur Judicial Commissioner's Court.
307	Joy Gobinda v. Hazira Bibi	...	24 C W N 149.
309	Muhammad Nabi v. Umedi	...	1 U P L R (B. R.) 37.
311	Shankar v. Govinda	...	*Nagpur Judicial Commissioner's Court.
313	Angad Singh v. Kashi Prasad	...	6 O L J 519.
315	Tukaram v. Deoji	...	*Nagpur Judicial Commissioner's Court.
317	Bhagwan Bakhsh Singh v. Sant Prasad	...	6 O L J 523; 22 O C 369.
318	Duraiswami Aiyar v. Krishnier	...	10 L W 436; (1919) M W N 797.
321	Twakkul Husain v. Ajodhya Bank Ltd, Fyzabad	...	6 O L J 523.
323	Nilkanth v. Madhorao	...	*Nagpur Judicial Commissioner's Court.
325	Gandharp Singh v. Nirmal Singh	...	6 O L J 529; 22 O C 300.
331	Rama Rao v. Kottipi Thimma Reddi	...	11 L W 393.
332	Jagannath v. Hanuman Singh	...	6 O L J 541; 2 U P L R (J. C.) 27.
334	Bulki v. Dagdia	...	*Nagpur Judicial Commissioner's Court.
335	Gopal v. Ram Harakh	...	6 O L J 547; 22 O C 331.
337	Chairman, Cossipore and Ohitpore Municipality v. Corporation of Calcutta	...	23 C W N 727; 46 C 910.
353	Ram Udit v. Bisheshwar	...	6 O L J 551; 22 O C 312; 2 U P L R (J. C.) 22.
357	Ramyad Panday v. Rambihara Pande	...	4 P L J 734; (1920) Pat 83.
359	Narain Singh v. Deputy Commissioner, Partabgarh	...	6 O L J 613.
362	Piyare Lal v. Chakar	...	2 U P L R (L.) 23; 13 P W R 1920; 6 P L R 1920.
364	Baldeo Das Kedar Nath v. Bombay Mercantile Bank, Limited	...	6 O L J 640.
366	Ahmad Noor Khan v. Abdur Rahman Khan	...	1 U P L R (H. C.) 167; 18 A L J 73.
368	Mahadeo Prasad v. Nasiban	...	6 O L J 615.
368	Bhutnath Nag v. Satya Kinkar Nag	...	*Calcutta High Court.
370	Ramsaran Das v. Sagar Mal	...	*Allahabad High Court.
371	Lal Ragoindra Pratap Sahi v. Abu Jafar	...	6 O L J 618; 22 O C 353.
378	Jagir Pramanik v. Subid Molla	...	*Calcutta High Court.
381	Raghunath v. Ganesh	...	18 A L J 214; 2 U P L R (H. C.) 79.
382	Neelatooru Venkatarangachari v. Neelatooru Sam-pathi Kumara Aiyangar	...	11 L W 5.
383	Ganga Singh v. Dhanno	...	15 P W R 1920; 7 P L R 1920.
394	National Insurance and Banking Co. Ltd, In the matter of	...	1 U P L R (H. C.) 192.
385	Abdul Gafur v. Ashamath Bibi	...	11 L W 31.
387	Mahesh Prasad Singh v. Budhwanti	...	2 U P L R (H. C.) 70.
387	Ghulam Muhammad v. Bura	...	2 U P L R (L.) 25; 14 P W R 1920; 8 P L R 1920.
389	Kutumat Puthen Variath Sekhara Varier v. Kotakat	...	(1920) M W N 9.
391	Golapjan Bibi v. Dil Mamud	...	*Calcutta High Court.
395	Ram Lagan Pande v. Muhammad Ishaq Khan	...	1 U P L R (H. C.) 181; 19 A L J 162.
396	Narendra Nath Kuti v. Satyadhan Ghosal	...	30 C L J 203.
398	Bazmir Khan v. Rustam Khan	...	*Allahabad High Court.
400	Satto v. Amar Singh	...	2 U P L R (L.) 27; 16 P W R 1920; 1 P L R 1920.
401	Walimahomed v. Emperor	...	13 S L R 166; 21 Cr L J 49.
402	Sital Prasad v. Emperor	...	18 A L J 64; 2 U P L R (H. C.) 76; 21 Cr L J 50.
404	Karuppiiah Pillai, In re	...	(1920) M W N 120; 11 L W 303; 21 Cr L J 52.
406	Kanhaiya Lal v. Emperor	...	1 U P L R (H. C.) 186; 21 Cr L J 54.
407	Jagan Nath v. Chandrika Prasad	...	6 O L J 616; 21 Cr L J 55.

408	Mahadeo Sahu v. Emperor	...	1 U P L R (H. C.) 173; 18 A L J 50; 21 Cr L J 56.
409	Muthu Goundan v. Emperor	...	(1920) M W N 49; 11 L W 317; 21 Cr L J 57.
411	Chander Shekhar v. Emperor	...	21 Cr L J 59.
412	Rohan v. Emperor	...	6 O L J 541; 21 Cr L J 60.
413	Sahdeo v. Sarjoo	...	21 Cr L J 61.
414	Chitralla Bheemanna, <i>In re</i>	...	37 M L J 656; 10 L W 669; (1920) M W N 156; 21 Cr L J 62.
416	Sheikh Sanao v. Emperor	...	21 Cr L J 64.
417	Sheoprasad v. Govind	...	*Nagpur Judicial Commissioner's Court.
418	Sudhia v. Makka	...	18 A L J 71.
419	Ghulam Muhammad v. Gauhar Bibi	...	18 P W R 1920; 10 P L R 1920.
424	Mundar Bibi v. Baijnath Prasad	...	18 A L J 81.
426	Kalka Singh v. Gar Saran Lal	...	6 O L J 656.
428	Bundesri v. Ganga Prasad	...	1 U P L R (H. C.) 170; 18 A L J 89.
429	Kunja Behari Roy v. Panchanon Sikdar	...	*Calcutta High Court.
431	Parshotam Das v. Biththal Das	...	*Allahabad High Court.
431	Satish Chandra Kanungoe v. Nishi Chandra Dutta	...	46 C 975.
432	Amba Prasad v. Mushtaq Husain	...	18 A L J 167; 2 U P L R (H. C.) 69.
433	Abdul Ajj Abdululla v. Yakub Abdul Gani	...	*Calcutta High Court.
435	Ikhlaiq Ali v. Budh Sen	...	*Allahabad High Court.
436	Prabh Dial v. Shambhu Nath	...	20 P L R 1920.
437	Bishun Padu Haldar v. Firm Chandi Prasad & Co.	...	1 U P L R (H. C.) 183; 18 A L J 73.
439	Hindley, C. D. M. v. Joynarain Marwari	...	46 C 962; 24 C W N 288.
443	Lachmi Narain v. Sheo Nath Pandey	...	1 U P L R (H. C.) 177; 18 A L J 78.
444	The Rheinfels, <i>In re</i>	...	21 Bom L R 1116.
450	Muhammad Hashim v. Pam Sahai	...	*Allahabad High Court.
451	Idumbu Parayan v. Pethu Heddy	...	37 M L J 495; 11 L W 25.
453	Dogar Mal v. Mula	...	17 P W R 1920; 9 P L R 1920.
454	Municipal Chairman, Virudupatti v. Saravana Pillai	...	10 L W 592.
455	Lang v. Moolji Kasonji	...	21 Bom L R 1111.
458	Thygaraja Mudaliar v. Seshappier	...	10 L W 58; 27 M L T 94.
459	Makhan Lal v. Municipal Board of Agra	...	1 U P L R (H. C.) 178; 18 A L J 180.
462	Natesa Aiyar v. Manoyya Aiyar	...	10 L W 549.
463	Muzaffar Ali v. Muhammad Jawad	...	*Allahabad High Court.
465	Emperor v. Maruti Santu More	...	21 Bom L R 1065; 21 Cr L J 65.
473	Gopala Aiyar v. Krishnasawmy Iyer	...	11 L W 459; 21 Cr L J 73.
478	Joseph Perry, <i>In re</i>	...	46 C 996; 21 Cr L J 78.
479	Bamasami Boyan v. Emperor	...	11 L W 8; 21 Cr L J 79.
481	Nasir Wazir v. Emperor	...	21 Bom L R 1096; 21 Cr L J 81.
483	Jhabbu v. Emperor	...	1 U P L R (H. C.) 174; 18 A L J 53; 21 Cr L J 83.
485	Chatur Natha v. Emperor	...	21 Bom L R 1101; 21 Cr L J 85.
487	Peary Lal Mullick v. Surendra Kishore Mitter	...	24 C W N 247; 21 Cr L J 87.
488	Sorab Merwanji Alpaivalla v. Emperor	...	21 Bom L R 1103; 21 Cr L J 88.
491	Gandi Apparazu v. Emperor	...	10 L W 521; 38 M L J 194; 21 Cr L J 91.
494	Shan Singh v. Emperor	...	3 U B R (1919) 188; 21 Cr L J 94.
494	Lachmi Narain v. Emperor	...	1 U P L R (H. C.) 171; 21 Cr L J 94.
495	Emperor v. Vishvanatha Vishnu Joshi	...	21 Bom L R 1084; 44 B 42; 21 Cr L J 95.
496	Yusaf Ali Khan v. Emperor	...	21 Cr L J 96.
497	Sena Yasim Sahib v. Kadur Ekambara Iyer	...	37 M L J 698; 26 M L T 441; 10 L W 672.
501	Ma E Ko v. Ma Pwa Hmi	...	3 U B R (1919) 179.
503	Ranganayaki Ammal v. Parthasarathy Ayyangar	...	10 L W 550.
504	Muhammad Sajjad Ali Khan v. Muhammad Ishaq Khan	...	1 U P L R (H. C.) 168; 18 A L J 83.
506	Venkata Perumalla Pillai v. Marapudi Venkata-swami Naidu	...	10 L W 605.
507	Maung Tun Maung v. Ma Ywe	...	3 U B R (1919) 183.
508	Agnihotram Jagannadha Charyulu v. Bommadevara Satyanarayana Varaprasada	...	37 M L J 706; 11 L W 101; (1920) M W N 145.
512	Pala-Bam v. Mulk Raj	...	2 U P L R (L.) 29; 17 P L R 1920.
513	Maung Taw v. Moosaji Ahmed & Co.	...	3 U B R (1919) 189.
515	Sabapathi Pillay v. Thandavaroya Odayar	...	37 M L J 620; 11 L W 108.
518	Sasi Bhushan Bhador v. Basanta Lal Bhar	...	*Calcutta High Court.
510	Mohamed Askari v. Nisar Husain	...	18 A L J 212; 2 U P L R (H. C.) 95.
520	Hanuman Singh v. Adiya Prasad	...	22 O C 323.
524	Chioambaranatha Goundan v. Sellappa Reddi	...	10 L W 620; 27 M L T 37.
528	Dirgpai Singh v. Pahladi Lal	...	18 A L J 137; 2 U P L R (H. C.) 99.
530	Vedalingam Pillai v. Veerathal	...	37 M L J 547; 26 M L T 518; (1920) M W N 77.

535	Ladli Prasad v. Nizam-ud-din Khan	...	22 O C 842; 2 U P L R (J. C.) 25.
536	Venkatachella Reddy v. Muthialu Reddy	...	37 M L J 624.
538	Jachmi Mondal v. Cheninissa Bibi	...	24 C W N 328.
540	Jagdeo v. Mathura Prasad	...	6 O L J 677; 22 O C 845; 2 U P L R (J. C.) 19.
542	Abirajan Bewa v. Sheikh Kabil	...	*Calcutta High Court.
543	Madukuri Ankamma v. Muvvala Subbayya	...	37 M L J 611.
544	Jai Kishori Bibi v. Afzal Khanam	...	22 O C 849; 2 U P L R (J. C.) 17.
546	Sohan Lal-Chiman Lal v. Jai Narain-Babu Lal	...	2 U P L R (L.) 20.
548	Asanulla Molla v. Sankar Das Sauyal	...	*Calcutta High Court.
550	Firm of A. M. Mylappa Chettiar v. Aga Mirza Mahomed Shirazee	...	37 M L J 712; 26 M L T 504.
558	Harendra Kumar Roy v. Debendra Kumar Das	...	*Calcutta High Court.
561	Ram Narain v. Harzam Das	...	1 U P L R (H. C.) 166; 18 A L J 142.
562	Umesh Chandra Ghosh v. Nistarini Besu	...	24 C W N 204.
564	Ali Bahadur Khan v. Bisheshar Singh	...	22 O C 319; 2 U P L R (J. C.) 21.
565	Bahim-un-nissa Begam v. Srinivasa Ayyangar	...	11 L W 138; 38 M L J 266.
567	Ram Gopal v. Bhooaraj Singh	...	1 U P L R (B. R.) 41.
568	Satindra Nath Banerjee v. Banwari Mukunda Dass	...	*Calcutta High Court.
569	Kudai Khan v. Jagat Narain Dubey	...	1 U P L R (B. R.) 42.
570	Abirjan Bibi v. Gole Mahamed	...	*Calcutta High Court.
572	Govind Pandey v. Dipa Koeri	...	1 U P L R (B. R.) 47.
578	Rajasaheb Rasulsahab, <i>In re</i>	...	21 Bom L R 1085; 44 B 44.
574	Ram Harakh v. Jagdamba Debi	...	1 U P L R (B. R.) 46.
575	Maung Po Lat v. Ma Ngwe Ma	...	3 U B R (1919) 182.
575	Ishwari Chaudhari v. Dukhi	...	1 U P L R (B. R.) 43.
577	Nga Nan Da v. Emperor	...	3 U B R (1919) 176; 21 Cr L J 97.
578	Amrita Bazar Patrika, <i>In the matter of</i>	...	23 C W N 1057; 30 O L J 269; 21 Cr L J 98 S.B.
614	Jharu Khan v. Sarada Charan Sikdar	...	21 Cr L J 134.
616	Ram Parsad Sahu v. Emperor	...	21 Cr L J 136.
617	Kullappa Naicker v. Talaniammall	...	11 L W 148; (1920) M W N 131; 21 Cr L J 137.
619	Ganesh Ram v. Gyan Chand	...	21 Cr L J 139.
620	Pirbux v. Musammat Baji	...	21 Cr L J 140.
623	Sheikh Chamman v. Emperor	...	(1919) Pat 483; 1 P L T 11; 2 U P L R (Pat) 24; 21 Cr L J 143.
624	Bhanwar v. Emperor	...	18 A L J 58; 1 U P L R (H. C.) 172; 21 Cr L J 144.
625	Madan Mondal Gochi v. Tarini Chandra Banerjee	...	*Calcutta High Court.
626	Niaz Husain v. Tikaram	...	1 U P L R (B. R.) 48.
626	Mauindra Nath Mittra v. Hari Mondal	...	24 C W N 133.
630	Mahesh Kant Choudhury v. Ram Prasad Rai	...	1 P L T 33; (1910) Pat 75; 2 U. P L R (Pat) 26.
631	Sasadhar Bhattacharjee v. Arun Kumar	...	*Calcutta High Court.
632	Kaniz Zohra v. Nepal	...	22 O C 247.
633	Abdul Rahaman v. Mohendra Chandra Ghosh	...	*Calcutta High Court.
634	Hari Prasad v. Govinda Rao	...	*Nagpur Judicial Commissioner's Court.
636	Detendra Narayan Singh v. Narendra Narayan Singh	...	30 O L J 417; 24 C W N 110.
642	Allah Bakhsh v. Topan Bam	...	28 P R 1919 note; 28 P L R 1920.
643	Amrita Lal Mukherjee v. Hira Lal Mukherjee	...	*Calcutta High Court.
644	Gopal Jee Singh v. Ram Nandan Singh	...	*Patna High Court.
645	Durga Charan Biswas v. Kailash Chandra Das	...	*Calcutta High Court.
646	Mahmud v. Jumma	...	28 P R 1919; 16 P L R 1920.
647	Hochen Sardar v. Pores Nath Pal	...	*Calcutta High Court.
647	Zemindar of Pangidigudem v. Venkatappayya	...	37 M L J 591.
652	Sukan Sao v. Karu Mahton	...	1 P L T 13; 5 P L J 87.
655	Nur Khan v. Shaikh Rahim	...	*Nagpur Judicial Commissioner's Court.
658	Laljit Upadhyay v. Wajihunessa Begum	...	(1919) Pat 449; 5 P L J 79.
659	Abdul Rashid Mandal v. Shaharali Molla	...	46 C 1032.
662	Mathura Singh v. Ratan Barhi	...	*Patna High Court.
664	Radha v. Sakhu	...	*Nagpur Judicial Commissioner's Court.
666	Jhingur Cha v. Badri Sahu	...	*Patna High Court.
667	Hathising v. Kuber etha	...	22 Bom L R 83.
669	Tejpal Jamunndas v. B. Nathmull & Co.	...	46 C 1059.
670	Tipangavda v. Ramangavda	...	22 Bom L R 35; 44 B 50.
672	Jagdeo Narain Singh v. Bhagwan Mahto	...	1 P L T 27.
673	Padarath Singh v. Atan Singh	...	5 P L J 28; 21 Cr L J 145.
677	Abdul Salam v. Ramnewal Singh	...	1 U B R (1919) 172; 21 Cr L J 149.
679	Divanlal Varajrai Desai, <i>In re</i>	...	22 Bom L R 13; 21 Cr L J 151.
686	Chokauri Rai v. Emperor	...	21 Cr L J 159.
689	Jagannath Kashiram v. Shankar Ganpat	...	22 Bom L R 39; 44 B 55.

691	Harnandroy v. Gootiram.	...	46 C 1070.
693	Chanbasayya v. Chennappavda	...	22 Bom L R 44.
695	Aiti Kochuni v. Aidew Kochuni	...	24 C W N 173.
699	Khelafat Hussain v. Azmat Hussain	...	*Patna High Court.
700	Official Assignee of the Calcutta High Court v. Bidyasundari Dasi	...	30 C L J 428; 24 C W N 145.
703	Bhagwati Saran Singh v. Secretary of State	...	5 P L J 86; (1920) Pat 81.
705	Kalimuddin Mollah v. Sahibuddin Molla	...	24 C W N 4; 30 C L J 455 F. F.
715	Ramdhan Tewari v. Bishun Pragash Narain Singh	...	5 P L J 17; 1 P L T 156.
718	Manmatha Nath Kar v. Secretary of State	...	*Calcutta High Court.
719	Jarip Sardar v. Jogendra Nath Chatterjee	...	24 C W N 53; 31 C L J 78.
721	Balasubramania Sastri v. Ponnusami Iyer	...	10 L W 305; 26 M L T 259; (1919) M W N 707.
726	Babu Ram Mondal v. Dakhina Sundari Namasudrani	...	24 C W N 27.
728	Tanguthur Narasimham v. Singaraju Ramiah	...	38 M L J 126; (1920) M W N 233.
731	Sworup Mandal v. Ayan Rai Kowra	...	*Calcutta High Court.
733	Gumani v. Banwari	...	22 O C 289.
736	Bejoy Krishna Mookerjee v. Lakshmi Narain Jiu	...	30 C L J 433.
740	Palaniappa Chetty v. Subramanian Chetty	...	11 L W 145; (1920) M W N 135; 38 M L J 338.
742	Probhat Chandra Sen v. Hari Mohan Dhupi	...	24 C W N 206.
749	Venkatapathi Narayani v. Gaddam Chowdenna	...	11 L W 3.
750	Sheikh Nasarat v. Kali Das	...	*Calcutta High Court.
752	Poran Chandra v. Indra Seni	...	47 C 129.
753	Gantasola Jagannadhan v. Thathavarthi Ramabrahman	...	*Madras High Court
755	Soudamini Ghose v. Teniram Mahaldar	...	*Calcutta High Court.
756	Jhandi Lal v. Shiam Lal	...	*Allahabad High Court.
757	Abinash Chandra Choudhury v. Osman Biswas	...	*Calcutta High Court.
758	Murugappa Mudaliar v. Menuswami Mudali	...	38 M L J 131; (1920) M W N 178; 11 L W 248.
761	Maliram Kalita v. Purnananda Adichar	...	*Calcutta High Court.
761	Solaiyappa Chetty v. Lakshmanan Chetty	...	10 L W 659; 38 M L J 146; (1920) M W N 277.
763	Basanta Kumar Sarkar v. Sukhomoy Mondal	...	*Calcutta High Court.
764	Ram Parsan Upadhyay v. Nageshar Pande	...	18 A L J 135; 2 U P L R (H. C.) 43.
766	Gur Dayal v. Taid Husain	...	7 O L J 31; 2 U P L R (J. C.) 34.
768	Mahraj Singh v. Pitambar Singh	...	2 U P L R (H. C.) 44.
769	Jawad Hussain v. Emperor	...	21 Cr L J 161.
769	Tepanidhi Gobinda Chandra v. Emperor	...	5 P L J 11; 21 Cr L J 161.
772	Ram Chander v. Emperor	...	18 A L J 85; 2 U P L R (H. C.) 46; 21 Cr L J 164.
773	Mahesh Dutt Singh v. Emperor	...	(1920) Pat 127; 21 Cr L J 165.
774	Faqiray Lal v. Emperor	...	6 O L J 680; 21 Cr L J 163.
775	Enayet Karim v. Emperor	...	21 Cr L J 167.
778	Surendra Nath v. Emperor	...	21 Cr L J 170.
780	Ram Chandra v. Emperor	...	21 Cr L J 172.
781	Probodh Chandra v. Corporation of Calcutta	...	24 C W N 196; 21 Cr L J 173.
784	Jagdat Tewari v. Emperor	...	2 U P L R (H. C.) 38; 21 Cr L J 176.
785	Haris Chandra Nandi v. Keshab Chandra	...	*Calcutta High Court
786	Ram Sarup v. Ram Dei	...	18 A L J 118; 2 U P L R (H. C.) 37.
787	Bepin Chandra Roy v. Profulla Narain Roy	...	*Calcutta High Court
789	Tikaram v. Ram Chandra	...	*Nagpur Judicial Commissioner's Court.
792	Abdur Rahim v. Sital Prasad	...	17 A L J 856; 1 U P L R (H. C.) 115; 41 A 659.
794	Bhure v. Sheo Gopal	...	*Nagpur Judicial Commissioner's Court.
797	Badar-ud-din v. Herajtulla	...	*Calcutta High Court.
798	Dhansukhdass v. Zangoo	...	16 N L R 3.
801	Farhat-un-nissa v. Sundari Prasad	...	18 A L J 124; 2 U P L R (H. C.) 35.
802	Banwari Lal v. Ram Chandra Singh	...	1 P L T 17; 2 U P L R (Pat.) 23.
804	Rambharosa v. Sukhdas	...	*Nagpur Judicial Commissioner's Court.
805	Phakki Lal v. Brij Mohan Singh	...	*Allahabad High Court.
806	Dudali Uyal v. Belo Bibi	...	*Calcutta High Court.
807	Muthusami Asari v. Angayakannu Asari	...	11 L W 115.
807	Debendra Prasad v. Surendra Prasad	...	1 P L T 19; 5 P L J 107; (1920) Pat 83.
814	Balwantrao v. Narhar Gangaram	...	*Nagpur Judicial Commissioner's Court.
816	Ishri Mal v. Umrao Singh	...	*Allahabad High Court.
816	Alagiasundaram Pillay v. Midnapore Zemindary Co. Ltd.	...	*Madras High Court.

820	Somaria v. Bhularya	...	*Patna High Court.
821	Krishna v. Mahadeo	...	*Nagpur Judicial Commissioner's Court.
822	Kali Dayal v. Nagendra Nath	...	30 C L J 217; 24 C W N 44.
827	Hukam Chand v. Umar Din	...	21 P L R 1920.
827	Poonabai v. Ballabhdas	...	*Nagpur Judicial Commissioner's Court.
828	Sheo Bahadur Singh v. Beni Bahadur Singh	...	6 O L J 664.
829	Muhammad Beg v. Amar Nath	...	2 U P L R (L.) 33.
831	Iqbal Jehan v. Mathura Prasad	...	6 O L J 660.
832	Lochangir v. Sada	...	*Punjab Chief Court.
833	Kali Prasad v. Muhammad Yasin Khan	...	6 O L J 666.
833	Bua Ditta v. Ladha Mal	...	2 U P L R (L.) 37.
836	Koramull Ram Bullobh v. Mungilal Dalim Chand	...	23 C W N 1017.
838	Miran Ditta v. Bihari Lal	...	2 U P L R (L.) 39.
839	Annada Prasanna v. Somaruddi	...	23 C W N 926; 30 C L J 135.
842	Jhandu v. Niamat Khan	...	*Lahore High Court.
846	Parshotam Das v. Nazir Husain	...	6 O L J 668.
850	Jogesh Chandra Roy v. Mokbul Ali	...	23 C W N 945; 30 C L J 140.
853	Nasir Ali Shah v. Sughra Bibi	...	*Lahore High Court.
856	Makund Singh v. Kalka Singh	...	6 O L J 704.
860	Kanhai Singh v. Karu	...	*Nagpur Judicial Commissioner's Court.
861	Haidar v. Emperor	...	4 P R 1919 Rev.
862	Begg Dunlop & Co. v. Satis Chandra	...	23 C W N 677; 29 O L J 584; 46 C 1061.
873	Muhammed Umar Khan v. Razi Khan	...	170 P R 1919.
875	Atraj Singh v. Mooloo Singh	...	*Allahabad High Court.
876	Harnam Singh v. Naraina	...	162 P R 1919; 2 U P L R (L.) 40.
877	Nazir Bibi v. Ram Ratan	...	6 O L J 691.
879	Ali Muhammad v. Nathu	...	163 P R 1919.
881	Rusna Teli v. Emperor	...	21 Cr L J 177.
884	Daulat Ram v. Emperor	...	33 P R 1919 Cr; 21 Cr L J 180
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CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 317
OF 1918.

June 17, 1919.

Present:—Mr. Justice Newbould
and Mr. Justice Cuming.

KRISHNA PRASAD MAITRA, SHEBAIT
OF ANNOPURNA THAKURANI—

DECREE-HOLDER—APPELLANT

versus

DHIRENDRA NATH CHAKRAVARTY

JUDGMENT-DEBTOR—RESPONDENT.

*Limitation Act (IX of 1908), Sch. I, Art. 182—
Execution of decree—Notice, order for service of, whether
extends limitation—Limitation, commencement of—
Affidavit of service of notice, filing of, whether step-in-
aid of execution.*

An order for the service of a notice made by a Court to which the notice is sent by an executing Court for service, has not the effect of extending the period of limitation prescribed by Article 182, Schedule I of the Limitation Act, for making an application for execution of a decree. [p. 2, col. 1.]

The filing of an affidavit of service of notice in the Court to which the notice is sent by the executing Court for service, is not a step-in-aid of execution of the decree [p. 2, col. 2.]

Limitation does not run from the date when the execution case is disposed of, but from the date of presentation of the application for execution. [p. 2, col. 1.]

Appeal against the order of the Additional District Judge, 24-Pargannas, dated the 18th September 1918, affirming that of the Subordinate Judge, 3rd Court of that District, dated the 10th June 1918.

Babu Sarat Ohandra Mukerjee, for the Appellant.

Babu Hiralal Sanyal, for the Respondent.

JUDGMENT.—This is an appeal by the decree-holder against an order refusing execution of his decree on the ground that his application is barred by limitation. The following are the dates neces-

sary to understand the points which have been urged at the hearing of the appeal. The decree was passed on the 10th July 1908 and an application for execution was made in 1911 with which we are not concerned. Then a second application was made in 1914. On the 18th January 1915, a notice was filed for service on the judgment-debtor, under rule 22 of Order XXI of the Code of Civil Procedure. On the 22nd of January 1915 that notice was signed by the Sheristadar of the third Court of the Subordinate Judge at Alipur. As the judgment-debtor resided in the town of Calcutta that notice was forwarded to the clerk of the Small Cause Court of Calcutta on the 22nd January and was received by him on the 23rd January 1915 for service. On the 25th January 1915, the clerk of the Small Cause Court ordered the notice of the proceedings to be served and the notice was served on the judgment-debtor in Calcutta on the 27th January 1915. On the 23th January 1915 the decree-holder's identifier made an affidavit of service in the Small Cause Court and that affidavit was forwarded with the return of service to the executing Court at Alipur. In the Alipur Court the 2nd of February had been fixed for the hearing of the execution case. On that day the case was adjourned to the next day when it was dismissed for want of prosecution. The present application for execution was filed on the 25th January 1918. The question, therefore, is whether any act was done on or after the 25th January 1915 from which the period of limitation under Article 182 of the Schedule of the Limitation Act can be held to have commenced to run. Three points have been raised on behalf of the appellant. The

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first is that limitation should run from the 25th January 1915 when the order for service was passed by the Small Cause Court. The second is that the filing of the affidavit on the 28th January 1915 was a step-in aid of the execution from which the period of limitation should commence and thirdly, that limitation should run from the 2nd February 1915 when the Court passed an order on the application for execution.

As regards the first point, reliance is placed on the case of *Ratan Ohand Oswal v. Deb Nath Barua* (1) where it was held that the date of issue of notice was the date when the Nazir of the Court made over the process to the peon for service. As regards the meaning of the word "issue" in clause (6) of Article 182 of the Indian Limitation Act, reference may be made to sections 27 and 28 of the Code of Civil Procedure and also to Order V, rule 21 and the following rules. There it is clear that the Court which issues a notice or summons is the Court having jurisdiction in the matter and not the Court to which the notice or summons is sent for service. In the present case the issuing Court is the Court of the Subordinate Judge at Alipur and not the Court of Small Causes in Calcutta. We cannot say that the notice can, under any circumstances, be said to have been issued on any date subsequent to its leaving the Court that was executing the decree, that is to say, the 22nd of January 1915. In the case relied on, the Nazir who made over the process to the peon for service was the Nazir of the Court executing the decree. What was held in that case was that the date of issue was the date on which the notice actually left the Court and that is the view we take in the present case. The notice actually left the Court of execution on the 22nd January, and the fact that in the Court of service it was made over to the peon on a later date cannot extend the period of limitation.

As regards the second point, it turns on the meaning of the expression "Applying in accordance with law to the proper Court for execution or to take some step.

in aid of execution" in clause 5 of Article 182 of the Schedule of the Indian Limitation Act. On behalf of the appellant, great reliance is placed on the decision of this Court in the case of *Pran Krishna Das v. Protap Ohandra Dalal* (2). In that case it was held that filing an affidavit to prove service on the judgment-debtor of a notice issued under Order XXI, rule 22 of the Civil Procedure Code was equivalent to applying to the Court to take a step-in-aid of execution. At first sight this case seems to support the appellant's contention, but the facts in the present case are clearly distinguishable. In the first place the affidavit of service was never filed by the decree holder, and secondly, it was not filed in the proper Court as defined in Explanation 2 of Article 182. But in any case, we cannot hold that the filing of the affidavit in this case can be treated as an application to the proper Court to take some step-in-aid of execution. As was pointed out in the case of *Sarat Kumary Dassi v. Jagat Ohandra Roy* (3) the question whether an application in aid of execution has or has not been made is a pure question of fact. In this case, the lower Appellate Court, as a final Court of fact, has held that neither a written nor an oral application was made along with the affidavit. Having regard to this finding it is unnecessary to consider the many cases cited on both sides in which certain acts by the judgment-debtor in execution proceedings were held to amount to an application to take a step-in aid of execution. If no application was made, the period of limitation cannot be extended by any act that was done.

As regards the last point, it seems obvious that if on the date of hearing the case no application by the decree holder to the Court can be implied, that date of hearing cannot be substituted for the date of the application. In the case to which we have already referred, namely, *Sarat Kumary Dassi v. Jagat Ohandra Roy* (3), it was held that the 3rd March 1893, that is, the date when the order was passed on the application for execution, could not be treated as the date of the application which had, in fact,

(1) 10 C. W. N. 303; 4 C. L. J. 530.

(2) 38 Ind. Cas. 536; 21 C. W. N. 423.
(3) 1 C. W. N. 260.

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been made on the 11th January 1893 as there was nothing to show that there was any fresh application made on the 3rd March 1893. Also it was pointed out in the case of *Madan Mohun Dey v. Ganga Ohandra Roy* (4) that the time runs from the date of the presentation of the application and not from the date on which the application is disposed of by the Court.

We, therefore, hold that this appeal fails on all the three points urged before us and is dismissed with costs.

We assess the hearing fee at five gold mohurs.

Appeal dismissed.

(4) 13 Ind. Cas. 189; 17 C. L. J. 422.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 37B OF 1916.

December 5, 1916.

Present:—Mr. Stanyon, A. J. C.

GOKULDAS NAINSUKHDAS MARWARI

—DEFENDANT—APPELLANT

versus

RADHAKISAN MINOR, GUARDIAN SITABAI

—PLAINTIFFS—RESPONDENTS.

Negotiable Instruments Act (XXVI of 1881), s. 20, applicability of—Hundi paper, signed but left blank, delivery of, effect of—Attachment of unsigned stamp, without authority, effect of—Estoppel.

The estoppel arising from section 20 of the Negotiable Instruments Act can only be applied to the paper or papers which the signature covers. The delivery of a hundi paper signed but left blank cannot be taken to give *prima facie* authority to make thereon a negotiable instrument outside the maximum value covered by the stamp by attaching thereto other unsigned stamps. [p. 4, col. 2.]

The delivery of several signed stamps separately does not give *prima facie* authority to stick them together for the purpose of a single instrument. It is only when the signature is across two or more stamp papers pasted together showing thereby that the several stamps have been united with the sanction of the person making the signature, that section 20 will govern as one transaction an instrument engrossed upon the joined papers. [p. 4, col. 2.]

Appeal against the decree of the Senior Sub-Judge, Akola, in Civil Suit No. 94 of 1914, decided on 25th February 1916.

Mr. J. C. Ghosh, for the Appellant.

Sir B. K. Bose and Mr. Lal Mohan Bose, for the Respondent.

JUDGMENT.—The plaintiffs, *Musammatt Sitabai* and her adopted son *Radhakisan*, a minor under her guardianship, brought the suit giving rise to this appeal claiming Rs. 5,476.4 as due from the 1st defendant as the drawer, and the other defendants as the indorsees of a *hundi* for Rs. 5,000 dated the 19th July 1913 purporting to be payable in 61 days, i. e., on the 13th September 1913. The 1st defendant alone contested the suit, the other defendants remaining absent. The contending defendant urged that, taking advantage of his possession of signed *hundi* papers made over to him in blank, the defendant *Aidan* had drawn the *hundi* without authority and fraudulently and that the apparent drawer had received no consideration for the same.

In reply the plaintiffs denied all knowledge of the alleged circumstances under which the *hundi* was drawn, and pleaded sections 29 and 118 of the Negotiable Instruments Act, 1881, as applied to *Berar*, as entitling them to recover against the contending defendant. The lower Court decided the suit upon the above statutory estoppels, finding that the 1st defendant had in fact made over to the defendant *Aidan*, a *hundi* broker, *hundi* papers, and holding that the former could neither dispute the authority of *Aidan* to draw the *hundi* nor dispute the receipt of consideration. The Judge held, however, that, in the absence of any agreement, interest could only be claimed under section 80 of the above enactment. In accordance with these findings the plaintiff *Radhakisan* being found the sole owner of the firm to which the *hundi* was indorsed, was given a decree for Rs. 5,308.5.6 with costs and future interest. From this decree the 1st defendant has made the present appeal, and the ground urged by him amounts to this that section 20 of the above Act has been incorrectly applied to this case.

There was a marked want of intelligence upon the part of all concerned in dealing with this case. A mere perusal of the plaint, pleadings and judgment creates the impression that the Court was dealing with a *hundi* drawn on a single stamp paper. But that is not the case. The *hundi* is

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written across three stamp papers, only one of which is signed. The following diagram will explain this, the English words being a translation of the Guzrati in which the *hundi* is written :—

Hundi stamp of Rs. 3	Hundi stamp of As. 12	Hundi stamp of As. 12.
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Sagatmal please
accept the *hundi*
as drawn.

Hundi sold by
Deokisan Aidan
to Raghunath-
dasji Rampratap
of Aidan.

A *hundi* for Rs. 5,000 one-half of which is rupees two thousand five hundred double thereof being the full amount of this *hundi* drawn by Nainsukhdas Gokuldas of Khamgaon (in Nainsukhdas Gokuldas of Khamgaon) in favour of Deokisandasji Aidan of Akola payable within 61 days from *Ash Sudi 15* after being satisfied as to the identity of the person. Dated Saturday *Asarh Sudi 15 S. 1970*—19th July 1913.

The 1st defendant is bound by the signature on the centre paper 'Sagatmal', which is made by his authorised representative. But under each side of this paper are pasted two other *hundi* stamp papers which are not found to have been delivered by him to Aidan and the affixing of which enabled Aidan to draw a *hundi* for a sum which exceeds by more than six times the maximum sum covered by the signed paper. I am of opinion that the lower Court was wrong in applying section 20 of the Negotiable Instruments Act to these unsigned attachments. It is not alleged that there is any usage which excludes *hundis* in Barar from the operation of section 20, and we may, therefore, apply it. Section 20 reads thus:—

"Where one person signs and delivers to another a paper stamped in accordance with the law relating to negotiable instruments then in force in British India, and either wholly blank or having written thereon an incomplete negotiable instrument, he thereby gives *prima facie* authority to the holder thereof to make or complete, as the case may be, upon it a negotiable instrument for any amount specified therein and not exceeding the amount covered by the stamp. The person so

signing shall be liable upon such instruments, in the capacity in which he signed the same to any holder in due course for such amount; provided that no person other than a holder in due course shall recover from the person delivering the instrument anything in excess of the amount intended by him to be paid thereunder."

Now whether we look at the language of the section, or of the whole enactment, or of the Indian Stamp Act or of the Rules made thereunder, the words "a paper stamped" mean a single sheet of paper having engraved or embossed on it or affixed to it, a revenue stamp; and though the Stamp Act and the rules thereunder allow the joining together of two or more stamp papers for the engrossing thereon of a transaction requiring the aggregate value of the stamp used, and, except in the case of *hundi* paper, allow the writing area of a single stamp paper to be increased by the attachment of plain paper, it is clear that the estoppel arising from a signature under section 20 can only be applied to the paper or papers which it covers. The delivery of a *hundi* paper signed but left blank cannot be taken to give *prima facie* authority to make thereon a negotiable instrument outside the maximum value covered by the stamps by attaching thereto other unsigned stamps. The delivery of several signed stamps separately does not give *prima facie* authority to stick them together for the purposes of a single instrument. It is only where the signature is across two or more papers pasted together, showing thereby that the several stamps have been united with the sanction of the person making the signature, that section 20 will govern as one transaction an instrument engrossed upon the joined papers. Any other view of the law would open a wide door to fraud, and destroy commercial confidence. *Prima facie*, if the decision of this suit is to rest on the application of section 20 aforesaid, then the plaintiff-respondent could get no more than the maximum of Rs. 800 covered by the only paper which is signed; provided he is an indorsee in good faith. But it would not be just to either party to decide a case so imperfectly pleaded and tried upon a technical ground of that kind. The finding of the Court that the 1st defendant gave signed papers to Aidan cannot

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apply to the unsigned paper pasted to each side of the signed paper. The addition must have been made at the time of drawing the instrument, when the amount of consideration was settled and there is neither admission nor proof that the 1st defendant delivered to Aidan wholly blank stamp papers, with authority to paste them on to signed papers. Nor could the delivery of unsigned papers raise any presumption under section 20. The case must go back as wrongly decided on a preliminary ground, namely on the assumption that section 20 applies to all the three papers of the *hundi* in suit.

The appeal is allowed; the decree of the lower Court is reversed and the case remanded to that Court for fresh trial and decision with advertence to the above remarks, as between the 2nd plaintiff and the 1st defendant only. The appellant will be given a refund certificate. His other costs here and hitherto and the claim of the plaintiff to costs against him will abide the result. This judgment does not affect the lower Court's decree against the defendants who have not appealed.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 825
OF 1916.

April 10, 1918.

Present:—Justice Sir Ernest Fletcher, Kt.,
and Justice Sir Syed Shamsul Huda, Kt.,
GIRISH CHANDRA GHOSE AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

KISHORE MOHAN DAS—DEFENDANT
—RESPONDENT.

*Evidence Act (I of 1872), s. 114—Registered letter
returned to sender as having been refused by addressee
—Presumption.*

Where the addressee of a letter containing a notice to quit, sent through the Post Office by registered post refuses to take delivery, a Court would be entitled, under section 114 of the Evidence Act, to presume that the letter reached him in the ordinary course. The fact that the letter was returned to the sender, not through the Dead Letter Office but as a letter which the addressee had refused to accept, would not destroy the presumption.

Appeal against the decree of the Subordinate Judge, 1st Court, Hooghly, dated the 1st January 1916, reversing that of the Munsif, 1st Court, at Howrah, dated the 10th September 1914.

Babus Satindra Nath Mukherjee and Atindra Nath Mukherjee, for the Appellant.

JUDGMENT.

FLETCHER, J.—This is an appeal by the plaintiffs against the decision of the learned Subordinate Judge of Hooghly, dated the 7th June 1916, reversing the decision of the Munsif at Howrah. The plaintiffs sued for a declaration of their title and for ejectment of the defendant after service of notice to quit under the provisions of the Transfer of Property Act. The first Court gave the plaintiffs a decree. The second Court reversed that decision acting on the decision of this Court in the case of *Gobinda Chandra Saha v. Dwarka Nath Patita* (1). Of course, the decision in each case must depend on the particular facts proved in that case. One must first look into the facts proved in each case and then apply the law. In this case, the evidence proves that the notice was placed in a registered cover addressed to the defendant at his residence. It was taken to the Post Office, registered there and left in the custody of the Postal authorities. Therefore, under the provisions of section 114 of the Indian Evidence Act, the letter having been properly placed in the custody of the Post Office, the Court might presume that that letter reached the defendant. The Post Office returned the letter, not through the Dead Letter Office but as a letter which the defendant had refused to accept. It seems to me that that portion of the evidence does not, in any way, destroy the presumption that the Court might make under the terms of section 114 of the Evidence Act, that that letter having been duly posted, in the ordinary course of business, reached the defendant. It is trifling with the facts of this case to come to the conclusion that proper service of the notice through the Post Office has not been made. Each case must stand on its own facts. In this case, the only conclusion that a reasonable Judge must come to on the facts proved is that the letter containing the notice to quit having been duly committed to the charge of the Postal authorities for delivery to the defendant in the ordinary course reached the defendant. That being so, I think the service of the notice to quit has been properly proved. The decision

(1) 26 Ind. Cas. 932; 19 C. W. N. 439; 20 C. L. J. 455.

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of the learned Subordinate Judge must, therefore, be set aside and the decision of the Munsif restored. The appeal must be allowed, with costs, both in this Court and in the Courts below.

SHAMSUL HUDA, J.—I agree.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 65 OF 1916.

July 24, 1919.

Present:—Justice Sir Asutosh Mookerjee, Kt, and Mr. Justice Panton.

MANOHAR MOOKERJEE—PLAINTIFF

—APPELLANT

versus

Raja PEARY MOHAN MOOKERJEE

AND OTHERS—DEFENDANTS—RESPONDENTS.

Trust, private—Debttar estate—Shebait, failure of line of—Founder, right of, to appoint Shebait—Removal of Shebait, suit for, maintainability of—Administration of trust—Misconduct of trustee—Discretion of Court—Trustee, whether can purchase trust property—Civil Procedure Code (Act V of 1908), s. 92, applicability of, to private trust.

The rule embodied in section 92 of the Civil Procedure Code cannot be extended to private trusts. [p. 11, col. 1.]

Where the line originally indicated by the founder fails the founder or his heir has the right to nominate the shebait, and this principle applies equally to private and public trusts. [p. 11, col. 1.]

The founder or his heirs may also sue for the enforcement of the trust, for the removal of the old trustee, for the appointment of a new one and may thereby secure the proper administration of the trust and its properties. Whatever restrictions may have been prescribed by the Legislature as to the mode of institution of such suits in respect of public trusts, the rights of the founder of a private trust and his heirs remain unimpaired. [p. 11, col. 2.]

On the analogy of the well settled principle of English Law the view may be maintained that in respect of a debttar in India the founder or his heirs may invoke the assistance of a judicial tribunal for the proper administration thereof on the allegation that the trusts are not properly performed, and the case is strengthened when the management would under the terms of the trust vest in the plaintiff as the founder's heir, on a vacancy caused by the removal of the actual incumbent for misconduct. [p. 12, col. 1.]

Attorney-General v. Dedham School, (1857) 23 Beav. 350; 53 E. R. 138; 113 R. R. 169; 26 L. J. Ch. 497; 3 Jur. (N. S.) 325; 5 W. R. 395; *Biddia Soonduree v. Doorganund*, 22 W. R. 97; *Kazi Hassan v. Sagun*, 24 B. 170; 1 Bom. L. R. 649; *Prosunno Mulyee Dossee v. Koonjo Beharee*, (1864) W. R. 157; *Ram Narain Singh v. Ramoon Paurey*, 23 W. R. 76, relied on.

A trustee cannot purchase trust property directly or indirectly from himself or at his own sale. The rule is universal that, however fair the transaction, the cestui que trust is at liberty to set aside the sale

and take back the property. The law does not stop to enquire into the fairness of the sale or the adequacy of the price but stamps its disapproval upon a transaction which creates a conflict between the self-interest and the integrity of the trustee and this principle is equally applicable to the case of a purchase made by the shebait at a sale publicly held or held at the instance of a Court in execution of a decree against the debttar estate. [p. 13, cols. 1 & 2; p. 14, col. 2.]

The question as to whether there are sufficient grounds for the removal of a shebait is within the sound judicial discretion of the Court. In such a case the Court is guided by considerations of the welfare of the beneficiaries and of the trust estate, and also of a clear necessity for interference to save the trust property. [p. 18, cols. 1 & 2.]

Appeal against the decree of the Subordinate Judge, Hooghly, dated the 23rd December 1915.

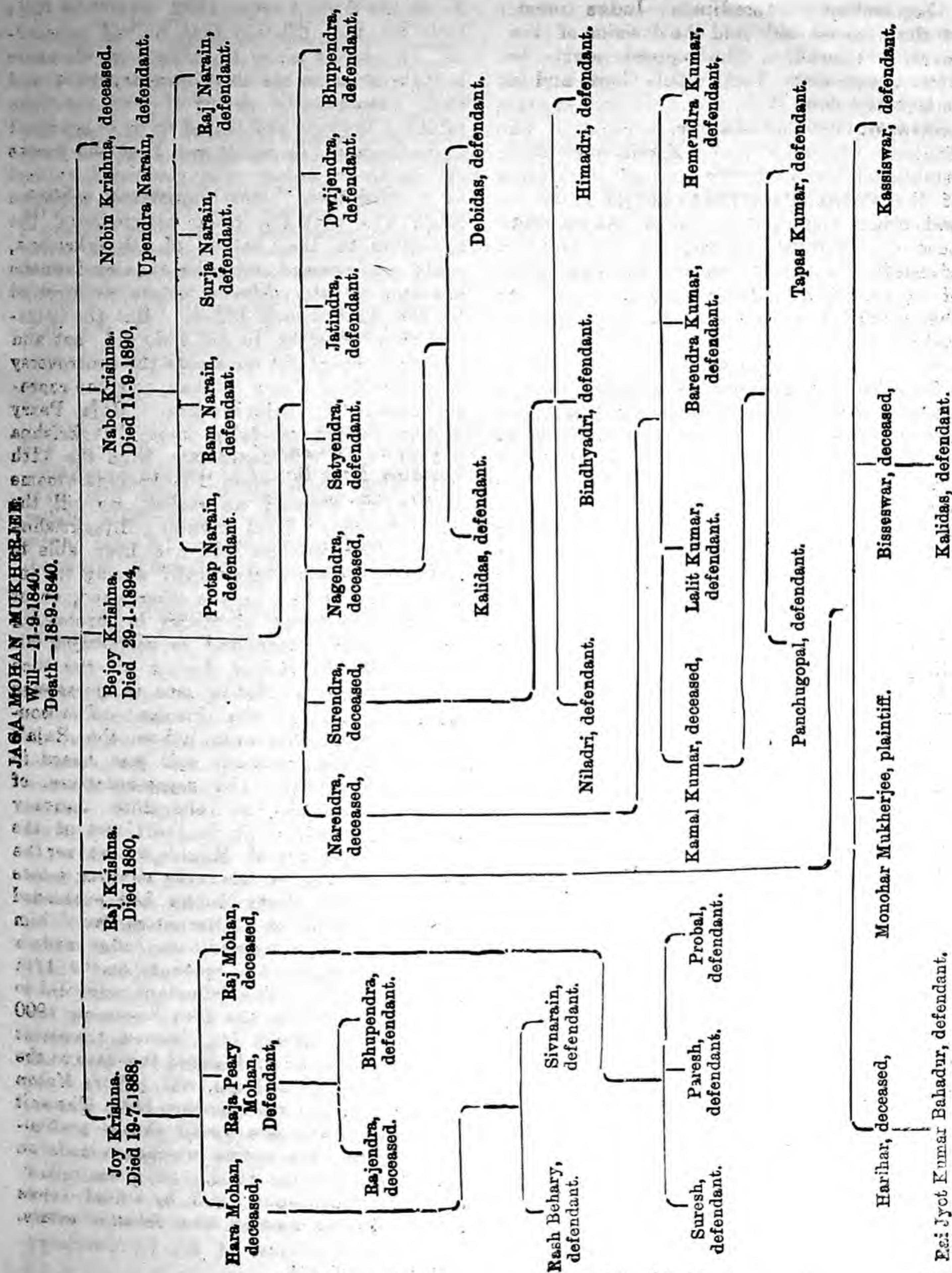
Mr. N. Sircar (with him Babus Biraj Mohan Mozumdar, Hiralal Chakravarti, Taradas Chatterjee, Sailendra Nath Chatterjee and Pramatha Nath Banerjee), for the Appellant.

Babu Mahendra Nath Roy (with him Babu Surendra Nath Roy, Dr. Dwarka Nath Mitter, Babus Haradhan Chatterjee and Kumar Sankar Roy), for Defendants Nos. 1 and 2, Respondents.

Babu Dwarka Nath Chakravarti (with him Babu Bijoy Kumar Chatterjee), for Defendant No. 3, Respondent.

JUDGMENT.—This is an appeal by the plaintiff in a suit for the construction of a Will, for the administration of a trust (private debttar) created thereby, for the removal of the trustee, for the appointment of a new trustee or receiver, for declaration that an execution sale of a portion of the trust estate held on the 14th January 1913, when it was purchased by the son of the trustee was invalid and inoperative, for proper investment of a sum of Rs. 11,500 alleged to form part of the trust estate, and for other incidental reliefs. The Subordinate Judge has found in favour of the plaintiff upon several of the questions in controversy, but he has dismissed the suit on the ground that the allegations of misconduct have not been established and the plaintiff is not entitled to ask for the removal of the trustee. To appreciate the substantial points in dispute, between the parties (whose relationship will appear from the annexed genealogical table), it is necessary to consider briefly the history of the trust which, since its foundation, has formed the subject of many proceedings in Court.

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Jagomohan Mookerjee, the common ancestor of the parties to this suit, made a testamentary disposition of his properties on the 11th September 1840, and died a week later. By this Will, he dedicated certain properties to the *sheba* or worship of two Thakurs, Sridhar and Gopaleswar Siva, established by him, the annual celebration of the Durga Paja, the Sradh of ancestors, and other pious acts, such as the maintenance of childless widows, the construction of roads for public use and the excavation of tanks. The testator also provided for the order of succession to the office of *shebait* among his own descendants. The first *shebait*s were his eldest son, Jaykrishna Mookerjee and Haranath Chatterjee (not a member of the family). Haranath died on the 29th January 1862, and thereafter Jaykrishna continued as sole *shebait* till his death on the 19th July 1888. Rajkrishna who, according to the Will, was to have followed Jaykrishna had died in 1880. Consequently Jaykrishna was succeeded by his step-brother Nabakrishna who died on the 11th September 1890. On his death, the succession opened to his brother Bijaykrishna. Raja Peary Mohan, the second son of Jaykrishna opposed Bijaykrishna and threw every possible difficulty in the way of his obtaining possession of the *debuttar* estate and collecting the rents. After the usual preliminary contest in the Revenue and Criminal Courts, on the 10th June 1892, Bijaykrishna instituted a suit in the Court of the Subordinate Judge of Hughli to establish his title to the office of *shebait* under the Will of the founder. The suit was defended by the Raja, who denied the genuineness of the Will and the existence of the *debuttar*. On the 29th January 1894 the Subordinate Judge decreed the suit, and on that very day Bijaykrishna died. Raja Peary Mohan preferred an appeal to this Court on the 25th January 1895 (as apparently some considerable time was taken up by proceedings for amendment of the decree) and joined as respondents the sons of Bijaykrishna who had been appointed executors to the estate of their father under his Will. In the memorandum of appeal, he challenged the factum and validity of the *debuttar* and completely repudiated the trust created by his grandfather. The appeal came to be heard before Maclean, C. J. and Banerjee,

J. on the 21st August 1898 when the Raja took up the position that he had succeeded as *shebait* upon the death of his uncle Bijaykrishna on the 29th January 1894 and that, consequently many of the questions raised in the suit had ceased to be of practical importance. The result was that the decree of the Court below was confirmed subject to modifications. One important variation made was that the then respondents, the executors to the estate of Bijaykrishna, could not proceed with the enquiry into the accounts of the *debuttar* estate as directed by the Subordinate Judge. But the litigation thus brought to an end, did not and obviously could not terminate the controversy between Raja Peary Mohan and the representatives of Bijaykrishna. Raja Peary Mohan had successfully kept Bijaykrishna out of the *debuttar* estate from the 11th September 1890, when Bijaykrishna became entitled to succeed as *shebait*, up till the 29th January 1894, when Bijaykrishna died. Bijaykrishna had not been able to collect more than Rs. 4,607 during his incumbency; he had, on the other hand, spent considerable sums of money in protesting the *debuttar* estate and in performing his obligations as *shebait* during all the time that Raja Peary Mohan was in possession and enjoyment of the income. The consequence was that even before the Raja's appeal in the previous suit was heard in the High Court, the representatives of Bijaykrishna had, on the 25th January 1897 instituted a suit in the Court of the Subordinate Judge of Hughli to recover the sum of Rs. 77,964 from the *debuttar* estate to which Raja Peary Mohan had succeeded as *shebait*, or in the alternative, from him personally. The Subordinate Judge made a preliminary decree for accounts on the 17th February 1899. The defendant appealed to this Court, and on the 28th November 1900 Banerjee and Brett, J.J., directed the plaint to be amended, and remanded the case to the Court below for a fresh trial [*Peary Mohan Mukherjee v. Narendra Krishna* (1)]. The suit was re-tried, with the result that a preliminary decree for accounts was again made on the 10th February 1902. This was followed on the 30th June 1903 by a final decree for Rs. 45,960 against the *debuttar* estate.

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Raja Peary Mohan appealed to the High Court, with the result that the decree of the Subordinate Judge was confirmed on the 24th February 1905 by *Hose and Pargiter, JJ.*: *Peary Mohan Mukerjee v. Narendra Nath Mukerjee* (2). The Raja was not satisfied and appealed to the Privy Council. On the 16th December 1909 the Judicial Committee dismissed the appeal and the judgment delivered by Lord Macnaghten commented upon his wrongful acts: *Peary Mohan Mukerjee v. Narendra Nath Mukerjee* (3). The decree-holders promptly applied for execution on the 1st May 1910 to realise a sum of Rs. 83,548 inclusive of interest and costs in all the Courts. They claimed that the costs of the Court of first instance were realisable out of the *debuttar* estate, while the costs of the appeals to the High Court and the Privy Council were realisable from the judgment-debtor personally. Raja Peary Mohan took various objections to the execution on the 27th July 1910, including an objection that he was not personally liable to pay the costs of the High Court and the Privy Council. These objections were overruled by the Subordinate Judge on the 3rd December 1910. Raja Peary Mohan appealed to the High Court against the decision imposing a personal liability on him, and obtained an order for stay of proceedings during the pendency of the appeal. No appeal was preferred against the order overruling his objections to execution against the *debuttar* estate. The result was that while execution against him personally was held up by order of the High Court, it proceeded against the *debuttar* estate, and an order for the sale was made by the Subordinate Judge on the 10th January 1911. Further objections were taken to the execution on the 13th January 1913, with a view to vary the order in which the attached properties were to be sold, but they proved infructuous. On the 14th January 1913, the most valuable of the properties comprised in the *debuttar* estate, namely, a four fifth share of lot Bahirgora was put up to auction and was purchased by Bhupendranath, one of the Raja's sons, for a sum of Rs. 1,56,600. The appeal prefer-

red by Raja Peary Mohan against the order for personal execution was heard in this Court by Jenkins, C. J. and Ray, J. on the 23rd March 1913, and was dismissed on the ground that, under the terms of the decree of the High Court and of the Privy Council, he was personally liable for the costs awarded thereby. The Court pointed out that there was nothing inconsistent in the fact that the claim sought to be enforced had been decreed against the *debuttar* estate with the direction that the *shebait* should be personally liable for the costs of the litigation conducted by him on behalf of the Thakurs.

Meanwhile, on the 17th February 1913, that is, about a month after the sale of Bahirgora in execution and its purchase by the son of the *shebait*, Monohar Mookerjee, a grandson of the founder and the eldest surviving son of Rajkrishna, had instituted the present suit for administration of the trust estate. The principal defendants were Raja Peary Mohan in his capacity as *shebait* as also in his personal capacity, and Bhupendranath his son who had purchased Bahirgora. The plaintiff further joined as *pro forma* defendants members of the various branches of the family, all descendants of the founder Jagamohan Mookerjee. The suit was defended by the Raja and Bhupendranath. The former challenged all the material allegations in the plaint, while the latter alleged that as he had purchased Bahirgora for himself with his own money, the property in his hands could not be declared to be trust property. The fourth defendant, Pratapnarin, the eldest son of Nabakrishna, also filed a written statement, which does not require further consideration; no relief is claimed against him and he has died during the pendency of this litigation. The following thirteen issues were raised on these pleadings:

1. Has the plaintiff right of suit and cause of action?
2. Has this Court jurisdiction to try this suit? Is the suit maintainable in the way in which it has been framed?
3. Has the plaintiff the right to maintain this suit under section 66 of the Civil Procedure Code?
4. Is the plaint sufficiently stamped?
5. Is the suit barred by limitation, estoppel and acquiescence?

(2) 32 C. 582; 9 C. W. N. 421.

(3) 5 Ind. Cas. 404; 37 C. 229; 11 C. L. J. 220; 37 I. A. 27; A. L. J. 125; 7 M. L. T. 63; 14 C. W. N. 261; 12 Bom. L. R. 257; 20 M. L. J. 171 (P. J. C.).

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6. Is the plaintiff as the next presumptive *shebait* for the time being entitled to the declaration sought for by him, and was Bhupendranath Mookerjee (defendant No. 3) colluding with Raja Peary Mohan Mookerjee (defendants Nos. 1 and 2) in the purchase of the *debuttar* property or was he an innocent purchaser for value without the knowledge of the Raja's wrongdoings?

7. Are the allegations of misconduct made by the plaintiff against defendant No. 1 true? If so, are they sufficient to justify the latter's removal from the *shebaitship*?

8. Is the plaintiff entitled under the terms of the Will of the late Babu Jagomohan Mookerjee to ask for the removal of the defendant No. 1 from the *shebaitship* and for the appointment of another trustee in his place, and to have a scheme for the execution of the trust prepared by the Court?

9. Whether the defendant No. 3 purchased the *debuttar* property at the auction sale as a mere *benamdar* for Raja Peary Mohan Mookerjee?

10. Whether the plaintiff is entitled to the declaration that 12-annas, 16 *gandas* of Bahirgora with Chakran purchased by defendant No. 3 at auction is *debuttar* property still?

11. Whether the defendant No. 1 can be restrained from withdrawing the surplus sale-proceeds deposited in Court in execution case No. 52 of 1910?

12. What relief, if any, is the plaintiff entitled to?

13. Which of the parties has under the terms of the Will of late Jagomohan Mookerjee the best claim to the *shebaitship* of the Thakurs and the *debuttar* estate? Is defendant No. 4 the best entitled to claim them as *Jaishta Putra* of the *Bansha*?

The Subordinate Judge has found against the plaintiff on the second part of issue No. 1, on the first part of issue No. 6, and on issues Nos. 7, 8 and 10, but in his favour on the first part of issue No. 1, issues Nos. 2, 3, 5, second part of issue No. 6, issues Nos. 9 and 13. On these findings, the Subordinate Judge has dismissed the suit with costs.

In support of the present appeal, preferred by the plaintiff, two substantial grounds have been urged, namely, first, that in the circumstances disclosed in the evidence, not-

withstanding the sale of the Bahirgora in execution and its purchase by the son of the *shebait* with funds supplied by his father, the property should in law be still regarded as part of the trust estate, and, secondly, that in view of the past conduct of the *shebait* in relation to the *debuttar* estate and his present position which involves a clear conflict of duty and self-interest, he should be removed from the office of *shebait*. On behalf of the respondent *shebait* the validity of these contentions has been questioned, and it has been urged in addition that the plaintiff is not competent to maintain the present suit. On behalf of Bhupendra, the son of the *shebait*, the finding of the Subordinate Judge that he was not the real purchaser has been assailed, and an endeavour has been made to support the decree on the ground that he is entitled to the protection enjoyed by a *bona fide* purchaser for value. The reasons assigned by the *shebait* to justify the decree made by the Subordinate Judge have also been reiterated on behalf of Bhupendranath, though as purchaser he is not directly concerned with the matters raised therein. The questions which emerge from the elaborate arguments addressed to us by the several parties may be conveniently examined in the following order:

(i) Is the plaintiff competent to maintain the present suit?

(ii) What is the true nature of the purchase of Bahirgora in execution by Bhupendra and what is the legal effect thereof on the *debuttar* estate?

(iii) Have sufficient grounds been established for the removal of the *shebait*?

As regards the first question, the defendants have contended that as the plaintiff has no present interest in the *debuttar* estate, he is not competent to maintain this action. No authority has been cited in support of this argument, but reference has been made to section 92 of the Civil Procedure Code. That section, it is conceded, is applicable only to trusts created for public purposes of a charitable or religious nature; suits in respect of alleged breaches of such public charities may be instituted, either by the Advocate General or by two or more persons having an interest in the trust who have obtained the consent in writing of the Advocate General. The defendants respond-

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ents have laid stress on the fact that the object of this restriction was to prevent the institution of an indefinite number of reckless and harassing suits against the trustees of a public charity by individuals interested in the trust: *Sajedur Raja Chowdhuri v. Gour Mohun Das* (4), *Budree Das v. Ohooni Lal* (5), *D'Oruz v. D'Silva* (6), and they have pressed us to extend, to private trusts by way of analogy, the rule embodied in section 92, and to hold that, as in the case of public trusts so also in the case of private trusts, the interest of the plaintiff in the trust, sufficient to qualify him to maintain his suit, must be an existing interest, not a mere contingency nor the mere possibility of succession to the managership of the trust properties. *Mohiuddin v. Sayiduddin* (7), *Budh Singh Dudhuria v. Niradbaran Roy* (8). But we cannot accept the contention of the respondents as well-founded either on authority or on principle. In the case before us, according to the Will of the founder, the plaintiff stands, after Raja Peary Mohan, the next in order among persons entitled to succeed to the office of *shebait*, as (*Bansher Jaishta Putra*) the eldest male member among the descendants of Jagomohan Mookerjee; as such, he is clearly competent to maintain this suit. It is not necessary for our present purpose to recapitulate all the rights of the founder of a charitable trust or of his heirs in relation to the trust. The authorities are clear upon the point that, in certain events, for instance, where the line originally indicated by the founder fails, the founder or his heir has the right to nominate the *shebait* or have vested in him the *shebaitship*, and this principle is applicable equally to private and public trusts: *Sital Das Babaji v. Pertap Ohunder Sarma* (9), *Raj Krishna Dey v. Bipin Behari Dey* (10), *Boidyo Gauranga Sahu v. Sudevi Mata* (11). Analogous to this doctrine is the

principle that the founder or his heirs may sue for the enforcement of the trust, for the removal of the old trustee, for the appointment of a new one and may thereby secure the proper administration of the trust and its properties. Whatever restrictions may have been prescribed by the Legislature as to the mode of institution of such suits in respect of public trusts, the rights of the founder of a private trust or of his heirs remain unimpaired. Such right of suit by the founder or his heirs is recognised in a long series of decisions: *Bhurruck Chunder Sahoo v. Golam Shuruff* (12), *Mohesh Chunder v. Koylash Ohunder* (13), *Biddia Soonduree v. Doorganund* (14), *Sheoratan Kunwari v. Ram Pargash* (15), *Giyana Sambandha Pandara Sannadhi v. Kandasami Tambiran* (16), *Sathappayyar v. Periasami* (17), *Gajopati v. Bhagavan Doss* (18), *Ganapati Ayyan v. Savithri Ammal* (19). As Lord Mansfield, observed in *St. John's College v. Toligton* (20) a charitable foundation, so far as it is charitable, that is, so far as it is formed to give effect to a charitable purpose in reference to property provided by the founder, is the creature of the founder. He has the right to determine, when the charitable foundation is established, the mode in which the foundation shall be governed and its revenues applied, and the law reserves to him and his heirs or appointees certain permanent functions with a view to prevent what is called by Holt, C. J., "all perverting of the charity": *Phillips v. Bury* (21). This right, according to Lord Hardwicke, has its origin in "the property of the donor and the power which every one has to dispose, direct and regulate his own property": *Green v. Rutherford* (22). Under the Law of England it is well-settled that if a private person is the founder of a charitable corporation, then he and his heirs are the visitors,

(4) 24 O. 418.
 (5) 83 O. 789; 10 O. W. N. 581.
 (6) 1 Ind. Cas. 995; 32 M. 131; 4 M. L. T. 345.
 (7) 20 O. 810.
 (8) 2 C. L. J. 431.
 (9) 8 Ind. Cas. 408; 11 C. L. J. 2.
 (10) 18 Ind. Cas. 961; 40 O. 251; 17 C. L. J. 189.
 (11) 41 Ind. Cas. 589; 40 M. 612; 32 M. L. J. 597;
 (1917) M. W. N. 429.

(12) 10 W. R. 458.
 (13) 11 W. R. 443.
 (14) 22 W. R. 97.
 (15) 18 A. 227; A. W. N. (1896) 37; 8 Ind. Dec. (N. s.) 858.
 (16) 10 M. 375; 3 Ind. Dec. (N. s.) 1015.
 (17) 14 M. 1; 5 Ind. Dec. (N. s.) 1.
 (18) 15 M. 44.
 (19) 21 M. 10.
 (20) (1757) 1 Burr. 158 at p. 200; 97 E. R. 245.
 (21) (1788) 2 T. R. 346 at p. 353; 100 E. R. 183.
 (22) (1750) 1 Ves. 462; 27 E. R. 1144.

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and it is only where the line of heirs of a private founder has become extinct, or where they cannot be found or are incompetent to act, that the visitatorial power devolves on the Crown. *Attorney-General v. Gaunt* (23), *Attorney-General v. Dedham School* (24). We are of opinion that on the analogy of this well-recognised principle, the view may be maintained that in respect of a *debttar* in this country, the founder or his heirs may invoke the assistance of a judicial tribunal for the proper administration thereof on the allegation that the trusts are not properly performed; and the case is strengthened when the management would, under the terms of the trust, vest in the plaintiff as the founder's heir, on a vacancy caused by the removal of the actual incumbent for misconduct: *Biddia Soonduree v. Doorganund* (14); *Kazi Hasan v. Sagun* (25), *Prosunno Moyee Dosse v. Koonjo Beharee* (26), *Ram Narain Singh v. Ramoon Paurey* (27). We hold accordingly that the plaintiff is entitled to maintain the present suit.

As regards the second question, three points require examination, namely, *first*, who supplied the purchase-money; *secondly*, if the purchase-money was supplied by Raja Peary Mohan, can the validity of the sale be successfully impeached, as between the *debttar* estate on the one hand and the nominal purchaser on the other; and *thirdly*, if the sale can be impeached, on what terms should the property be restored to the *debttar* estate.

As regards the first of these points, it has, in our opinion, been conclusively established that the purchase-money was supplied by the Raja. The property was knocked down to Bhupendra on his bid of Rs. 1,56,600. Rs. 40,000 which was slightly in excess of one-fourth of the purchase money, was deposited on his behalf forthwith. The *chalan* shows that the deposit was made by Kanti Chandra Rarhi the Raja's Am Moktear. Bhupendra admits that he received on the date of sale Rs. 37,400 from his father. Raja Peary Mohan confirms this statement and adds

(23) (1790) 3 Swans. 158 note 36 E. R. 811.

(24) (1857) 23 Beav. 350; 6 L.J.Ch. 497; 3 Jur. (N.S.) 325; 5 W. R. 395; 53 E. R. 138; 113 R. R. 169.

(25) 24 B. 170; 1 Bom. L. R. 649.

(26) (1864) W. R. 157.

(27) 23 W. R. 76.

that this was part of money which had been received by him about that date from his Zemindari is Sagar Islands. Bhupendra states that, in order to make up the sum of Rs. 40,000, he borrowed Rs. 2,600 from an officer of his cousin Prabal Chandra Mookerjee, who confirms the allegation and adds that he was repaid the loan two or three days later. The balance of the purchase-money Rs. 1,16,600 was deposited on the 28th January 1913 with a *chalan*, which sets out the numbers of the currency notes. There were ten notes of Rs. 10,000 each and sixteen notes of Rs. 1,000 each, besides sixty notes of Rs. 10 each. The whole of this money has been traced to the Raja. It is proved that Bhupendra obtained Rs. 1,16,000 from the Bank of Bengal on a deposit of Government securities for Rs. 1,30,000. These securities stood in the name of Raja Peary Mohan up to the 9th January 1913, and were thereafter endorsed by him in favour of Bhupendra who pledged them with the Bank on the 25th January 1913. An account was opened by the Bank with Bhupendra on that date; this was closed on the 3rd February 1914. There is thus no escape from the position that the whole of the purchase-money was supplied by the Raja to Bhupendra. Bhupendra states, in the course of his deposition, that he had in his possession Rs. 55,000 which he had kept concealed from his father. If this be true, his position is certainly not improved; if he applied money, which belonged to his father, to make the purchase, the property would clearly belong to his father. There is also the significant circumstance that Bhupendra had no separate funds of his own and that father and son lived as members of a joint family. On these facts, it is not very material to discuss the motive which actuated Raja Peary Mohan when he made over to his son Bhupendra the sum of money with a view to purchase the property Bahirgora. An elaborate story has been developed to the effect that this payment was made in pursuance of a scheme for a special testamentary gift in favour of Bhupendra contained in a Will executed by Raja Peary Mohan on the 5th June 1912. But this Will has been superseded, and after the institution of the present suit, Raja Peary

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Mohan has executed a deed of settlement, on the 27th October, 1913. We cannot also overlook the fact that the theory of a special gift in favour of Bhupendra who was to receive the Zemindari of Sagar Islands (a property which, it is alleged, might, for its preservation, entail heavy and unexpected expenditure on the owner) does not fit in exactly with the gift of a large sum of money for investment in the way of purchase of a property for more than its full value. But whatever motive may have inspired the Raja, the facts remain incontestable that he was the *shebait* of this property, that it was brought to sale in execution of a decree liable to be satisfied partly from the *debuttar* estate and partly from himself, and that at the execution sale which took place it was purchased by his son Bhupendra with funds entirely supplied by him.

As regards the second point, the plaintiff-appellant has contended that, as between the *debuttar* estate and the *shebait*, the sale of Bahirgora is inoperative in law, on well-recognised principles of Equity Jurisprudence. In support of this position, reliance has been placed upon the cases of *Campbell v. Walker* (28), *Lacy, Ex parte* (29), *James, Ex parte* (30), *Bennett, Ex parte* (31), *Randall v. Errington* (32), *Sanderson v. Walker* (33), *Downes v. Graebrook* (34), *Farrar v. Farrar* (35) and *Baroda Prasad Banerji v. Gajendra Nath Banerji* (36). These cases, it has been argued, recognise what must now be regarded as an elementary rule, namely, that a trustee cannot purchase trust property from himself or at his own sale. The law does not stop to enquire into the fairness of the sale or the adequacy of the price, but stamps its disapproval upon a transaction which creates a conflict between the self-interest and the integrity of the trustee. The respondents have not

(28) (1800) 5 Ves. 678 at p. 681; 5 R. R. 135; 31 E. R. 801.
 (29) (1802) 6 Ves. 625 at p. 626; 31 E. R. 1228; 6 R. R. 9.
 (30) (1803) 8 Ves. 337 at p. 348; 7 R. R. 56; 32 E. R. 885.
 (31) (1805) 10 Ves. 381; 8 R. R. 1; 32 E. R. 823.
 (32) (1805) 10 Ves. 423; 8 R. R. 18; 32 E. R. 909.
 (33) (1807) 13 Ves. 601; 9 R. R. 234; 33 E. R. 419.
 (34) (1817) 3 Mer. 200; 17 R. R. 62; 36 E. R. 77.
 (35) (1888) 40 Ch. D. 395 at p. 409; 58 L. J. Ch. 185; 60 L. T. 121; 37 W. R. 196.
 (36) 1 Ind. Cas. 289; 9 C. L. J. 333 at p. 394; 13 O. W. N. 557.

disputed the correctness of this rule, but have urged that a trustee for the sale of property cannot himself be the purchaser of it, because no person can at the same time fill the two opposite characters of vendor and purchaser and that consequently the disability, does not apply to a case where, as here, the property is publicly sold by a Court in execution of a decree. The respondents have further contended that in cases of purchase at execution sales, the same principle should be applied as governs a purchase of trust property by a trustee from his *cestui que trust*: *Denton v. Donner* (37), *Luff v. Lord* (38); in other words, such a transaction should not be pronounced inoperative, but should only be jealously scrutinised, so that if it is impeached by the *cestui que trust*, the trustee must show that there has been no fraud or concealment or advantage taken by him of information acquired by him in the character of trustee and that the consideration paid was adequate *Dougan v. Macpherson* (39). The question thus raised is of great importance and requires careful examination.

It is regarded as a principle of fundamental importance in English Equity Jurisprudence that a trustee for sale is absolutely and entirely, disabled from purchasing the trust property, directly or indirectly. The rule is universal that, however fair the transaction, the *cestui que trust* is at liberty to set aside the sale and take back the property. Weighty reasons have been assigned by eminent Judges in support of this rule. If a trustee were permitted to buy in an honest case, he might buy in a case having that appearance, but which, from the infirmity of human testimony, might remain undetected: *Bennett, Ex parte* (31) (Eldon, L. C.); in other words, the ground of the rule is that though you may see in a particular case that the trustee has not made an advantage, it is impossible to examine sufficiently in ninety nine cases out of a hundred whether he has made an advantage or not *Williams v. Scott* (40). It is

(37) (1856) 23 Beav. 285; 53 E. R. 112; 113 R. R. 143.
 (38) (1864) 24 Beav. 220; 10 Jur. (N. S.) 1243; 11 L. T. 656; 55 E. R. 619; 145 R. R. 484.
 (39) (1902) A. C. 197; 71 L. J. P. C. 62; 83 L. T. 361; 50 W. R. 659.
 (40) (1900) A. C. 493 at p. 503; 69 L. J. P. C. 77; 82 L. T. 727; 49 W. R. 33; 16 T. L. R. 450.

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equally well settled that a trustee for other purposes than for sale cannot purchase the property where the purchase would conflict with his duty respecting it or his position in regard to it; but in this class of cases, there is no absolute rule against his purchasing the trust property from his *cestui que trust*, although Courts of Equity always regard such transactions with the utmost jealousy and will not hesitate to set them aside if their fairness is not conclusively established. The controversy before us has centred round the question, which of these principles governs the present case. Now, it is perfectly plain that the sale in this case was not by a *cestui que trust* to the trustee. As Sir Arthur Wilson pointed out in delivering the opinion of the Judicial Committee in the case of *Jagadindra Nath Roy v. Hemanta Kumari Debi* (41) though there is no doubt that an idol may be regarded as a juridical person, capable as such of holding property, it is only in an ideal sense that property is so held, for the possession and management of the dedicated property must, in the nature of things, belong to the *shebait*, whether the religious dedication is of the completest kind known to the law or is of a less strict character. Consequently, when a *shebait* purchases *debuttar* property it is a purchase by a person who is the custodian of the property and who is charged with the duty to preserve it for the benefit of the endowment. In a case of this description, if the purchase were allowed, precisely the same mischiefs would result as have been apprehended by eminent Judges in cases of purchases of trust properties by trustees for sale. Indeed, the mischief might be of a more aggravated character, less likely to be discovered and rectified, as, unless the *shebait* was removed, it might be impossible to determine the impropriety of the transaction and the injury inflicted thereby on the *debuttar* estate. If the contrary view prevailed, it is not inconceivable that an unscrupulous *shebait*, anxious to seize a particular portion of the *debuttar* estate for his personal use, might, notwithstanding ample funds at his disposal, be encouraged to borrow

money in the character of *shebait*, allow a decree to be passed against him, acquiesce in the consequent execution sale, and ultimately purchase the property in his private capacity. The true nature of a scheme of this character, elaborately planned and carefully carried out, would never be unraveled, except probably by a person intimately acquainted with the minutest details of the administration of the *debuttar* estate. On the other hand, if the *shebait* were allowed to bid, his interest would be to secure the property at the lowest price, and if he became the purchaser, an application to set aside the sale on the ground of irregularities in the proceedings would obviously be out of the question. In our opinion, no difference should, in this class of cases, be made in the application of this principle, by reason of the fact that the purchase is made at a sale publicly held or held at the instance of a Court in execution of a decree against the *debuttar* estate. This view is supported by principles adopted in cases of the highest authority.

Reference may be made, for instance, to the decision of the House of Lords in *York Buildings Co. v. Mackenzie* (42). The appellants in that case were an insolvent company and their estates were sold by order of the Court of Session at a public judicial sale to satisfy creditors. The procedure at such sales was to set up the property at a value fixed upon by the Court, which is called the upset price and which is founded on information procured by the common agent of the Court, who has the management of all the outdoor business of a cause. The respondent was the common agent in that cause, and he purchased for himself, at the upset price, no person appearing to bid more, and the sale was confirmed by the Court. In the course of eleven years, the purchaser in possession expended large sums for building and improvements. There was no question as to the fairness and integrity of the purchase, but the appellants sought to set aside the sale and to have the estate sold anew on the ground that the respondent (the common agent in Court, on behalf of all parties,

(41) 31 L. A. 203; 32 O. 129 at p. 140; 8 O. W. N. 309; 6 Bom. L. R. 765; 1 A. L. J. 585; 8 Sar. P. O. J. 698 (P. O.).

(42) (1795) 8 Brown P. C. 42; 3 Paton 378, 3 E. R. 432.

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to procure information and attend the sale) was in the nature of a trustee and so disabled to purchase. The case was argued before the House of Lords for sixteen days, by Counsel of the highest eminence, with exceptional ability and learning. The appellants contended that the common agent was under a disability to purchase, arising from his office; that the rule was founded on reason and nature and prevailed wherever any well-regulated administration of justice was known; that the disability rested on the same principle which dictates that a person cannot be both Judge and party and serve two masters; that he who is entrusted with the interest of another cannot be allowed to make the business an object to himself, because, from the frailty of human nature, one who has power will be too readily seized with the inclination to serve his own interest at the expense of those for whom he is entrusted; that the danger of temptation does, out of the mere necessity of the case, work a disqualification, because nothing less than incapacity is able to shut the door against temptation where the danger is imminent and the security against discovery great; "that the wise policy of the law had, therefore, put the sting of disability into the temptation, as a defensive weapon against the strength of the danger which lies in the situation;" that the parts which the buyer and seller have to act stand in direct opposition to each other in point of interest, and this conflict of interest is the rock for shunning which the disability has obtained its force, by making that person who has the one part entrusted to him incapable of acting on the other side. This argument was fortified by references to the Roman Law, showing clearly that the same principle had a deep and firm foundation in that system and was most extensively applied, as for instance, to guardians, tutors, curators procurators, judicial officers and all other persons who had a concern in the disposition and sale of the property of others, whether the sale was public or private, judicial or otherwise (Dig. Lib. 18 tit. 1, Ch. 34, lib. 18, tit. 1, Ch. 46 and lib. 26, tit. 8, Ch. 5). The respondent admitted the general principle, but denied its application. The House of Lords set aside

the sale and ordered the purchaser to account for the rents and profits, with a liberal allowance to him for his permanent improvements. The judgments delivered by the House of Lords are not set out in the report by Brown but the opinions of Lord Thurlow and Lord Loughborough, L. C., as also the interlocutors of the Scotch Judges whom they reversed will be found in the report by Paton. This decision carried the doctrine to its full extent and later decisions, as will presently appear do no depart therefrom.

In *Grover v. Hugell* (43) Sir John Leach, M. R., had to deal with a case where, on the sale for redemption of land tax of the glebe of a rectory, the rector himself had become the actual purchaser in the name of his curate. He held that the sale could not be sustained in a Court of Equity and observed as follows: "The general rule in Equity is that a man cannot place himself in a situation in which his interest conflicts with his duty. The duty of the rector was, to obtain the best possible price for the land sold; and his interest as purchaser was, to pay the least possible price. It is no answer to say, that the superintendence of the Commissioners would secure a full price. The sale is to be by public auction and before two of the Commissioners or some person appointed by them; and their approbation of the sale is required by the Act; but still the duty of the rector was to give his aid to the procuring of the best possible price." The same principle had been enunciated by Sir Thomas Plumer, M. R. in *Stratford v. Twynan* (44) though he held that an execution creditor was not a trustee within the meaning of the rule and was not incompetent to purchase at the sale held by the Sheriff of the property seized in execution. The decision in *Guest v. Smythe* (45) recognises the same rule, though the Court of Appeal did not adopt the view of the Master of the Rolls (Lord Romilly) that the purchaser in that case (the Solicitor, not of a party to the suit but of some creditors of the mortgagee, one of whom had

(43) (1827) 3 Russell 428; 27 R. R. 103; 33 E. R. 636.
 (44) (1822) Jacob 418; 23 R. R. 107; 37 E. R. 908.
 (45) (1870) 5 Ch. App. 551; 39 L. J. Ch. 526; 22 L. T. 563; 18 W. R. 742.

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obtained a decree for administration of the mortgagee's estate) stood in a fiduciary relation and was disqualified in the same way as a trustee would have been. An instructive case came before the Court of Appeal in *Nugent v. Nugent* (46). The Court of Appeal unanimously affirmed the decision of the primary Court, *Nugent v. Nugent* (47) that a Receiver appointed by the Court cannot purchase the property of which he is Receiver, without leave of the Court, even where the sale is made, not in the action in which he was appointed, but by a mortgagee selling with leave outside the action. Cozens Hardy, M. R. observed that the Receiver was in a fiduciary position and held that, in dealing with this class of cases, the Court does not proceed upon the footing that there has been fraud or improper concealment or any special advantage taken by the Receiver; it proceeds upon the general rule that, in cases of this kind, the purchase ought not to be allowed at all, because it is a dangerous thing to allow, as in most cases it is impossible to ascertain whether the Receiver has or has not taken undue advantage of his position. The Master of the Rolls declined to go into the question whether, under the special circumstances of the case, there was any great probability of fraud. Fletcher Moulton, L. J. observed that the general principle which actuates the Court in deciding its procedure in matters of this kind is that nobody must allow himself to get into a position where his interest conflicts with his duty. The Court carries out this principle, not by examining each particular case and weighing the details of the conflict between interest and duty, but by certain prohibitions with regard to persons who hold positions in which such a conflict might arise, and the Court has been very severe in past times in the rules which it has made for this purpose. Buckley, L. J. adopted the same view and observed that a person standing in a fiduciary relation cannot be allowed to put himself in a position in which his interest and his duty may conflict; if he does so, it is not necessary to show that he acted contrary to his

duty; the Court will not allow him to buy, if the position is such that he might be guilty of a breach of his duty. Reference was made in support of this view to the decision of Sir Michael O'Loughlen, M. R. in *Alven v. Bond* (48). It was ruled in that case that a purchase by a trustee at a sale, under the decree of the Court, of property with which he is connected by virtue of his office, cannot be sustained, if made without the sanction of the Court or the assent of the parties interested, but concealed from both. In answer to the argument that the proposed order for cancellation was one which no other Judge had ever ventured to make, the Master of the Rolls replied that it was not the introduction of a new doctrine into a Court of Equity and referred to *James, Ex parte* (30), where Lord Eldon, L. C. had pronounced against the validity of such a transaction on the ground "that no Court is equal to the examination and ascertainment of the truth in much the greater number of cases." Precisely the same view had been taken by Sir William McMahon, M. R., in *White v. Tommy* (49) and by Sir Edward Sugden, when Lord Chancellor of Ireland, in *Boddington v. Langford* (50): [See also *Hamilton v. Young* (51)].

It will be observed that reference is made in some of these judicial decisions to purchases by persons in a fiduciary relation with the leave of the Court. It is important to bear in mind that even in cases where the transaction is not absolutely prohibited, this leave of the Court must be obtained before the sale takes place. In *Lewis v. Hillman* (52), Lord St. Leonards said: "I should lay it down as a rule that ought never to be departed from, that if an Attorney or agent can show that he is entitled to purchase, yet, if instead of openly purchasing, he purchases in the name of a trustee or agent, without disclosing the fact, no such purchase as that can stand for a single moment. Such a transaction, to stand, must be open and fair, and free from all objections." These observations were referred

(48) (1841) 3 Ir. Eq. Rep. 365; Fl. & K. 198.

(49) (1846) Fl. & K. 224; 6 Ir. Eq. R. 303; 6 Cl. & F. 746; 1 H. L. C. 160; 3 H. L. C. 43; 4 H. L. C. 313.

(50) (1845) 15 Ir. Ch. Rep. 553.

(51) (1881) 7 L. R. Ir. 239 at p. 293.

(52) 1852) 3 H. L. C. 607 at p. 630; 10 E. R. 239; 88 R. R. 233.

(46) (1908) 1 Ch. 546 at p. 547; 77 L. J. Ch. 271; 98 L. T. 354; 24 T. L. R. 296.

(47) (1907) 2 Ch. 292; 76 L. J. Ch. 614; 97 L. T. 279; 23 T. L. R. 660.

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to with approval by Lord Cairns in *McPherson v. Watt* (53), "an Attorney is not affected by the absolute disability to purchase which attaches to a trustee. But, for manifest reasons, if he becomes the buyer of his client's property, he does so at his peril. He must be prepared to show that he has acted with the completest faithfulness and fairness; that his advice has been free from all taint of self-interest; that he has not misrepresented anything, or concealed anything, that he has given an adequate price and that his client has had the advantage of the best professional assistance, which, if he had been engaged in a transaction with a third party, he could possibly have afforded. And although all these conditions have been fulfilled, though there has been the fullest information, the most disinterested Counsel, and the fairest price, if the purchase be made covertly in the name of another, without communication of the fact to the vendor, the law condemns and invalidates it utterly." See also *Luddys Trustee v. Pearl* (54), *Farmer v. Dean* (55).

The principles thus recognised by English Equity Jurisprudence have been adopted by the Courts of the United States as founded on manifest reasons of justice and good conscience, and one of the most familiar doctrines of the law of trusts recognised there is stated to be that a trustee cannot in his private capacity purchase trust property at a sale held in execution of a decree made against himself as trustee. The leading decision on the subject is the classical judgment of Chancellor Kent in *Devoue v. Fanning* (56), where he held that a trustee cannot become the purchaser at a judicial foreclosure sale of the trust property, unless he is expressly allowed to do so by the Court; it makes no difference in the application of the rule that the sale is at public auction, *bona fide* and for a fair price. This was emphasised by Chancellor Walworth in *DeCaters v. DeOhaumand* (57) where, in answer to the contention that if the trustee had not bid, the price would not have been enhanced, he quoted the language of Lord

Eldon in *James, Ex parte* (30), "it is better for the general interests of justice that in some cases a loss should be sustained by the *cestui que trust* than a rule should be established, which would occasion loss in much more numerous cases." The same rule was affirmed in *Chapin v. Weed* (58), where the principle was stated to be that a trustee cannot become the purchaser, for his own benefit, of the property assigned to him in trust, and he cannot become such purchaser, even though the sale is a judicial one, made without the contrivance or procurement of the trustee, unless by the order of sale he is expressly allowed so to purchase. The question was elaborately examined by the Supreme Court of the United States in *Michoud v. Girod* (59) and the rule was affirmed that a purchase by an executor, through a third person, of property of the testator is void, though the sale was held at a public auction, judicially ordered, and the evidence showed that fair price was paid. The Court has approved of this doctrine in later cases: *Magruder v. Drury* (60), *U. S. v. Carter* (61). But, in one jurisdiction (Texas), the view has been maintained that the trustee may purchase the trust property at a judicial sale, which has been brought about by a third party, which he has taken no part in procuring and which he could not have controlled: *Allen v. Gillette* (62), *Starkweather v. Jenner* (63). This, however, is regarded as in the nature of a deviation from the well settled rule; it has been restricted to cases of *quasi* trustees and has not been applied to trustees proper (Story on Equity Jurisprudence, 1918, 446, and Pomeroy on Equity Jurisprudence, 1918, sections 958, 1052, 1078). We hold accordingly that where a decree has been obtained against a *shebait* as representative of the *debuttar* estate, he is not competent, without the leave of the Court, to purchase the *debuttar* property in his personal capacity.

In view of this conclusion it is not necessary for us to investigate whether the *debuttar* estate has suffered a pecuniary loss by the sale of the property in question; but we may

(58) (1841) Clarke Ch. 464

(59) (1846) 4 Howard 503; 11 L. Ed. U. S. 3076; 16 Cur. Dec. 188.

(60) (1914) 253 U. S. 120.

(61) (1909) 217 U. S. 308.

(62) (1887) 127 U. S. 589; 32 L. Ed. U. S. 271

(63) (1909) 216 U. S. 528.

(53) (1877) 3 App. Cas. 254 at p. 266.

(54) (1886) 33 Ch. D. 500 at p. 519; 55 L. J. Ch. 884; 55 L. T. 137; 35 W. R. 44.

(55) (1863) 32 Beav. 327; 55 E. R. 128; 138 R. R. 755.

(56) (1816) 2 Johnson Ch. 252.

(57) (1832) 3 Paige Ch. 178.

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state that there is no reason to apprehend that the property has not been sold for its full value. The assertion of the defendants that the property has been sold for about double its real value is, however, not so clear. Reference has been made to the annual income of the property, stated to be about Rs. 4,500 a year, and on this basis the contention has been put forward that the price paid at the sale is much in excess of its market value; but it must be remembered that the bid sheet makes it abundantly clear that the competition was keen and more than one bidder, including the representative of the Mahanta of Tarakeswar, offered sums in excess of a lakh and a quarter. Indeed, a nephew of the defendant offered Rs. 1,29,400. It thus seems probable that we do not know enough about the property and that its potential value is much higher than what is indicated by its present income.

The question next arises as to the terms on which the property should be directed to be held as part of the *debuttar* estate, notwithstanding the sale. It is manifest that the sale cannot be set aside in so far as the execution creditor is concerned. His decree has been satisfied and there was no misconduct on his part which could prejudice his position. When the property reverts to the *debuttar* estate, the surplus sale-proceeds must plainly be returned to the *shebait*. The consequence will be that the *shebait* will be deemed to have satisfied the decree obtained by the representative of Bijay Krishna and will be entitled to be reimbursed out of the *debuttar* estate on this basis. The materials on the record are, however, not sufficient to enable us to determine this matter finally, and the question of the precise amount which the *shebait* is entitled to realise out of the *debuttar* estate, on the footing that he has satisfied the claim of the execution creditor, must be investigated in a supplementary proceeding; when such enquiry is held, it must be borne in mind that the decree for costs of the High Court and the Privy Council was realisable from the *shebait* personally.

We have finally to deal with the third question, namely, whether sufficient grounds have been established for the removal of the *shebait*. No useful purpose would be served by an examination of decided cases to determine what constitutes a sufficient

reason for removing a trustee. The matter is peculiarly within what is called the sound judicial discretion of the Court. The Court is guided by considerations of the welfare of the beneficiaries and of the trust estate; and there must be a clear necessity for interference to save trust property. In the case before us, the plaintiff-appellant has urged that the conduct of the *shebait*, during many years past, has been detrimental to the best interests of the *debuttar* estate. Stress has been laid on the circumstance that upon the death of Nabakrishna on the 11th September 1890, Raja Peary Mohan seized the *debuttar* estate in assertion of a hostile title and successfully kept Bijay Krishna, the lawful *shebait*, out of possession. The result was that the *debuttar* estate became involved in ruinous litigation. The suit instituted by Bijay Krishna on the 10th June 1892 did not terminate in the trial Court till the very date of his death; and though thereupon Raja Peary Mohan himself became entitled to succeed as *shebait*, he still persisted in his repudiation of the Will of his grandfather and of the *debuttar* created thereby, and preferred and prosecuted an appeal in the High Court on that basis. Good sense prevailed, however, in the end, and the decree of this Court made on the 24th August 1898 recognised the validity of the *debuttar*. But it was impossible that the *debuttar* estate could be freed from the risks of litigation by this belated repentance on the part of the Raja. The representatives of Bijay Krishna instituted their suit on the 25th January 1897, for enforcement of their claim against him and the *debuttar* estate in his hands. This was inevitable and their claim had to be resisted. This expensive litigation lasted, as we have seen, for very nearly thirteen years, till it was terminated by the decree of the Privy Council on the 10th January 1910. Then followed as a corollary the equally inevitable execution proceedings, which ended in the sale of the most valuable property included in the *debuttar* estate on the 14th January 1913, and we cannot overlook the fact that the sale was precipitated, as the execution against the Raja personally was held up. It is indisputable that this misfortune is ultimately traceable to his inveterate hatred of Bijay Krishna, the result, we were told, of an old family feud. But whatever motives

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might have actuated him, we are concerned only with the result of his acts. The consequence has been that, while during the time of his father, out of the receipts of the *debuttar* estate, savings were steadily effected and were invested in Government securities and landed properties, so as to raise the annual income from Rs. 4,000 to Rs. 10,000, during his time, by reason of his unwise acts, the *debuttar* estate has been involved in successive protracted litigations, is now burdened with heavy debts, and has lost the most valuable portion of its assets. We are thus driven to the conclusion that his connection with the *debuttar* estate has been singularly unfortunate and has led to the most unhappy results. But this is not all. Events have so shaped themselves that a situation has arisen which involves him in clear conflict of duty and self-interest. In the view we have taken, the property sold in execution must be restored to the *debuttar* estate, while the *shebait* must be reimbursed to an extent which requires judicial determination. Further, the evidence shows that the *shebait* has set up a claim to realise from the *debuttar* estate considerable sums of money on account of litigation expenses. On the other hand, the dealings of the *shebait* with the Government securities for Rs. 11,500— which, in the litigation of 1892 were found to form part of the *debuttar* estate, must be forthwith investigated. It is plain that a person in this position cannot be allowed to hold the office of *shebait* in the best interests of the *debuttar* estate. We hold accordingly that the first defendant should cease to be *shebait* from a date to be fixed hereafter and the management of the *debuttar* estate should be vested in a Receiver to be appointed by this Court.

The result is that this appeal is allowed and the decree of the Subordinate Judge set aside. It is declared that the sale of Bahirgora held on the 14th January 1913 is not operative against the *debuttar* estate, but the first defendant is entitled to be reimbursed, the precise amount recoverable by him to be investigated by the Court below. Steps will be taken forthwith to place the *debuttar* estate in the hands of a Receiver to be appointed by this Court and the first defendant will cease to be *shebait* from the date

when the Receiver takes possession. Liberty is reserved to both parties to apply. The first defendant must pay the plaintiff his costs both here and in the Court below.

The cross appeal has not been pressed as such and will, therefore, stand dismissed.

Appeal allowed : Cross-appeal dismissed.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 20 OF 1919.

July 21, 1919.

Present:—Pandit Kanhaiya Lal, J. C.

GUR DIN, MINOR—DEFENDANT—

APPELLANT

versus

DURGA DIN AND ANOTHER—PLAINTIFFS—
RESPONDENTS.

*Guardians and Wards Act (VIII of 1890), s. 29—
Guardian, whether can accept lease of minor's property
from mortgagee—Minor, whether liable to pay rent.*

Under section 29 of the Guardians and Wards Act a certified guardian can grant a lease of property belonging to the minor for a period of five years and there is nothing to prohibit a lease for a similar period being taken by the same guardian of property belonging to the minor, from a person holding the same under a mortgage made for legal necessity. The lease, while it imposes upon the minor the liability to pay rent, brings with it a corresponding gain and the transaction is, if beneficial to the minor, of a nature within the competence of the guardian and binding on the ward. [p. 20, col. 2; p. 21, col. 1]

Appeal against the decree of the Subordinate Judge, Unao, dated the 19th November 1918, reversing that of the Munsif, North Unao, dated the 4th June 1918.

Mr. Bisheshwar Nath Srivastava, for the Appellant.

Messrs. A. P. Sen and Basdeo Lal, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs for the recovery of money due on a lease said to have been taken by Musammatt Mithana as the guardian of the defendant.

It appears that Sheodulav, the father of the defendant, was the owner of an 8-

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annas share in the village Solonipur. He mortgaged a one-anna share out of the same with Nanha on the 5th June 1912. He again mortgaged a 4-annas share with Durga Din on the 16th January 1912. The first mortgage was simple. The second mortgage provided for foreclosure.

On the 21st February 1914, Durga Din obtained a decree for foreclosure on foot of his mortgage. In order to protect the mortgaged property of the minor from foreclosure and to pay up the mortgages aforementioned, Musammât Mithana, the certificated guardian of the defendant, applied to the District Judge for permission to mortgage a 6-annas share of the property belonging to the minor. This permission was granted. The order of sanction did not specify whether the mortgage was to be simple or usufructuary. Musammât Mithana thought that the interest of the minor would be best served by making a usufructuary mortgage of the said six-annas share in favour of Hargovind Dayal, the predecessor-in-interest of the plaintiffs, and taking a lease of the mortgaged property from the mortgagee. She accordingly executed a deed of usufructuary mortgage in favour of Hargovind Dayal on the 18th February 1914 for Rs. 4,300 re-payable in five years and carrying interest at 10 annas per cent. per mensem and wrote a *qabuliyat* agreeing to pay a rent of Rs. 322 8 0 per year in satisfaction of the interest due to the mortgagee.

The plaintiffs, as the assignees of the interest of Hargobind Dayal, sue for the recovery of the arrears of rent secured by the said *qabuliyat*. The Court of first instance dismissed the claim but the lower Appellate Court decreed it, making the decretal money recoverable from the property of the minor.

The first point for consideration in this appeal is whether the *qabuliyat* in question was covered by the sanction granted by the District Judge. In express terms the lease is not mentioned. The lease is, however, only ancillary to the mortgage transaction which the Judge had sanctioned. Under the terms of the sanction it was open to Musammât Mithana to have made a simple mortgage of a 6 annas share on an agreement to pay interest on the

money borrowed. It was equally open to her to make a usufructuary mortgage on such terms as might be reasonable and conducive to the interests of the minor. Musammât Mithana adopted the latter course: she made a usufructuary mortgage and as a means of paying the interest secured to the mortgagee and preserving the remainder of the profits of the mortgaged property for the benefit of the minor, she wrote a *qabuliyat* by which she took back possession from the mortgagee and agreed to pay him a rent equal to the interest payable by her under the mortgage. In other words, the payment for which she would have been made liable by virtue of the mortgage is, in another form, the very payment for which she made herself liable under the lease.

Both the Courts below found that the mortgage was made for valid necessity to pay certain debts due by the father of the minor. The Court of first instance held that Musammât Mithana did not properly understand or realize the terms of the mortgage or the lease; but the lower Appellate Court has not accepted that finding. If the mortgage was made for legal necessity and the payment for which the minor had become liable under it was to be a valid charge on the minor's interest, the interest by which Musammât Mithana arranged to have that payment made did not in any way prejudice the minor. The *qabuliyat* must, therefore, be treated as having been taken for the benefit of the minor, and though no express sanction was taken in respect of it, it is binding on the minor in the same way as any other act of prudent management which the guardian may have done for the protection of the interest of the minor or for his maintenance. Section 29 of the Guardians and Wards Act (VIII of 1890) allows a guardian to give a lease of any property belonging to the minor for a term of five years. If a certified guardian can grant a lease of the property belonging to the minor for a period of five years, there is nothing to prohibit a lease being taken by the same guardian of the property belonging to the minor from a person holding the same under a mortgage made for legal necessity for a similar period.

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The learned Counsel for the defendant-appellant relies on the decision in *Gaya Prasad v. Musammatt Maharaj Kuar* (1). His contention is that although a guardian may, under certain circumstances, sell or charge the property of his ward, he cannot bind the ward personally by a covenant or by any promise to pay money or damages. But the taking of a lease of the property belonging to a ward from a mortgagee who holds it under a valid mortgage binding on the minor for a period of five years, may be as necessary in the interests of the ward as the granting of a lease in respect of the property belonging to the ward for the same period. The taking of a lease undoubtedly carries with it a liability to pay the rent reserved by the lease, but it secures to the ward the entire profits of the property which would otherwise have gone to the mortgagee. In other words, while it imposes some liability it brings with it some corresponding gain and the dealing is, if beneficial to the minor, of a nature within the competence of the guardian and binding on the ward. There is no reason, therefore, for interference with the decree passed by the Court below in this case.

The appeal is dismissed with costs.

Appeal dismissed.

(1) 7 O. C. 46.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 101 OF 1918.

March 24, 1919.

Present:—Justice Sir Ernest Fletcher, Kt., and Mr. Justice Cuming.

KANAI LAL KHAN AND OTHERS—DEFENDANTS NOS. 4 AND 5—APPELLANTS

versus

Srimati TOOLSJI MANJURI DASI AND OTHERS—DEFENDANTS NOS. 2 AND 3—RESPONDENTS.

Benamidar, suit by—Beneficial owner impleaded as

co-defendant—Decree, whether ought to be given—Presumption.

A suit by a benamidar to recover money should not be decreed where the beneficial owner of the money is before the Court as a co-defendant. The Court might, by making the beneficial owner a co-plaintiff, decree the suit, but in the absence of evidence that the money does not belong to the benamidar, the Court is bound to give effect to the legal presumption which arises. [p. 22, col. 1.]

Appeal against the decree of the District Judge, Midnapur, dated the 27th of September 1917, affirming that of the Subordinate Judge, 2nd Court of that district, dated the 13th of May 1916.

Babus Dwarka Nath Chakraverty and Jyotish Chandra Hazra, for the Appellants.

Babus Mohendra Nath Roy, Mohini Nath Bose and Probodh Chandra Roy, for the Respondents.

JUDGMENT.

FLETCHER, J.—This is an appeal preferred by the defendants Nos. 4 to 8 against the decision of the learned District Judge of Midnapur, dated the 27th September 1917, affirming the decision of the Second Subordinate Judge of the same place. The suit was brought by one Srimati Tulsji Monjori Dasi, who is the wife of the second defendant, to recover possession of certain property, or alternatively to recover the amount paid as the purchase-money at a sale in execution. The facts are perfectly simple. One Madhab Chandra Mondal held an under tenure under the defendants Nos. 4 to 8, the appellants before us. Madhab sold his interest to the defendants Nos. 1 and 2. The defendant No. 2 and his co-sharer, the defendant No. 1, apparently failed to register their names in the landlords' *sherista* and two suits were brought by the co-sharer landlords for rent against Madhab. In execution of the decree obtained, the property was put up to sale and purchased by the plaintiff, the wife of the defendant No. 2. The learned Judge in the lower Appellate Court remarks that in the appeal before him none of the parties has attacked the finding of the Subordinate Judge that the sale at which the plaintiff purchased the under tenure was of no effect inasmuch as the judgment debtor, that is, Madhab, had no saleable interest in the property. The learned Judge then went on to consider the alternative case, namely, as to whether the plaintiff could recover back the money which she paid for the prop-

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chase of the property at the sale in execution and he arrived at a conclusion which, I suppose, was satisfactory to himself, but which seems to me to be obviously wrong. What he says is this: That the plaintiff is the *benamdar* of the defendant No. 2 and that she is entitled to recover back the money. Of course, that cannot be accurate where the beneficial owner of the money is present before the Court. The Court might, by making the defendant No. 2 a co-plaintiff, order payment. But then one cannot get out of the equity that may subsist between the plaintiff and the defendant No. 2 by putting the money in the hands of the *benamdar*. The case does not stop there. The learned Judge does not say that on the evidence he finds that the plaintiff is the *benamdar* for her husband but he says that there cannot be much doubt. Of course that may or may not amount to a finding. But the evidence has been read to us and, as appears from the record, that is no evidence on which the learned Judge was entitled to say that this money did not belong to the plaintiff. The fact remains that no evidence was called on behalf of the appellants on this question and, in that view, the learned Judge having no evidence which he could believe was bound to give effect to what the presumption under the law was. The learned Judge's view on that part of the case cannot be supported.

The next point is that the evidence that has been given in this case is obviously unsatisfactory. A good portion of it would not be admissible under the provisions of the Indian Evidence Act such as the statement that an old lady of the village was told by somebody else that Tulsī Monjori was a *benamdar* of her husband. A case like this obviously ought to be decided on the best evidence available. I think we ought to give the parties a further opportunity of providing what evidence there is proper and relevant for the purpose of establishing whether the plaintiff was or was not a *benamdar* in respect of the money with which the under-tenure was purchased on behalf of her husband, the defendant No. 2. The case will be remitted to the lower Appellate Court in order to have the appeal re heard on that matter without disturbing the other conclusions arrived at in the case. Both parties will be entitled to adduce any

evidence which is relevant to that issue. The learned Judge of the lower Appellate Court may either himself record the evidence on that issue or may remit the case to the first Court for that purpose. Costs will abide the result of the re-hearing in the lower Appellate Court.

The appeal will stand dismissed with costs as against the defendant No. 1.

CUMING, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 576 OF 1913

AND

CIVIL MISCELLANEOUS APPEAL No. 16 OF 1910.

July 22, 1919.

Present:—Mr. Justice Seshagiri Aiyar
and Mr. Justice Odgers.

IN C. R. P. No. 576 OF 1913

NANDIGAM SUBBARAYUDU—PLAINTIFF
—PETITIONER

versus

KANNAM SAHEB AND OTHERS—DEFENDANTS
—RESPONDENTS.

IN C. M. A. No 16 OF 1910

KANDADY VENKATA KRISHNA-
MACHARYULU AYYAVARLAM
GARU (DEAD) AND OTHERS—PLAINTIFFS
—APPELLANTS

versus

KANTIPUDI MUNSIF PAPAYYA AND
OTHERS—DEFENDANTS—RESPONDENTS.

Madras Estates Land Act (I of 1908), s. 3 (2) (d), (e)—Inam, grant of, by zemindar before Permanent Settlement—Grant, whether of melwaram or both warams—Presumption—Burden of proof—Ejectment of tenants, suit for, by grantee—Occupancy rights, proof of—Jurisdiction of Revenue Court—Madras Regulation XXXI of 1802, s. 2.

In the case of villages granted as *inam* by a *zemindar* before the Permanent Settlement, there is no presumption that the land revenue alone was granted. It must be presumed that the grant conferred a right, not only to the land revenue, but also to the land itself. [p. 31, col. 2.]

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Suryanarayana v. Patanna, 48 Ind. Cas. 689; 41 M. 1012; 25 M. L. T. 30; (1918) M. W. N. 859; 23 O. W. N. 273; 9 L. W. 126; 29 O. L. J. 153; 1 U. P. L. R. (P. C.) 11; 36 M. L. J. 585; 21 Bom. L. R. 547; (1919) M. W. N. 463; 45 I. A. 203 (P. C.), followed.

An action by the grantee in ejectment against the tenants is, however, not maintainable where the defendants have permanent occupancy rights by custom or otherwise, as neither the *zemindar* by the grant nor the Government by their release could convey rights over which they had no control. [p. 31, col. 2.]

The burden of proving the existence of occupancy rights is on the defendants, tenants. [p. 32, col. 1.]

Where it is not shown that the lands comprised in the grant were in the occupation of tenants at the date of the grant, it is not an 'estate' falling within clause 3 (2) (d) of the Estates Land Act and a suit in ejectment is cognizable by a Civil Court. [p. 33, col. 2.]

Per Napier, J.—The Legislature has specifically dealt with *inams* in clause (d) of section 3 (2) of the Madras Estates Land Act and could not have intended to provide for any other class of them in clause (e). Clause (e) of the section provides for portions of an estate held on permanent under-tenure and the fact that *kattubadi* is paid to a *zemindar* in respect of a pre-settlement *inam* cannot make that *inam* either 'a portion' or an under-tenure. [p. 24, col. 1.]

Petition under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Subordinate Judge, Kistna at Ellore, in Miscellaneous Appeal No. 8 of 1912, preferred against the order of the Court of the Additional District Munsif, Tanuku, in Original Suit No. 407 of 1910; and

Appeal against the order of the Court of the Subordinate Judge, Kistna at Ellore, in Original Suit No. 36 of 1908.

The Civil Revision Petition No. 576 of 1913 coming on for hearing on the 7th August 1914, the Court (Sadasiva Aiyar, J.) delivered the following

JUDGMENT.—The view of the lower Courts that the Agraharam falls under clause 2 (e) of section 8 of the Estates Land Act is clearly erroneous. [See *Bila Sanyasi Naidu v. Agnihotram Venkatacharyulu* (1).]

It may fall under clause 2 (d), if the land revenue alone had been granted as *inam* by the *Zemindar* before the Permanent Settlement.

On the question of the burden of proving whether the land revenue alone was so granted or both the *Warms* were granted in the case of villages granted in *inam* to Brahmins before the Permanent Settlement,

(1) 23 Ind. Cas. 96; 26 M. L. J. 258; (1914) M. W. N. 318; 1 L. W. 241.

there is some conflict of opinion in the decisions of this Court.

The Subordinate Judge is requested to submit a finding on this question as a question of fact, allowing both sides to adduce further evidence. When both sides have been given an opportunity to adduce evidence, the question of burden of proof should not ordinarily be made much of by Courts of fact in arriving at conclusions. The Subordinate Judge, however, if he thinks the evidence to be so *very evenly balanced on both sides* that the question of the burden of proof becomes important, might express his opinion in the alternative on the two views of the burden of proof.

The finding should be submitted within six weeks from the date of receipt of records, and ten days will be allowed for filing objections.

The appeal against order coming on for hearing on the 9th August 1915, the Court (Seshagiri Aiyer and Napier, JJ.) delivered the following

JUDGMENT.

SESHAGIRI AIYAR, J.—The first question for consideration is whether the Agraharam is an estate as defined in section 3, clause 2 (e); I think the Subordinate Judge is wrong in his view that it is. It is admitted that when the *sannad* was granted the Agraharam was in the possession of the plaintiff's ancestors. It is also admitted that this property was not included in the *sannad* as being within the ambit of the *Zemindari* which was granted by the Government. The *Zemindar* was entitled to one *Kattubadi* fixed. It may be that he had some rights in the Agraharam [see *Jyoti Prosad Singh v. Lachipur Coal Company* (2)]. It is not necessary to decide the exact nature of those rights. I am satisfied that the Agraharam was not regarded as an under-tenure at the time of settlement. I, therefore, think that clause (e) does not cover this case. See *Tadikonda Buchi Virabhadrayya v. Sonti Venkanna* (3).

On the question whether clause (d) applies, we have the affidavits of the learned *Vakils* who appeared in the Court below that the

(2) 12 Ind. Cas. 482; 38 C. 845; 14 O. L. J. 361; 16 O. W. N. 241.

(3) 20 Ind. Cas. 763; 24 M. L. J. 652; (1913) M. W. N. 782.

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plaintiffs were not allowed to adduce evidence to prove their case. Mr. Prakasam frankly admits that he is not prepared to deny the statements in these affidavits. We must ask the Subordinate Judge, after hearing the evidence which the parties may adduce, to return a finding whether the Agraharam is an estate falling under section 3 (2) (d) of the Estates Land Act.

The finding should be submitted within three months and ten days will be allowed for filing objections.

NAPIER, J.—I agree and would only add that I should be slow to hold that any pre-settlement *inam* could be brought within section 3 (2) (e). The Legislature was dealing with *inams* specifically in clause (d) and I cannot think it intended to provide for any other class of them in (e). Clause (e) provides for portions of an estate held on permanent under-tenure and I cannot hold that the fact that Kattubadi is paid to a Zemindar in respect of a pre-settlement *inam* makes that *inam* either a "portion" or an under-tenure.

In compliance with the order contained in the above judgment in Civil Revision Petition No. 576 of 1913 the Subordinate Judge of Kistna at Ellore submitted the following

FINDING.

C. R. P. No. 576 of 1913.

The issue on which I am directed to submit my finding is

"Whether in the case of villages granted in *inam* by the Zemindar to Brahmins before the Permanent Settlement, the land revenue alone had been so granted or both the *Warms*."

2. With reference to the High Court's direction to try the above issue as a question of fact, both parties were given an opportunity to adduce evidence. Each party has accordingly adduced evidence tending respectively to prove and disprove the fact in issue. And so the importance of the incidence of the burden of proof disappears almost entirely in this case. The plaintiff, who is the appellant, has produced no *sannad* relating to Dammennu village but has filed a *sannad* relating to Karravari Savaram village, which is situated 2 miles away from Dammennu. According to the evidence of P. W. No. 12, who owns 1/6th share in 'Karravai Savaram,' the original grant, as evidenced by the *sannad* (Exhibit AAAA),

was made in Fasli 1159 (1749), i. e. the same year as the grant of the suit Agraharam (Dammennu) by the then Zemindar Apparayanam Garu. Exhibit CCCC, read with the evidence of P. W. No. 12, shows that the original grant was in respect of 30 *putties* of waste land * * * (*beedu bhoomi*) out of the village of Chivatam. The grant was made to Karra Perayya Sastry, who was the ancestor (i. e. paternal grandfather's grandfather) of P. W. No. 12. It is clear from the evidence of P. W. No. 12 that it was a waste land which was granted to his ancestor. It is further deposed to by P. W. No. 12 that as the land was waste, his ancestor went with his family and lived there; that he dug wells and raised gardens of arecanuts, cocoanuts and mango trees. Exhibit BBBB is an extract from the Inam Register relating to Karravari Savaram Agraharam referred to above. And Exhibit CCCC is a certified copy of the Dhimat issued to the village officers in pursuance of the *sannad* (Exhibit AAAA). The P. W. No. 12 deposed that from the time of his ancestor down to the time of his father, Savaram Agraharam was under the cultivation of the Agraharamdars themselves and that it was never in the cultivation of their tenants. The P. W. No. 12 further deposed that subsequent to the death of his father the Agraharam devolved upon him (P. W. No. 12) and his brothers and that they have been leasing out the same to tenants. The P. W. No. 12 also explained that his ancestor belonged to the Karra family and so he gave his family name to the Agraharam which was accordingly called "Karravari Savaram." And thus with reference to Karravari Savaram, the original grant being that of a waste land * * * (*beedu bhoomi*), it follows that the grant consisted of the entire right in the property. For, the position of the Zemindar before the Permanent Settlement was that he had the administration of the whole Zemindari.

3. The other grant relied on by plaintiff's Pleader is that of Kanur Agraharam. Kanur Agraharam is situated about 4 or 5 miles from the village of Dammennu. No *sannad* or Dhimat has been produced but reliance is placed on the oral evidence of P. W. No. 13, Vadali Annappa. According to P. W. No. 13 the Brahmins to whom the grant was made lived by cultivation. The

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grant was made to 80 or 90 Brahmans under a joint *sannad* and they were the residents of the Agraharam at the time of the grant. The Brahmans to whom the grant was made lived by cultivation and so they acquired both the Warms under the grant. It has, however, been held that in the case of an *inam* granted to a person in occupation of the land, the grant would still be only the Melvaram right although in consequence of the grant the Melvaram and the Kudivaram rights became vested in the same person (*vide Yeddampudi Lakshmi Narasimha Row v. Repalli Sitaramaswami* (4)).

4. Coming next to the suit Agraharam of Dammennu, the question for consideration is, what was the nature of the right given to the Agraharamdar at the time of the grant in Fasli 1159 (1749)? It is clear from the evidence of P. W. No. 6, Kandalam, Tirumalacharyulu, that Dammennu Agraharam was granted before the Permanent Settlement to his ancestor Prativathi Bhayamkaram Varadacharyulu, a resident of Vijiarayi which is situated at a distance of about 50 miles from Dammennu Agraharam. Dammennu is situated in Tanuku Taluk but Vijiarayi is situated in Ellore Taluk. Besides the oral evidence of P. W. No. 6, which goes to show that the original grantee was a non resident Brahmin of Vijiarayi, there is also the documentary evidence showing that the grantee's descendants also were residents of Vijiarayi, so far back as 1860 (*vide* columns 16 and 17 of Exhibit M) and even up to the year 1882 (*Vide* Exhibits M, N, Q and II). It has been held that the non-residence of the grantee, if proved, will negative the Kudivaram right [*vide* *Srimath Kidambi Jagannatha Charyulu v. Pidipiti Kutumbarayadu* (5) and *Upadrasta Venkata Sastrulu v. Devi Sitaramudu* (6)].

5. The next point for consideration is whether the suit Agraharam (Dammennu) was a waste land (* * beedu bhoomi) as in the case of "Karravari Savaram," referred to in paragraph 2, or in the occupation of tenants as in the case of "Kanur Agraharam" referred to in paragraph 3

(4) 19 Ind. Cas. 440; 24 M. L. J. 288; (1913) M. W. N. 282.

(5) 25 Ind. Cas. 891; 27 M. L. J. 233 at p. 236; 39 M. 21.

(6) 24 Ind. Cas. 224; 26 M. L. J. 585 at p. 596; 38 M. 891.

supra. In the absence of the original *sannad*, reliance is placed by both sides on Exhibits M and SS as also on Exhibit I. Exhibit M is an extract from the Register of Inams in the village of Dammennu. The original of Exhibit M appears to have been prepared in 1860. Exhibit SS is the Inam B Register of Dammennu Agraharam for Fasli 1298 (1888). And Exhibit I is a certified copy of Inam Statement of Dammennu Agraharam.

6. The three points for consideration regarding the village of Dammennu are

- (a) Whether the village of Dammennu was a waste land at the time of the grant in 1749 as in the case of "Karravari Savaram."
- (b) If not, whether the grant was to a Brahmin residing in the village and cultivating it as in the case of "Kanur Agraharam."
- (c) Whether the grant was made to a Brahmin not residing in the village.

The suit village of Dammennu is described under column 8 of Exhibit M as "granted as Agraharam." In Exhibit I (column 14) reference is made to a Dhimat addressed to village officials. It is argued for the respondent that the reference to village officials presupposes the existence of a village and that, therefore, the entire land in Dammennu could not have been a waste land (* * beedu bhoomi) at the time of the grant. And it is not the case of the plaintiff that Dammennu was entirely a waste land at the time of its grant in 1749.

7. Next as regards the points (b) and (c), if the village was not waste, it must have been in the occupation of tenants. The question then is, who were the tenants? Is it the original grantee? Or is it the ancestor of the present defendants? Certainly, it cannot be the original grantee, because according to P. W. No. 6 the original grantee was a resident of Vijiarayi. And it is impossible to believe that the original grantee residing at Vijiarayi (50 miles away from Dammennu) was the cultivating tenant prior to, and at the time of, the grant. I say it is impossible to believe, because even after the grant, the evidence on record points to the inference that the tenants themselves have been cultivating the land and not the Agraharamdars. The P. W. No. 8, who has been the Kurnam of Dam-

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mennu for the past 30 or 40 years and who, according to his own admission, has been working on behalf of the Agraharamdars in this litigation, supports the evidence of P. W. No. 6 in stating that the suit Agraharam lands have been all along cultivated by the tenants and not by the Agraharamdars themselves. And Exhibit I contains a statement of the Agraharamdar Srinivasa-charyulu that from 1835 to 1852 he and his co-sharers were looking after (managing) the village, which does not mean that they were cultivating the lands in the village. It is also stated in Exhibit I that they (Agraharamdars) were enjoying the “* * *

medhavi” i.e., produce or Melva-ram. This recital gives a lie direct to the evidence of P. W. Nos. 1 and 11 that Pedda Purushothamacharyulu was himself cultivating the land 4 or 5 years before his death. For Pedda Purushothamacharyulu died in 1852 after he had relinquished his right in favour of his daughter's son so early as 1835.

8. The evidence of P. W. No. 8 further shows that to his knowledge no Agraharamdar personally cultivated any portion of the Agraharam lands in the village of Dammennu; that the Agraharamdars resided permanently at Vijiarayi in Ellore Taluk; that the Agraharamdars, when they visited Dammennu for collecting rents, etc., used to stay in a portion of the house belonging to P. W. No. 8; that 40 years ago Kandalam Venkatacharyulu lived in the house within the compound of P. W. No. 8 for 4 years with his wife and children but he did not during that period cultivate any of the Agraharam lands; and that, as a matter of fact, the Agraharamdars owned no house-sites at all in the village but they belonged to the tenants who cultivated the surrounding lands. This evidence of P. W. No. 8 falsifies the evidence of P. Ws. Nos. 1 and 17 who depose to a contrary state of facts. But the evidence of P. W. Nos. 1 and 17 is purely interested and utterly unreliable, as it is not only opposed to that of P. W. Nos. 6 and 8 but also quite contrary to the recital of Exhibit CC itself, which makes no mention of any *patti*-sites belonging to the Agraharamdars.

9. If the Agraharamdars themselves were not the cultivators, either at the time of the grant, or subsequently as shown above,

it follows that the grant of the suit Dammennu village must have been made to non resident Brahmirs who were the inhabitants of Vijiarayi as deposed to by P. W. No. 6. And hence the case of “Kannur Agraharam” has no application whatever to the present case relating to Dammennu village. This disposes of points (b) and (c) in favour of defendants (respondents) and against plaintiff (appellant).

10. On the other hand, the evidence of P. W. No. 11, who is aged 90 years, shows that the village of Dammennu has been in the occupation of the tenants for nearly a century. Hence the presumption is that their ancestors also must have been living there in the absence of any evidence to the contrary. In the case of *Rajya v. Balkrishna Gangadhar* (7) it was observed that, if owing to antiquity there was no evidence of the commencement of a tenancy, it might be presumed to be co-extensive with the duration of the tenure of the landlord. The presumption is that the Zemindar did not deal with the rights of the occupants when the grant was made, the *ryots* being tenants of an Agraharam in a Zemindari. In the present case, this presumption is strongly supported by Exhibit XXXVII of 1853, which gives a description of the holdings of the several tenants as *agraharam* “Seri,” which means the same thing as ‘*jeroiti*’ or ‘*ryoti*’ holdings [vide *Narayanadaswami v. Venkayya* (8) and also *Zemindar of Ohellupalli v. Rajalapati Somayya* (9)]. The description of the holdings as ‘Seri’ in Exhibit XXXVII lends support to the further presumption that the tenants had been in the Dammennu village at the time of its grant to the ancestor of the Agraharamdars in 1749. This presumption, instead of being rebutted by any counter evidence on plaintiff's behalf, is supported by the admissions elicited in the cross-examination of P. W. No. 8 himself. For, P. W. No. 8 admitted that there are 40 or 50 families of tenants residing in the Agraharam and that he cannot say when these families first came to reside in the Agraharam. The P. W. No. 8 was not prepared to deny that the ancestors

(7) 29 B. 415; 7 Bom. L. R. 439.

(8) 6 Ind. Cas. 265; (1910) M. W. N. 282 and 116; 7 M. L. T. 366.

(9) 27 Ind. Cas. 77; 27 M. L. J. 718 at p. 720; 16 M. L. T. 576; (1915) M. W. N. 1 at p. 3; 2 L. W. 117; 39 M. 341.

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of these families were not the cultivating tenants at the time of the original grant.

11. With reference to the evidence *pro* and *con* discussed in the foregoing paragraphs, it is clear that the suit Agraharam of Dammennu must have been in the occupation of cultivating tenants and not in the occupation of the original grantee, who, according to the evidence of P. W. No. 6, was a resident of Vijiarayi. I accordingly find with reference to the issue remitted for trial that, so far as the village of Dammennu is concerned, the land revenue alone (Melvaram) had been assigned to the original grantee and not the Kudivaram right also. This finding is also in accordance with the decision reported as *Kandada Narasimhacharyulu v. Ravichela Ramabrahmam* (10), where it was observed that an Agrahamdar who obtained his *inam* from the Nuzvid Zemindar had only the Melvaram right.

12. Before concluding, I may add that I have not considered it necessary to discuss the contents of the other documents filed on both sides, *firstly*, because they do not throw any light upon the terms of the *sinnad* showing the origin of the grant of the suit Agraharam; *secondly*, because those documents relate to a disputed period and as such they are not of much evidentiary value to prove or disprove the nature of the original grant; and *thirdly*, because the mere fact that some of the tenants (not defendants) had acknowledged that they had no occupancy right is not sufficient to rebut the inference of occupancy right arising in favour of the tenants when they have been in possession for a long time and the origin of their tenancy is unknown.

13. In the result, my finding is that in the case of *inams* granted by the Zemindar to Brahmins before the Permanent Settlement, if the grantees of the *inam* were in possession of the *inam* lands as cultivating tenants, it would make such persons owners of both the Warams. So also in the case of waste lands granted by the Zemindar, the grantee would acquire both the Warams. I further find that in the case of an Agraharam village granted before the Permanent Settlement by the Zemindar to a Brahmin, who is a resident of a different place, as in the present case, the grant would be deemed to be only of the Melvaram, because the

(10) 20 Ind. Cas. 759; 24 M. L. J. 656; (1913) M. W. N. 774.

Kudivaram was with the tenants in actual possession of the land at the time of the grant [*vide* also *Parvataneni Venkataramiah v. Parvataneni Narayudu* (11) and *Suryanarayana v. Acchutta Potanna* (12)]. This finding has reference to the suit village and disposes of the issue in favour of defendants (respondents) and against plaintiff (appellant).

In compliance with the order contained in the above judgment in Civil Miscellaneous Appeal No. 15 of 1910, the Subordinate Judge of Kistna at Ellore submitted the following

FINDING.

A. A. O. No. 16 of 1910.

Plaintiffs are the sons of one Kandady Varadacharyulu. He had a divided brother Bulli Kristnamacharyulu. He died childless leaving his widow Tiruvengalamma as his sole heir. A divided fourth share in the Dammennu Agraharam, composed of the lands in the possession of the defendants, 73 in number, in all about 60 acres, belonged to Bulli Kristnama Charyulu. Tiruvengalamma died on 23rd March 1908. In 1894 with regard to about 40 acres of land she had executed in favour of the *ryots* registered *cowles* for a period of 60 years at a fixed rate of rent (*Vide* Exhibit XXVa to XXVk). With regard to remaining 20 acres they were let to the *ryots* for a period of 8 years from 1894, and in 1902 the *cowles* were again renewed for another period of 10 years. Tiruvengalamma having died in March 1908, the plaintiffs instituted this suit on 16th September 1908 as the reversioners to the estate of Bulli Venkayya, to recover the lands from the defendants. The plaintiffs contend that Tiruvengalamma had only the right to enjoy the said property as long as she lived, and that she had no higher right, that accordingly the *cowles* which she had given in respect of her properties were not valid subsequent to her death, and that they would not bind the plaintiffs (*vide* paragraph 6 of the plaint). The defendants plead, apart from any question as to the binding character of the *cowles*, that Dammennu Agraharam is an estate falling within the definition of section 3, clause (d) of the Estate Land Act, and that the Civil Court has no jurisdiction to entertain the present suit in ejectment. The same question is

(11) 17 Ind. Cas. 246; 12 M. L. T. 313.

(12) 22 Ind. Cas. 339; 26 M. L. J. 99; 35 M. 608; 15 M. L. T. 268.

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under consideration in Civil Revision Petition No. 576 of 1913 on the file of the High Court. The parties in the present suit have agreed to the oral and documentary evidence in the said suit being treated as evidence in the present case. Over and above the said evidence the defendants examined an additional witness D. W. No. 6 in the case. The plaintiff recalled and further examined the plaintiffs' 8th witness the Kurnam, and filed certain additional documents JJJJ to SSSS. Thus the evidence is substantially the same in both the suits. The additional documents are merely intended to explain certain transactions in the light of the plaintiffs' case. The conditions necessary to bring an *inam* under the definition of an estate are four. (1) The original grant should be of a village as a whole. (2) The land revenue alone of the village should have been granted in *inam*. (3) That the person to whom the *inam* is granted should be one not owning the Kudivaram of the village. (4) The grant should have been made, confirmed or recognised by the British Government. The wording of the section shows that for any *inam* being classed as an estate the aforesaid conditions should be fulfilled; and it would, therefore, lie upon any person who sets up the plea that an *inam* is an estate to establish, apart from any presumptions, that it fulfils all the aforesaid conditions. Further any person who wants to oust the jurisdiction of a Civil Court must also substantiate his plea. The defendants were accordingly called upon to show that the plaintiff *inam* is an estate. The plaintiff *inam* has been confirmed by the British Government in 1860 (*vide* Exhibit M). The extract from the Inam Register shows that the *inam* was conferred in Fasli 1159 (1747) on Varada-charyulu by the Zemindar Rajah Apparayanam Garu. The *sannad* and 29 Dumbalas, from Fasli 1159 to 1200, the *takeed* and the *patta* produced before the Inam Commissioner by the *inamdars* are not now forthcoming. They were said to have been lost in a fire in Sanivarappet, which burnt the house in which one of the *inamdars* Sadagopalacharyulu was put up. The evidence as to such loss is not of a convincing character, but there is nothing to show that plaintiffs had possession of those records, and I do not think that any presumption adverse to the plaintiffs could be drawn on that ground. The extent of the grant and the character of the *inam*

should have, therefore, to be gathered from the available records. The Inam Statement filed by the *inamdars* at the time of the Inam Settlement in 1860, Exhibit I, shows that the grant was of the village of Dammennu as a whole and not of any specified portion thereof. It begins: "Statement prepared by the Agraharikulu of Mounji Dammennu Agraharam attached to Relangi Taluk." All the extents of land within the four boundaries of the village are claimed as *inam* with the exception of Porambokes 2 and odd *putties* and minor *inams* 8 and odd *putties*. As to whether the minor *inams* were in existence at the time of the grant it is not clear, but probably they did as the village undoubtedly existed at the time of the grant. The existence of such minor *inams* does not make the grant less the grant of a village as a whole. There is thus no doubt that the grant was of a village as a whole. [*Vide* Gopisetti Narayana-swami v. Nalam Subrahmanyam (13)].

2. Secondly, it has to be seen whether the grant was of the land revenue alone. In the first place the description of the village as *mounji* is significant. It is only when a village already under cultivation is granted, it is known as a *mounji* village [*vide* Upadrasta Venkata Sastrulu v. Devi Sitaramudu (6)]. Secondly, column 6 of the Inam Statement shows that the grant was in the nature of a Srothriam of G. 60 Pagodas to be enjoyed by the grantee, Sreemat Prathivedi Bhayamkaram Varada-charyulu Garu and his heirs. Srothriam means literally an assignment of land revenue to a Srothria or Brahmin learned in the Vedas, and here evidently the grantee, as his name indicates, is a Vishtnavite Brahmin of that stamp. Admittedly the grantee and his descendants are Garus for a number of people. Srothriam grant gives no right over the lands, and the grantee is only entitled to land revenue and cannot interfere with the occupants as long as they pay the established rent [*Papala Narayanasami Naidu v. Pensalani Kanniappa Naidu* (14), *Ohinnan v. Kondam Naidu* (15)]. Thus the Inam Statement shows conclusively that the grant was a Srothriam *inam* of 60 Pagodas of land revenue. The unambiguous nature of the present grantee, therefore, obviates the decision of any question as to even where

(13) 30 Ind. Cas. 375; 29 M. L. J. 478; 18 M. L. T. 148; 2 L. W. 683; (1915) M. W. N. 590; 39 M. 683.

(14) 14 Ind. Cas. 261; 24 M. L. J. 36 at p. 39; (1912) M. W. N. 496.

(15) 23 Ind. Cas. 113; 26 M. L. J. 169; 1 L. W. 41.

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the grant had been made of the lands in the village or of Melevaram in such lands the section would cover such grants as well.

The third point for consideration is whether the land revenue of the village was granted to a person not owning the Kudiaram thereof. All the other voluminous oral and documentary evidence in the case is of use only in considering this aspect of the case. Firstly, there is scarcely any doubt that the grantee and his descendants were permanent residents of Vijayarai in the Ellore Taluk. Dammennu is a village situate in the Tanuku Taluk at a distance of more than 50 miles from Vijayarai. Admittedly the Agraharamdars do not own at present any site or house in the village. Nor is there any evidence worth the name that they did so at any other time. The dwelling sites owned by the tenants belong to them and the Agraharamdars have no right to any of such sites. There is further no doubt whatever that they never lived in the village except camping temporarily in the Kurnam's house, when they went to collect Cist or lease out the lands. The plaintiffs' attempt to establish to the contrary is a miserable failure and does not deserve any detailed examination. The P. W. No. 8, Kalluri Venkayya, who is aged about 60 years, has been the Kurnam of the village for the last 40 years. In spite of the fact that he is hand and glove with the plaintiffs, and is too much interested in the result of the suit to speak the truth, he was nevertheless perforce obliged to admit the aforesaid facts. It is established beyond all reasonable doubt that till the year 1891 so long as the Agraharam had not been partitioned into 4 shares by the Agraharamdars, they never claimed any higher right in the lands than that of collecting the Mamool Cist, nor did they deny the right of the *ryots* to permanent occupancy rights in the lands. It is only after the partition of the lands by the Agraharamdars they made a determined effort to get at the lands. In the Inam Statement, the *inamdars* state as follows:—
"We have been paying the Cist to the Government on the Srothriam and maintaining ourselves with the income therefrom
* * *. A reference to the Inam Register, Exhibit M, shows that the Agra-

haramdars had then let the village for 5 years for an annual rent of Rs. 700. The Mashath account prepared on 25th September 1858 gives in detail the holdings of individual *ryots* in the village (XXXVIII). In order to facilitate the collection of rent from the *ryots*, the Agraharamdars had been till 1891 in the habit of executing a *cowle* for the entire village to the names of four principal or representative *ryots* of the village, with a stipulation therein that they should not collect from the other *ryots* any amount more than the amount settled with such *ryots* according to the Tharamvar of the lands owned by them (*vide* Exhibits II, III and IV). In almost all the *cowles* prior to 1891, the enjoyment of the several tenants or their holdings for a long time (* * * *vide* Exhibit II) is expressly and unambiguously admitted, and their right to continue on the land is not also denied, as the said *cowles* do not contain any stipulation that the tenants should surrender the land at the end of the period. The evidence of the Kurnam also with regard to the tenants' rights in the land is important to show that the tenants were recognised by the landlords as possessed of permanent occupancy rights. He says, "if a tenant dies, his son or heir cultivates unless for any reason the landlord gives the land to strangers. If a tenant dies leaving a son, his son cultivates the land. This has been the practice ever since I became Kurnam. The Agraharamdar collects rent from tenant's son or heir as described above." Asked whether the Agraharamdars had ever disallowed the heir to cultivate the lands, he said: "I cannot give any instance when the Agraharamdar did not allow the heir of the tenant to cultivate the land of the deceased tenant." Then again "there is no practice for the heirs of the deceased tenant to apply to the Agraharamdar, to apply for permission to cultivate the land of the deceased tenant," and he admitted that the names of female heirs are so registered in the account. For example after her husband's brother, Ramayya's death, Pullamma's name is entered in the accounts. He further admitted that till the year 1891 there has been not a single instance of a tenant having been ejected, and that till then there was no change of holding effected by

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the landlords. In addition to the aforesaid evidence there have been numerous alienations by the tenants of their lands by sale, mortgage, gift, &c. (*vide* Exhibits VI to VIc, XII, XVIII to XXII). All these documents have been written by the Kurnam himself, and the lands dealt with are described as lands in which the tenants had *geroit* right. It was also admitted by the Kurnam that the Agraharamdars raised no objection to such transfers and received the rent from the transferees, and that their names also were duly entered in the accounts. The Proceeding in Summary Suit No. 117 of 1891 is significant as showing that the Agraharamdars had till that date never disputed the occupancy right of the tenants. In the said suit Kanoori Venkatarreddi sued for acceptance of a *patta* by a tenant with the Mamool Cist Rs. 23-5-7. (Exhibit XXIX) The suit was compromised to the effect that a decree may be passed for the acceptance of a *patta* with the Mamool Cist Rs. 9-14-0 (Exhibit XXX). After the partition by the Agraharamdars, the above tenant was sought to be ejected in 1892, and on his setting up a right of occupancy it was found in his favour, and the suit was dismissed, and the decree was confirmed both in the first Appellate Court and in the High Court (*vide* Exhibits XIV and XIVa). As a matter of fact, as already observed, there was no attempt till the actual partition by the Agraharamdars of the village in 1891 to dispute the occupancy rights of the tenants in any manner. The Agraharamdars were content to receive the Mamool Cist from the several *ryots*. But after 1891 the Agraharamdars put forward a claim to the absolute ownership of the land, and the tenants resisted the claim for some years. But finally the tenants and the landlords came practically to an agreement by which most of the tenants had their occupancy rights in the lands confirmed or recognised by the Agraharamdars on payment of some consideration. Thus Sadagopachari and Jagannathachari, who in all owned one-half of the Agraharam or 120 acres, have confirmed the occupancy rights possessed on the lands by the tenants for some consideration. With regard to another Agraharamdar, Venkata Reddi, who owns 60 acres, he has similarly recognised the

occupancy rights of the tenants for 40 acres. Of course in all the above cases, the recognition, had been effected either as sales or as permanent leases. In the case of Thiruvengalamma, as she had only a widow's estate the above procedure could not be followed, and with regard to 40 acres she executed leases for the long period of 60 years for some consideration and for the remaining 20 acres for 10 years to the tenants who had long been in occupation of the lands. The Kurnam, P. W. No. 8, helped the Agraharamdar materially in bringing round the tenants, and has also materially profited thereby. Of course, the reason of the tenants' agreeing to so repurchase the occupancy rights from the Agraharamdars was of course due to their fear that they might be ejected out of their lands either forcibly or by being dragged into litigation for long periods, and thus be ruined. It must also be said that subsequent to 1891 the tenants as a whole recognised the landlords' right to the lands and have in many instances given up their lands which the landlords had rented to others. It may be safely asserted that while the evidence prior to 1891 is all in favour of the tenants, the evidence subsequent to 1891 is all in favour of the Agraharamdars' right to the entire land. They have subsequent thereto periodically increased the rents, changed tenancies, and have otherwise also exercised absolute ownership of the lands. No good purpose would be served by setting forth in detail the evidence on the above indisputable facts. But a village has to be determined whether it is an estate or not by the original grant and by ascertaining whether at the time of the grant the grantee also owned the Kudivaram of the village. In the present case the evidence conclusively shows that at the time of the grant the grantee did not own the Kudivaram. I accordingly answer the issue in the affirmative.

The civil revision petition, and the appeal against order and the memorandum of objections filed on behalf of the respondents in the appeal came on for final hearing on the 16th of July 1919 after the return of the finding of the lower Court upon the issue referred by this Court for trial.

Mr. L. A. Govindragava Iyer, for the Petitioner.

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Messrs. T. Prakasam, P. Ohenchieh and V. Rama Doss, for the Respondents.

JUDGMENT.—The civil miscellaneous appeal and the civil revision petition are against orders returning the plaint for presentation to the Revenue Court. The suit in the civil miscellaneous appeal was filed by the Agraharamdars against about sixty tenants for ejectment. On the first occasion the then Subordinate Judge decided that the Civil Court had no jurisdiction to entertain the suit. On appeal against that order this Court pointed out that the village in question was not an estate under clause (e) of section 3 (ii) of the Estates Land Act, and remanded the case for a finding whether it came under (ii) (d). The present Subordinate Judge has come to the conclusion that it is an estate falling under section 2 (ii) (d).

Mr. Govindaraghava Aiyer who appeared for the appellant addressed a very elaborate argument to us resting it mainly upon the recent Privy Council decision in *Suryanarayana v. Patanna* (16). In the course of the argument we expressed doubts whether that decision would cover this case, and whether the fact that the grant of the Agraharam was made by one of the Nuzvid Zemindars and certain other circumstances would not differentiate this case from the one before the Judicial Committee. Since the argument was concluded, we have had the advantage of hearing Mr. Ramesam on a similar question relating to Thottapalli estate, and the learned Vakil drew our attention to a subsequent decision of the Judicial Committee in *Upadrashta Venkata Sastrulu v. Devi Sestharamulu* (17) which to a considerable extent has dispelled our doubts entertained at the hearing. That decision reverses the judgment of this Court in *Upadrashta Venkata Sastrulu v. Devi Sitaramudu* (6). In that case as in the case before us, the grant in question was made by one of the Nuzvid Zemindars, and was made to Brahmins. Yet the Judicial Committee, following their view enun-

ciated in the case in *Suryanarayana v. Patanna* (16), have held that there is no presumption that the land revenue alone was granted. If the matter were *res integra*, we would have had some hesitation in applying the principles enunciated in *Suryanarayana v. Patanna* (16) to a grant by a Nuzvid Zemindar. In Appeals Nos. 122 and 123 of 1900, and 32 and 41 of 1904, this Court took occasion to examine the origin of the Nuzvid and Nidadavole Zemindaries. Quoting from Grant's Political Survey, Justices Davies and Benson held that the ancestors of the present Nuzvid Zemindars were farmers of revenue under the Nizam. It is not necessary to pursue this matter further, although it is open to argument that the same rule of construction cannot be applied to grants from these Zemindars as would apply to grants made by the ancient Kings of this country. But the Judicial Committee have, by referring to the preamble of Regulation XXXI of 1802, construed a grant of a similar character in their subsequent decision as conferring a right to the land itself and not merely to the land revenue. Section 2 of that Regulation may be regarded, as suggested by Mr. Ramesam, as justifying this conclusion. The framers of that section were aware that not only Ruling Princes but persons who had a lesser right in the soil but who professed to possess royal rights and prerogatives were making grants in the same manner. The section says that grants by these limited owners would be equally valid. This may be construed as a release on the part of the East India Company, which succeeded to the sovereign rights in these territories, of their right to take exception to the grant made by such owners. Therefore, the grant by one of the Nuzvid Zemindars would convey the right in the property as well as the right in the soil, which by the Regulation XXXI of 1802 may be regarded as having been surrendered to the grantee by the Government. Even that would not deprive tenants of their rights, if they had any, in the soil. Because neither the Zemindar by such grant nor the Government by their release can convey rights over which they had no control. Therefore, the question resolves itself into this. Had the defendants any right of occupancy at the time when the grant was made by the Nuzvid Zemindar which in this case

(16) 48 Ind. Cas. 689; 41 M. 1012; 25 M. L. T. 30; (1918) M. W. N. 859; 23 O. W. N. 273; 9 L. W. 126; 29 O. L. J. 153; 1 U. P. L. R. (P. C.) 11; 36 M. L. J. 585; 21 Bom. L. R. 547; (1919) M. W. N. 433; 45 I. A. 209 (P. C.).

(17) 51 Ind. Cas. 304; 43 I. A. 123 (P. C.); 17 A. L. J. 723; 37 M. L. J. 42; 21 Bom. L. R. 925; 26 M. L. T. 175; 30 O. L. J. 441; 10 L. W. 633; 24 O. W. N. 129.

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is said to have been made about the year 1747: Or, in other words in the language of the Judicial Committee in the case reported as *Suryanarayana v. Patanna* (16): "Is it proved, or is there evidence to suggest, that at the date of the grant there were any tenants in the village holding lands with any rights of occupancy by custom or otherwise?" There can be no question from the language of the judgment of the Judicial Committee in the two cases already referred to that the burden of proving this is on the defendants. Looking at it from another point of view also the burden is on the defendants. It is they that object to the jurisdiction of the Civil Court, and it is for them to show that their rights in the property are of such a character as a Civil Court cannot take cognizance of. The Subordinate Judge rightly held that the burden was on the tenants. He has, however, come to the conclusion that that burden has been discharged. Although in Civil Miscellaneous Appeal No. 16 of 1910 there is no special reference to the current of authorities in this Presidency to the effect that grants of this description should be presumed to have affected the land revenue only and not the land, still there can be no doubt that in appreciating the evidence, the Subordinate Judge has been led to the conclusion at which he has arrived by this well-known presumption of fact. Since his judgment was delivered the Judicial Committee, as we pointed out already, have taken a different view of the situation and, therefore, in dealing with the judgment of the lower Court we have to examine the evidence from a new standpoint—a point which did not naturally strike the Subordinate Judge.

We shall now proceed to shortly discuss the evidence that has been let in. Mr. Govindaraghava Aiyar relied upon Exhibits KK to NN, which were executed between the years 1864 and 1870, as showing that the Agraharamdar regarded himself as the owner of the land. They were mortgage-bonds and contained statements that they were under cultivation by somebody and that in the event of the instalments not being paid the documents should be regarded as *cowles* enabling the mortgagee to take possession of the land. At best this is self-serving evidence. There is no evidence before us that the tenants were deprived of their possession. This clause about treating

the document as a *cowle* is not sufficient to warrant us in holding that the Zemindar was the owner of the soil. The learned Vakil then referred to Exhibit M, the Inam Register of 1860, and commented upon the statement therein that the Agraharam was under lease for 5 years. If one remembers the fact that for a long time in the Northern Circars, Zemindars and Agraharamdars were in the habit of leasing out their right to receive rent from the tenants to middlemen, there is nothing in the statement relied on to show that it was the cultivation of the land that was leased for the period. Nor is Exhibit Z, wherein directions were given to the agent to put a seal upon the crops, inconsistent with the conception of occupancy rights in the tenants. There are many cases in which as against occupancy rights the Zemindar has claimed the right to insert in the *patta* a condition that the tenants should not carry away the crops without notice to the Zemindar and that the agent of the Zemindar should put a seal upon the harvested crops. There is nothing in Exhibits VI and VII, which refer to pre-existing *cowles* and renewals of *cowles*, to support the appellant's case. In *Suri Venkata Subbarayya Sastri v. Darapparoddi Kristnaiya* (18) it was held that such conditions were not inconsistent with rights of occupancy. There are some documents relating to the acquisition of land which have better evidentiary value for the plaintiff than the ones we have discussed. It seems apparent that in one instance at any rate the Agraharamdar was given some land outside the Agraharam in lieu of the land taken by Government within the Agraharam. The defendants have not shown that they had a similar exchange of property for their interests in the land acquired. But that is only a solitary instance and may be due to the fact that the land was Poramboke in which there were no tenants or the tenants were not astute enough to assert their rights. There are documents subsequent to 1891, which undoubtedly show that the Agraharamdar has been asserting a right in the soil. This is conceded by the lower Court. It does not attach any importance, and in our opinion rightly, to these later documents. In section 185 of the Estates Land Act, it is clearly intended by the Legislature that the

(18) 7 Ind. Cas. 358; 20 M. L. J. 526.

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evidence of acts and of assertions subsequent to 1898 should not be regarded as settling the rights of the landlord against the tenant. The reason of this rule is that in the year 1898 the first draft of the Act which subsequently became law in 1908 was prepared and published. The land-holders, anticipating that tenants would be given large rights in the property, took active steps to create evidence in their favour. It is for that reason the legislature has inserted the provision referred to by us in section 185. Although the year 1898 was mentioned in that section, there can be no doubt that at least in the part of the country from which the present litigation has come the contest between landlord and tenant has been acute and pronounced for a long time earlier. From *Appa Rau v. Ratnam* (19), which was a decision of 1889 and which related to the Nuzivid Zemindari, it is clear that there was active controversy regarding occupancy rights between the *zemindar* and the tenant. Other cases may also be quoted to the same effect. Therefore we agree with the Subordinate Judge that much importance should not be attached to the documents which have been brought into existence since the year 1891.

Thus far we have dealt with the evidence relied on by the plaintiff for establishing that he had the Kudivaram right in himself. It may be mentioned that the *sannad* itself has not been produced. Therefore if the burden of proof was upon the Agraharamdar to show that at the time of the grant not only the Melvaram rights but also the rights in the soil were granted to him, we would have agreed with the Subordinate Judge that he has failed to prove his case. But as we said before, in the language of the Judicial Committee, it is for the defendants to show that at the date of the grant they or their ancestors had the right of occupancy in the land. An examination of the documents filed by them does not establish this position. We shall very briefly deal with them, because we are anxious that we should not prejudice the parties in any way by a too elaborate discussion of them. There are documents on their side which contain statements by the Agraharamdar that the defendants and their ancestors have been long on the soil, that rates of rent have been settled with them and that

the middleman or the lessee should not increase the rates thus settled. Exhibits VI (c), XXII, XIX, VI (a) and Exhibit II are instances of this kind. It must be said that they are all subsequent to the year 1853. There are documents which go to show that these tenants had been alienating the property as if they were the owners thereof. Exhibits XXI and XX are instances of this kind. There is Exhibit XXXVIII, a document of 1858, which shows that the Agraharamdar had compiled a list of tenants in occupation. Exhibit XIV shows that a previous suit in ejectment against the tenant was unsuccessful. These documents undoubtedly show that there had been an assertion of the right in the soil on the part of the tenants. They do not either directly or inferentially suggest that at the time of the grant in 1747 they or their ancestors had any occupancy right. It may be, and we must express this opinion very guardedly, that these documents show that since the grant the tenants have acquired an occupancy right. That is a matter for consideration at the trial on the merits. But for the purposes of deciding whether the Agraharam is an estate these documents are not of much value. For these reasons we must hold that it has not been shown that the lands in the Agraharam were in the occupation of the tenants at the time of the grant to the plaintiff's ancestors and that, therefore, it is not proved that it is an estate falling within clause 3 (2) (d) of the Estates Land Act. We must, therefore, reverse the decision of the Subordinate Judge and remand the case to the Court of first instance for disposal on the merits. Costs hitherto incurred will be provided for in the revised decree. As regards the Razinama petitions alleged to have been executed by some of the tenants, the Court of first instance will inquire into their genuineness and validity and deal with them.

In the civil revision petition, although it is open to argument that there is no question of want of jurisdiction which would enable us to interfere with the decision of the Court below, we think that having regard to our decision in the civil miscellaneous appeal it would be injurious to the rights of both parties to allow one set of cases to be heard by the Revenue Court and another set of cases by the Civil Court,

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It may not inaptly be said that having regard to the presumption with which the judgment in the civil revision petition starts, namely, that in case of similar grants the land revenue alone must be taken to have been granted, there has been material irregularity in the exercise of jurisdiction. We must reverse that decision as well and remand the case for disposal by the Civil Court on the merits. Costs hitherto incurred will be provided for in the revised decree.

M. C. P.

*Petition and Appeal allowed;
Case remanded.*

ODUH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 15 OF 1918.

September 10, 1919.

Present:—Mr. Lyle, A. J. C.

Sheikh ZAHUR AHMAD—DEFENDANT—
APPELLANT

versus

Sheikh MOHARRAM ALI AND ANOTHER—
PLAINTIFFS—MURTAZA HUSAIN DEAD,
AND ON HIS DEATH MOHAMMAD AHMAD
AND RUQUAYA BIBI *alias* RUQQAN—
DEFENDANTS—RESPONDENTS.

*Oudh Laws Act (XVIII of 1876), s. 13—Pre-emption,
suit for, by mortgagee—Amount payable to vendee—
Amendment of decree—Market value, determination
of—Fancy price, whether fictitious.*

A vendor of certain property left with the vendee a portion of the sale money to be paid to the mortgagee of the property and the pre-emptor, who was the mortgagee, applied under section 151 of the Code of Civil Procedure for amendment of the decree to the effect that the defendant vendee was entitled to receive from him only such sums as the latter had paid to the vendor, and the Court amended the decree accordingly:

Held, that the Court was right in applying section 151 and in amending the decree as prayed for. [p. 35, col. 1.]

In the absence of any special reason for paying a fancy price for property, the fact that such a fancy price has been entered in the sale-deed is in itself evidence of the price being fictitious. [p. 35, col. 2.]

Under section 13 of the Oudh Laws Act if any single item forming part of the price mentioned in the sale-deed is found to be fictitious, the Court must

fix such price as appears to it to be the fair market value of the property sold. [p. 36, col. 2.]

Appeal against the decree of the Additional Sub Judge, Lucknow, dated the 30th November 1917.

Mr. Niamatullah, for the Appellant.

Mr. A. P. Sen, for Respondents Nos. 1 and 2.

JUDGMENT.—This was a suit for pre-emption. The defendant No. 2, who was the owner of the property in suit, sold it to the defendant No. 1 under a sale-deed dated the 18th of December 1915. The plaintiffs alleged that as co-sharers in the village they were entitled to pre-emption against the defendant No. 1 who was not a co-sharer, that the price entered in the sale deed, Rs. 6,400, was fictitious and that the property was actually sold for Rs. 5,000 while the market value is not more than Rs. 4,200. The plaintiffs claimed pre-emption on payment of Rs. 5,000, the price at which they alleged the property was actually sold.

The defendant No. 1 pleaded that he purchased the property with the consent of the plaintiffs and that, therefore, they were estopped from claiming pre-emption. He also pleaded that the property was in fact purchased for Rs. 6,400.

The learned Subordinate Judge found that the plaintiffs had not declined to purchase the property and were not estopped from claiming pre-emption, that certain items in the price mentioned in the sale-deed were fictitious and that the market value of the property was about Rs. 4,700. But as the plaintiffs offered Rs. 5,000, he gave a decree for pre-emption to the plaintiffs on payment of that sum.

The plaintiffs applied for amendment of the decree, relying on sections 151 and 152 of the Code of Civil Procedure, on the following grounds:—

They pointed out that they were in fact mortgagees in possession of the property in suit and that under the sale-deed the sum of Rs. 4,800 had been left with the vendee, defendant No. 1, out of which Rs. 4,375 were to be paid by the vendee to themselves in satisfaction of their mortgages and Rs. 422 to one Zaki Mohammad under a decree. They claimed that as these sums had not been paid by the vendee and that as they (the pre-

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emptors) were entitled to be placed in the shoes of the vendee, they should have been given a decree for pre-emption on payment of Rs. 200 only, the balance of the sale price, to the vendee and asked that the decree should be amended accordingly.

During the proceedings it was admitted that the vendee defendant No. 1 had, out of the balance of the sale price left with him, actually paid the sum of Rs. 422 due to Zaki Mohammad. The learned Subordinate Judge, therefore, allowed the application and amended the decree. By the amendment the plaintiffs were given a decree for pre-emption of the property on payment of Rs. 622, that is Rs. 200 plus Rs. 422, to the defendant No. 1 vendee. During the hearing of the application for amendment the vendee pleaded that out of the sum left with him Rs. 500 had been paid to the vendor and claimed that he was entitled to recover this amount from the plaintiffs-pre-emptors. The learned Subordinate Judge, however, found that no such payment had been made and disallowed the claim.

The vendee defendant No. 1 has appealed and the questions for consideration in the appeal are:—

(1) Whether the Court was justified in amending the decree;

(2) if so, whether the vendee's claim to recover from the plaintiffs Rs. 500 alleged to have been paid to the vendor should have been allowed;

(3) whether the price stated in the sale-deed Rs. 6,400 was fictitious, and

(4) if so, what is the market value of the property.

It seems to me quite clear that the lower Court was right in applying section 151 of the Code of Civil Procedure and amending the decree. In the plaint it was clearly stated that the plaintiffs were mortgagees in possession of the property with regard to which pre-emption was claimed, and in the sale-deed it was stated that the sum of Rs. 4,375 was left with the vendee for payment to the plaintiffs. The vendee was clearly entitled to receive only such sums as he had already paid, and beyond question he was not entitled to receive from the plaintiffs the amount left with him for payment

to the plaintiffs which he had not paid to them.

The learned Subordinate Judge was also clearly right in refusing to believe the story that a sum of Rs. 500 had been paid by the vendee-appellant to the vendor. There is no reason whatsoever why there should have been a settlement of account or why such a sum should have been paid before the mortgage debts due to the plaintiffs were satisfied, and the evidence of the vendor relative to the alleged payment is patently false.

The learned Subordinate Judge was also clearly right in holding that the price stated in the sale-deed was fictitious. The plaintiffs-respondents were in possession of the property as mortgagees, and one of them has gone into the witness-box and stated that the net profits of the property, including *sir* amount to Rs. 150 per annum. *Jamabandis* have also been produced, which show that the net income of the property mentioned in the sale-deed amounts to Rs. 153. The vendee-appellant alleges that the net income is Rs. 175, but there is no evidence whatsoever in support of it. The statement of Zaki Mohammad, to the effect that he saw this figure in a sale statement prepared in execution proceedings, is not evidence. The appellant has himself admitted that the entries in the *patwari's* papers are correct and though he summoned the *patwari* as a witness, he did not dare to produce him to contradict the evidence given by the plaintiffs with regard to the annual profits. Taking the annual profits, therefore, at Rs. 153, the alleged price of Rs. 6,400 would be at a rate of Rs. 2.6 per cent. The ordinary rate is not less than Rs. 3 per cent. and the appellant-vendee himself does not even suggest that a rate of less than Rs. 2.12 per cent. is ever paid.

As there is no suggestion whatsoever that the appellant had any special reason for paying a fancy price for this property, the fact that such a fancy price has been entered in the sale-deed is in itself evidence that the price is fictitious. At the ordinary rate of Rs. 3 per cent. the price would come to Rs. 5,100.

The learned Subordinate Judge has found that three items mentioned in the sale-deed are fictitious, namely, Rs. 300 due on a promissory note dated the 4th November 1915; Rs. 400

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due on a pro note dated the 1st of December 1915 and Rs. 700 out of the Rs. 800 paid before the Sub-Registrar, which the learned Subordinate Judge has found was subsequently returned to the vendee, the appellant. It is to be noted that neither of the pro-notes has been produced and the vendor defendant No. 2 states that he destroyed them when they were returned to him by the vendee. It is further to be noted that the vendee-appellant did not dare to go into the witness box to give evidence with regard to these alleged pro-notes. The vendor at first stated that he did not remember who wrote the pro note for Rs. 400 or when it was written and suggested that Zaki Mohammad might have written it, but he afterwards admitted that it had been written by Mumtaz Ali. Mumtaz Ali and one Ujju Lal who attested the receipt have given evidence that the pro note for Rs. 400 was executed on the same date as the sale-deed, that it was antedated and that no consideration passed. Mumtaz Ali is a *mukhtar* of one Baqar Miya at whose house the vendor stays when he comes to Lucknow. The learned Subordinate Judge had the advantage of seeing the manner in which these witnesses gave their evidence. He has believed their statements and in all the circumstances of the case, I am not prepared to differ from his finding. And there is very good reason for holding that the pro note for Rs. 300 is also fictitious. Two witnesses have been produced by the defendant-appellant with regard to this pro note, one is Murtaza Husain defendant No. 2 and the other is Zaki Mohammad the scribe of the pro-note. The learned Subordinate Judge has made a note on the record that the demeanour of Murtaza Husain as a witness was unsatisfactory and a perusal of his evidence shows that no reliance whatsoever can be placed upon it. The two witnesses directly contradict each other with regard to this pro-note. Zaki Mohammad alleges that Rs. 300 was paid by the vendee-appellant to the vendor as earnest money for the sale of the property, while Murtaza Husain declares that it was altogether an independent loan advanced to him three months before the vendee-appellant agreed to purchase the property. In view of these findings it is unnecessary to consider whether any portion

of the sum paid to the vendor in the presence of the Sub Registrar was given back subsequently to the vendee. Under section 13 of the Oudh Laws Act if any single item forming part of the price mentioned in the sale-deed is found to be fictitious, the Court must fix such price as appears to it to be the fair market value of the property sold.

It remains, therefore, to consider what is the fair market value of the property. The learned Subordinate Judge has found it to be about Rs. 4,700 and after examining the evidence, I am not prepared to differ from his finding. One witness Mohammad Naim, whose evidence has not been criticised by the learned Pleader for the appellant, has stated that in his opinion the property is worth Rs. 4,700 and that the defendant No. 2 offered it to him for Rs. 5,000 but he was not willing to pay more than Rs. 4,700 for it. This witness has also stated that he has purchased property in the same village at the rate of Rs. 32 per cent. and at this rate, taking the net profits at Rs. 153, the value of the property would come to about Rs. 4,800. The defendants' own witness Zaki Mohammad has admitted that he sold property in this village at the rate of Rs. 35 per cent. and at this rate the value of the property would come to about Rs. 4,600. The defendants' witness Siraj ud-din has stated that property in the village is sold at the rate of Rs. 2.12 per cent., but he is unable to refer to any sale that was made at that rate.

The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEALS NOS. 704 TO 706
OF 1918.

November 20, 1919.

Present : — Mr. Justice Adami.

CHATURBHUI SAHAY—PLAINTIFF—
APPELLANT

versus

MUHAMMAD HABIB AND OTHERS—
DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XVI, r. 1

CHATURBHUI SAHAY v. MUHAMMAD HABIB.

—Appeal filed without copy of decree, effect of—
Limitation Act (IX of 1908), ss. 3, 5—Appeal filed
beyond time—Limitation, extension of—Sufficient cause
—Burden of proof—Objection not taken by respondent
—High Court, whether can consider question of limita-
tion—Procedure—Practice.

A petition of appeal filed without a copy of the decree appealed against is not valid as an appeal. [p. 37, col. 2.]

Where an appellant seeks the benefit of the provisions of section 5 of the Limitation Act, he must adduce distinct proof of the sufficient cause on which he relies and must furnish a detailed affidavit explaining the cause of the delay. [p. 37, col. 2.]

Where an Appellate Court exercises the discretion vested in it by section 5 of the Limitation Act, it must record the reasons for allowing an extension of the period of limitation. [p. 37, col. 2.]

Where a respondent fails to object to the admission of an appeal by a lower Appellate Court under section 5 of the Limitation Act, the High Court is not precluded from considering the question of limitation. Even an agreement between the parties that the objection should not be raised would not prevent the High Court from interfering. [p. 39, col. 1.]

The practice of admitting appeals out of time provisionally, without notice to the respondent, and allowing objection to its admission to be taken at the hearing should be discontinued. Provision should be made for the final determination at the stage of admission of any question of limitation affecting the competence of the appeal. [p. 39, col. 1.]

Appeals from a decision of the District Judge of Patna.

Mr. Sundar Lal, for the Appellant.

Messrs. Akbari and Nawal Kishore Prasad II, for the Respondent.

JUDGMENT.—The only question which arises in these appeals is one of limitation. A decree was passed in the original Court on the 13th September 1917, an appeal was filed on the 27th September but without any copy of the decree and four days were allowed for remedying the defect. The vacation commenced from the 28th September and lasted till the 30th October; the last date, therefore, for filing the appeal would be the 31st October. On the 5th November the appellant's Vakil was told that no copy of the decree had been filed and that a copy should be supplied. On the 10th November, no step having been taken by the appellant to cure the defect, the appeal was struck off. Then, on the 19th November the appellant filed a copy of the decree and on the 21st the learned District Judge admitted the appeal subject to objection, a petition having been filed together with the copy of the decree.

It is contended before me that the Court could only have admitted the appeal after time by exercising the power of extension allowed by section 5 of the Limitation Act, and it is explained that it was in exercise of this power that the appeal was admitted. There is nothing, however, on the record to show us how the appellant satisfied the Court that he had sufficient cause for not filing the appeal in the regular way within time. All we have on the order sheet is: "admitted subject to objection."

In the first place, it is clear, according to numerous decisions, that the petition of appeal filed without a copy of the decree is not valid as an appeal and the appeal cannot, therefore, be said to have been filed until the 19th November, about 22 days out of time. The only material on the record on which the learned District Judge can have satisfied himself as to the desirability of extending the time under section 5 is the petition which was filed with a copy of the decree on the 19th November. In that petition it is stated that the appellant's Karpardaz had been injured in a riot and had been confined to hospital for several days, that the petitioner did not know that a copy of the decree had not been filed nor the fact that the Court had passed an order that it should be filed within four days. This petition is not supported by an affidavit and the learned District Judge does not say that the extension of time was based on it. There is no doubt that the reasons for allowing more time should have been recorded and there should have been a detailed affidavit explaining the delay. Notice should also have been given to the respondents who should have had an opportunity to object to the admission. Pleadings having been engaged in the case, the illness of the Karpardaz could hardly be taken as a sufficient excuse. There is no finding by the learned District Judge that the delay was excusable. It lay on the litigant to adduce distinct proof of the sufficient cause on which he relied.

In the case of *Krishnasami Panikondur v. Ramasami Chettiar* (1) their Lordships of (1) 43 Ind. Cas. 493; 22 C. W. N. 481; 34 M. L. J. 63; 4 P. L. W. 51; 16 A. L. J. 57; 7 L. W. 156; 23 M. L. T. 101; 27 C. L. J. 253; 2 P. L. R. 1913; 41 M. L. J. 21 Bom. L. R. 541; 11 Bur. L. T. 121; (1918) M. L. N. 906; 45 I. A. 25 (P. C.).

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the Privy Council decided that the practice of admitting appeals out of time provisionally without notice to the respondent and allowing objection to its admission to be taken at the hearing should be condemned. Provision should be made for the final determination at the stage of admission of any question of limitation affecting the competence of the appeal and that the burden rests on the applicant under section 5 of the Limitation Act of adducing distinct proof of the sufficient cause on which he relies. There is nothing to show us that the present appellant made any objection to the admission of the appeal before the lower Appellate Court but there is no doubt that, even so, this Court can take the question of limitation into consideration: *Balaram v. Mangta Dass* (2), and even an agreement between the parties that the objection should not be raised in the lower Court would not prevent this Court from considering it [*Midnapur Zamindari Company v. Deputy Commissioner of Manbhum* (3)]. The lower Court should have recorded reasons, and there is nothing to show to this Court that the lower Court was satisfied that the appellant had sufficient cause for not preferring the appeal within the period of limitation. In the absence of anything to show that there was material sufficient for an allowance of an extension, I must allow the appeals and set aside the decrees of the lower Appellate Court and restore those of the Munsif. The appellant is entitled to his costs in both of the Appellate Courts.

Appeal allowed.

(2) 31 C. 94; 11 C. W. N. 953 (F. B.); 6 C. L. J. 237.

(3) 44 Ind. Cas. 570; 3 P. L. J. 132.

PUNJAB CHIEF COURT.

REVISION PETITION No. 775 OF 1918.

January 29, 1919.

Present:—Mr. Justice Wilberforce.

RULIA RAM—DECREE-HOLDER—PETITIONER
versus

SULTAN KHAN AND OTHERS—JUDGMENT-
DEBTORS—RESPONDENTS.

Punjab Alienation of Land Act (XIII of 1900), ss. 2

(3), 16—"Land", meaning of—Trees growing on land, whether exempt from attachment.

The definition of "land" given in section 2 (3) of the Punjab Alienation of Land Act is not intended to be exhaustive. [p. 39, col. 1.]

Although the maxim *quicquid plantatur solo, solo cedit* cannot be accepted in India as having the wide meaning attached to it in England, it does cover the case of trees growing on the land. [p. 39, col. 1.]

Wali Muhammad v. Mariam Bi, 52 P. R. 1906; 102 P. L. R. 1906, followed.

It was not the intention of the Legislature to exclude standing trees from the definition of land given in section 2 (3) of the Punjab Alienation of Land Act and consequently such trees are exempt from attachment and sale under the provisions of section 16 of the Act. [p. 39, col. 1.]

Petition for revision of the order of the Senior Subordinate Judge, Gurdaspur, dated the 20th December 1917, affirming that of the Munsif, 2nd Class, Shakargarh, District Gurdaspur, dated the 17th August 1917.

Mr. Jaigopal Sethi, for the Petitioner.

JUDGMENT.—In this case a decree-holder attached miscellaneous trees situated on agricultural land and the lower Appellate Court has held, especially on the authority of *Nihal Kaur v. Hari Singh* (1) and on orders of the District Judge, that in the definition of land trees are included. Against this decision an application for revision has been preferred.

The petitioner's Counsel relies specially on *Dhani Das v. Aya Ram* (2) and on remarks made therein by Stogdon, J., at page 75,* to the effect that trees are not land within the definition of section 4, clause (1), of the Punjab Tenancy Act, 1887. He also relies on *Yaru v. Adil* (3), which follows the previously recited judgment, and on *Nur Muhammad v. Tiloka Mal* (4) to the effect that a proprietor's share of standing crops is not "land." These judgments, however, are merely to the effect that a suit for trees or crops is not necessarily for the purpose of the Punjab Courts Act a suit for land. *Dhani Das v. Aya Ram* (2) was a suit relating to fruit trees and it followed *Dewa v. Hira Singh* (5), in which Sir Meredyth Plowden remarked that it was a common practice to sell or let or mortgage fruit trees independently of the land on which they

(1) 32 P. L. R. 1903.

(2) 15 P. R. 1892.

(3) 46 P. R. 1893.

(4) 4 P. R. 1905; 130 P. L. R. 1904.

(5) 119 P. R. 1890.

*Page of P. R. 1892—Ed.

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stand. It is clear that such judgments are of no assistance in determining whether the definition of land as given in the Punjab Alienation of Land Act includes the trees situated thereon. This definition is silent with regard to trees and as many other objects annexed to land are mentioned, it is argued that the Legislature did not intend to include trees in the definition of land, but it is clear that the definition itself is by no means intended to be exhaustive. There appears to be no published authority of this Court dealing exactly with the matter before me, though *Wali Muhammad v. Mariam Bi* (6) is in some way applicable to this case. In that case it was held that though the maxim *quicquid plantatur solo, solo cedit* cannot be accepted in this country as having the wide meaning attached to it in England, it does cover the case of trees growing on the land. I have no doubt, therefore, that it was not the intention of the Legislature to exclude standing trees from the definition of land and agreeing with the decision of the lower Appellate Court that they are exempt from attachment and sale under the provisions of section 16 of the Land Alienation Act, I dismiss the revision with costs.

Revision dismissed.

(6) 52 P. R. 1906; 102 P. L. R. 1903.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 1112 OF 1918.

November 13, 1919.

Present:—Mr. Justice Coutts and
Mr. Justice Adami.BERADAR SINGH AND OTHERS—
PLAINTIFFS—APPELLANTS

versus.

BACHA MAHTO—DEFENDANTS—
RESPONDENTS.Landlord and tenant—Rent, suit for, against some of
several co-tenants—Money decree, whether can be
passed.

Where a landlord desires to obtain a rent decree good against the land under the Bengal Tenancy Act, he must ordinarily implead all the co-tenants including the heirs or legal representatives of a deceased co-tenant. For the purposes, however, of a money decree he is free to sue any or all of the

tenants, provided at the time of the creation of the tenancy it was intended that each of the tenants should be liable to pay the whole rent. [p. 40, cols. 1 & 2.]

Appeal from a decision of the Subordinate Judge, Patna.

Messrs. Manuk, Bimola Chharran Sinha and Sunder Lal, for the Appellants.

Messrs. Siveswardyal and Murari Prasad, for the Respondents.

JUDGMENT.

COURTS, J.—This was a suit for arrears of rent of certain lands in Mouzah Koelawan for the years 1321—1324. The suit was brought by several plaintiffs against one Chhattarpati Mahto. The facts of the case have not been stated in the judgment of the lower Appellate Court and it is necessary to recapitulate them shortly.

The plaintiffs' case is that the defendants originally held the land for which rent is claimed partly *nagdi* and partly *bhowli*. In 1911 the plaintiffs brought a suit for both *bhowli* and *nagdi* rent for the years 1316—1318. This suit was compromised, Chhattarpati Mahto agreeing that the whole rent should be *nagdi*, and the amount was fixed at Rs. 131-11-11. In accordance with this compromise a decree was passed and the full amount was paid by the defendants out of Court. Subsequently another suit was brought by the same plaintiffs against Chhattarpati Mahto for arrears of rent for the years 1319 and 1320. This suit was also decreed in terms of the compromise which had been entered into in the previous suit and the full amount was realised from Chhattarpati Mahto. The present suit, as I have already said, was brought for arrears of rent for the years 1321—1324.

It appears that in the Record of Rights five tenants, including Chhattarpati Mahto, were jointly recorded as holders of the land for which the rent is claimed, and the contentions of Chhattarpati are that the suit is not maintainable because all the five recorded tenants are not impleaded and that in any case the rent is Rs. 106 4 and not Rs. 131-11-11 as agreed to in the compromise petition. It is further contended that the compromise is illegal as no evi-
[The text continues with the judgment, but is cut off in the provided image.]

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In the Court of first instance where the case was very carefully considered by the learned Munsif, a money decree was passed at the rate of Rs. 106-4-0, but on appeal this decree has been set aside and the whole suit dismissed. The plaintiffs have now appealed.

There are two points for consideration in the appeal. *First*, whether the suit is maintainable, and *second*, if it is maintainable, at what rate it can be decreed. With regard to the first point, there is no doubt that all the tenants not having been made defendants, no rent decree can be passed unless it is shown that Chhatarpati Mahto was the Karta of the family and was entitled to act on behalf of the other recorded tenants. This has not been proved; consequently no rent decree can be passed. But there appears to be no reason why a money decree should not be passed. That a money decree may be passed in such a case is the view which in a long series of decisions in the Calcutta High Court has been taken, and I need only refer to the last ruling on the point which is reported as *Krishna Das Roy v. Kuli Tara Chowdhurani* (1). In that case it was held that if the landlord desires to obtain a decree good against the land under the Bengal Tenancy Act, he must ordinarily (apart from any question of representation) implead all the co-tenants including the heirs or legal representatives of a deceased co-tenant. But for the purposes of a money decree (in the absence of express agreement to the contrary) he is free, under section 43 of the Contract Act, to sue any or all of the tenants. On the other hand reliance has been placed on two decisions of the Calcutta High Court, *Kashi Kinkar Sen v. Satyendra Nath Bhadro* (2) and *Jogeswar Rai v. Kesho Persad Singh* (3). In the first of these cases the learned Judges were of opinion that the proposition that the landlord may maintain a suit for rent against any number of several joint tenants had been too broadly laid down in a previous decision of the Court, *Rameswar Singh v. Jaideb Jha* (4), and

that when a tenancy is created in favour of two persons jointly, the question whether each is liable for the entire rent depends upon the intention of the parties. In the present case we do not know the origin of the tenancy but it would certainly appear, from the conduct of the parties, that it was intended that Chhatarpati Mahto should be liable for the entire rent and he does not deny this, and in view of the compromise petitions in the previous suits he could not have done so.

With regard to the case which is reported as *Jogeswar Rai v. Kesho Persad Singh* (3) Mullick, J., held that a rent suit is not properly constituted unless it is brought against all the recorded tenants. There is no presumption that in every joint tenancy in the Province of Bihar and Orissa there is also a several promise by which each tenant agrees to be bound for the whole rent. This decision does not in any way conflict with the general trend of the decisions in the Calcutta High Court, and it is nowhere suggested that in a case of this kind a money decree cannot be passed.

The second point for consideration is the rate of rent. The argument of the learned Vakil on behalf of the appellants is, that the compromise petition was in settlement of a *bona fide* dispute and consequently that, even if there is an enhancement of more than 2 annas in the rupee, the provisions of section 29, Bengal Tenancy Act, will not apply. The question whether the compromise was in settlement of a *bona fide* dispute has not been decided in definite terms by either of the lower Courts, but it is to my mind perfectly clear from the judgment of the learned Munsif that he did not consider that there was any *bona fide* dispute, inasmuch as he says in the course of his judgment that in all the stages from the beginning of the survey and settlement operations the lands were held *nagdi* and that the *jama* payable was Rs. 106-4-0. The learned Subordinate Judge, in his judgment in appeal, has not discussed the point but it is clear that he agrees with the learned Munsif. In this view of the case I am unable to accept the contention that there was any *bona fide* dispute, and I would, for the reasons already given, set aside the decree of the lower Appellate

(1) 44 Ind. Cas. 80; 22 C. W. N. 289.

(2) 7 Ind. Cas. 840; 12 C. L. J. 642 at p. 644; 15 C. W. N. 191.

(3) 37 Ind. Cas. 262; 1 P. L. J. 190.

(4) 6 Ind. Cas. 387; 12 C. L. J. 591.

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Court and restore the decree of the learned Munsif. Costs to be in proportion to the success of each party.

ADAMI, J.—I agree.

Decree set aside.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND APPEAL NO. 2158
OF 1918.

October 15, 1919.

Present:—Sir Henry Rattigan, Kt.,
Chief Justice.

JADU RAI—JUDGMENT-DEBTOR—APPELLANT
versus

MUSAMMAT MISRI AND OTHERS—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 73—
Decrees in favour of several creditors—Attachment in
execution of one—No action taken by other creditors—
Proceeds, whether liable to rateable distribution.

There were several decrees against one M, including one in favour of J. S. M had obtained a decree against one B. whose representative-in-interest was one J. R. J. S. applied for execution by attachment of the decree held by M. against J. R., and a private arrangement was come to whereby J. S. agreed to regard his decree as satisfied on payment of a certain sum by J. R. This sum having been paid, the other creditor of M. objected to the arrangement and claimed rateable distribution:

Held, (1) that inasmuch as there was no other claimant before the Court at the time when J. S. applied for execution, it was open to the latter to attach the whole of the decree held by M. against J. R.: [p. 41, col. 2; p. 42, col. 1.]

(2) that the money, obtained by J. S. from J. R. not having been paid into Court so as to constitute "assets held by the Court," was not liable to rateable distribution. [p. 41, col. 2.]

Miscellaneous second appeal from the order of the District Judge, Ambala, dated the 17th June 1918, confirming that of the Senior Sub-Judge, Ambala, dated the 5th April 1918.

Mr. Sunder Das, for the Appellant.

Lala Jagan Nath, for the Respondents.

JUDGMENT.—Briefly the facts are that one Musammât Misri was judgment debtor in respect of some ten decrees obtained against her by various persons, including the firm of Jhandu Lal-Sham Das. On the other hand Musammât Misri had

obtained a decree for a sum of Rs. 2,600 against one Bindra Ban, represented in the present case by Jadu Rai. Jhandu Lal-Sham Das, whose decree amounted to Rs. 3,098, applied for execution by attachment of the decree held by Musammât Misri against Jadu Rai and in the course of the proceedings a private arrangement was come to, whereby Jhandu Lal-Sham Das agreed that their decree against Musammât Misri should be regarded as satisfied on payment by Jadu Rai of a sum of Rs. 1,350 to them. This sum was paid by Jadu Rai to Jhandu Lal-Sham Das and at a later stage the other creditors of Musammât Misri objected that the arrangement was not binding upon them and claimed that sum of Rs. 1,350 was divisible amongst all the creditors generally and that Jadu Rai was bound to make good to those creditors the balance of Rs. 1,250 due under the decree obtained against him by Musammât Misri. The Courts below have held that the sum of Rs. 1,350 is liable to be rateably distributed amongst the various decree-holders and that Jhandu Lal-Sham Das, whose agreement with Jadu Rai has been set aside, are entitled to claim from Jadu Rai payment of the balance of Rs. 1,250.

Jadu Rai has appealed to this Court and the only respondents present are Jhandu Lal-Sham Das, the other creditors, though served with notice of the hearing, not having put in an appearance before me. It appears to me that the lower Courts have misread the provisions of sections 64 and 73, Civil Procedure Code, and that the orders passed by them cannot be upheld. At the time when Jhandu Lal-Sham Das applied for execution of the decree by attachment of the money due to Musammât Misri from Jadu Rai, no action to enforce their decrees by attachment of that debt had been taken by the other creditors, nor was the money obtained by Jhandu Lal-Sham Das from Jadu Rai paid into Court so as to constitute "assets held by the Court." The amount of the decree in favour of Jhandu Lal-Sham Das exceeded the amount due from Jadu Rai to Musammât Misri and it was open, therefore, to the former to attach the whole of the decree against Jadu

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Rai, there being at the time no other claimant before the Court for execution of decree and attachment of that debt.

I accordingly accept this appeal and set aside the orders of the lower Courts. Jhandu Lal-Sham Das do not oppose the order which I now pass and as the other creditors have put in no appearance, I make no order as to costs.

Appeal accepted.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL NO. 222 OF 1918.

May 16, 1919.

Present: —Mr. Justice Pratt.

PO MAUNG AND ANOTHER—DEFENDANTS—
APPELLANTS

versus

R. M. C. R. M. CHETTY—PLAINTIFF—
RESPONDENT.

Construction of document—Mortgage—Future tense, use of, effect of—Contract Act (IX of 1872), s. 23—Lower Burma Land and Revenue Act (II of 1876), s. 18, rules framed under, r. 20 (3)—Mortgage of grant land without sanction of Deputy Commissioner, validity of.

Where from a document, construed as a whole, it appears that the intention of the parties was to effect a mortgage *in presenti*, the mere fact that the future tense is used should not be construed as indicating that the parties intended the document to be a mere agreement to mortgage to be followed by an instrument of mortgage in due course. [p. 42, col. 2.]

A transfer of grant lands without the sanction of the Deputy Commissioner, in contravention of the conditions of the grant, renders the grant liable to resumption and the grantee to certain penalties, but it cannot be said that such transactions are forbidden by law, within the meaning of section 23 of the Contract Act. [p. 42, col. 2; p. 43 col. 1.]

A mortgage of grant lands without the sanction of the Deputy Commissioner is a valid mortgage of the right, title and interest of the mortgagor in the grant, but the mortgagee runs the risk of having his grant resumed. So long, however, as the Deputy Commissioner does not take action to resume the grant, the mortgage holds good and can be legally enforced. [p. 43, col. 1.]

Mr. Halker, for the Appellants.

Mr. A. B. Banerji, for the Respondent.

JUDGMENT—Plaintiff obtained a mortgage decree over certain land. The decree was affirmed by the Court of first appeal. The points taken in second appeal are

that the document on which plaintiff relies is not a mortgage-deed, but a mere agreement to mortgage; that the mortgage is invalid, because the land was grant land, and the mortgagor had no right to mortgage, and finally that the suit is barred by limitation. In the document in question, the expression used is "will place in mortgage"; but I quite agree with the lower Courts that, if it is construed as a whole, there can be no doubt that the intention was to effect a mortgage *in presenti*. The future tense was used, but it was merely a mode of expression and there was no intention that the document should be a mere agreement to mortgage to be followed by an instrument of mortgage in due course. Section 92 of the Evidence Act has no application.

As regards the second point I see no reason to hold that the mortgage is void because the land was grant land, and the conditions of the grant have been infringed. Condition (3) of rule 20 under the Lower Burma Land and Revenue Act provides that no grantee or lessee shall without the sanction of the Deputy Commissioner within five years from the date of expiry of the term of exemption or, where no exemption has been granted, until five years after the date of the execution of the grant or lease, transfer, mortgage or hypothecate, etc., his right, title or interest in the land granted or leased.

Rule 21 provides that if a grantee or lessee infringes the conditions set forth in the previous rule as applicable to all grants or leases, the Deputy Commissioner may resume the grant, and the grantee lessee shall be liable to certain specific penalties.

It is noticeable that the rule does not say that an unauthorized transfer, constituting an infringement of any of the conditions of a grant or lease, will be void. Rule 20, although called a rule, as a matter of fact lays down the conditions applicable to grants and leases and rule 21 prescribes the consequences of the infringement of the conditions. A transfer without the sanction of the Deputy Commissioner in contravention of the conditions of the grant no doubt renders the grant liable to resumption, and the grantee to certain penalties, but I do not think that it can be said that such transactions are forbid-

MAHAMUD SHAH V. FATTA.

den by law within the meaning of section 23 of the Contract Act, and it cannot, therefore, be held that the object or consideration of the contract of mortgage is forbidden by law. The mortgagor makes a valid mortgage of his right, title and interest in the grant, but the mortgagee runs the risk of having his grant resumed. So long as the Deputy Commissioner does not take action to resume the land, the mortgage holds good and can be legally enforced.

I see no reason to differ from the concurrent finding of both the lower Courts that there was a payment of interest, which rendered the suit not barred by limitation. The appeal is dismissed with costs.

Appeal dismissed.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1676 OF 1915.

October 20, 1919.

Present:—Mr. Justice Shadi Lal and
Mr. Justice Wilberforce.

MAHMUD SHAH, MINOR, THROUGH
PHUNDAR SHAH AND OTHERS—
DEFENDANTS—APPELLANTS

versus

FATTA AND OTHERS—PLAINTIFFS—
RESPONDENTS.

Pleadings—Practice—Rule of law—Plaintiff, whether to be limited to his plaint—Alternative claim, whether can be put forward—Court, whether can make out new case.

The rule of law is perfectly clear that a plaintiff must be limited to the case which he puts forward in his plaint, but he may put forward an alternative case in his plaint in the commencement, so that the defendant may know if he has more than one case to meet and may not be taken by surprise. [p. 44, col. 1]

It is not open to a Court to make out a new case for the plaintiff which the defendant has had no opportunity to meet. [p. 43, col. 2; p. 44, col. 1.]

Where, therefore, plaintiffs sued for joint possession with the defendants on the ground of ownership and the Court decreed their claim in respect of a portion of the area in dispute for the purpose of grazing cattle:

Held, that since the plaintiffs had not asked for any relief on the strength of their grazing rights, such relief could not be granted to them. [p. 44, col. 1.]

First appeal from the decree of the Senior Subordinate Judge, Shahpur at Sargodha dated the 13th March 1915.

Mr. Mukand Lal Iuri and Lala Ram Ohand Manchanda, for the Appellants.

Mr. Gobind Ram, for the Respondents.

JUDGMENT.—The dispute in this case relates to a plot of land, nearly 8,114 *bighas* in area, which is recorded in the revenue papers as the *shamilat* of the village Mohabpur in the Shahpur District. The plaintiffs, who are some of the proprietors of a neighbouring village called Bhin, claim that they are joint proprietors with the defendants of the land, and allege that they had been grazing their cattle thereon. They complain that their rights were denied by the defendants at the time of the recent settlement, and consequently pray that they may be awarded joint possession of the property.

The Subordinate Judge holds that only the proprietors of Mohabpur are the owners of the land, and that the plaintiffs have only grazing rights thereon. He has, accordingly in order to safeguard those rights, allotted to them a plot of 291 *bighas* and passed a decree for possession thereof. Both the parties are dissatisfied with this decree and have preferred appeals which may be disposed of by one judgment.

So far as the plaintiffs' appeal is concerned, the matter is perfectly simple. There is no documentary evidence to show that they have any rights of ownership in the land in dispute, and it is perfectly clear that the land has all along been recorded as the *shamilat* of the proprietary body of Mohabpur. The plaintiffs' appeal must, therefore, fail.

Coming now to the appeal preferred by the defendants, we find that the settlement papers prepared at the settlements of 1860 and 1891-92 record plaintiffs' right of grazing in the land in dispute, and it seems to us that if the plaintiffs had brought a suit properly framed for the purpose of enforcing their grazing rights, they might have obtained a decree. The suit as disclosed in the plaint is, however, one for possession on the ground of ownership, and the trial Judge is entirely wrong in making out a new case for the

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plaintiffs which the defendants had no opportunity to meet.

The rule of the law is perfectly clear that a plaintiff must be limited to the case which he puts forward in his plaint, but he may put forward an alternative case in his plaint in the commencement, so that the defendant may know if he has more than one case to meet and may not be taken by surprise. It was open to the plaintiffs in the present case to put forward an alternative claim on the ground of easement, and in that case the defendants would have got an opportunity to raise such defence as they had in answer to that claim. But as pointed out above, the plaintiffs simply claimed joint possession on the ground of ownership. The question of easement was not, therefore, determined.

The plaint is inelegantly drafted but after considering all the clauses carefully we are unable to hold that the plaintiffs asked for any relief which could be granted upon the strength of their grazing rights. Indeed, they did not even ask that a sufficient area might be reserved for grazing purposes, and that the defendants be restrained from using that area for other purposes.

In the circumstances we are constrained to hold that the decree on the strength of easement cannot be granted, and that the judgment of the Subordinate Judge must be reversed. Accordingly we accept the defendants' appeal and dismiss the plaintiffs' suit. Considering that the defendants denied even the grazing rights which are clearly mentioned in the settlement records, and that the suit fails on a technical ground, we direct the parties to bear their own costs throughout.

Appeal accepted.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 53 OF 1916.

May 22, 1918.

Present :—Mr. Justice Maung Kin and
Mr. Justice Rigg.

P. T. CHRISTENSEN—APPELLANT

versus.

W. P. MITCHELL—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 151, O. IX, r. 13—Ex parte decree, setting aside of—Bona fide mistake, whether sufficient cause—Inherent power of Court, exercise of.

A Court is not confined to a narrow construction of the expression "prevented by sufficient cause" in Order IX, rule 13, of the Civil Procedure Code: it has inherent power to set aside an *ex parte* decree in certain circumstances. [p 45, col. 2.]

A *bona fide* mistake as to the date of hearing is a sufficient cause for setting aside an *ex parte* decree. [p 45, col. 2.]

Mr. McDonnell, for the Appellant.

Mr. Dawson, for the Respondent.

JUDGMENT.—This is an appeal against the order of the District Judge, Moulmein, refusing to set aside an *ex parte* decree passed in Civil Regular No. 110 of 1915. The ground briefly on which the appellant Christensen asked for the setting aside of the *ex parte* decree is that by mistake he thought the civil suit was fixed for the 7th January whereas as a matter of fact it had been fixed for the 6th. It appears that Christensen had two other cases fixed for the 7th, one being a criminal case in which the subject-matter of the civil suit was also the subject matter of a charge of defamation against him and the other was the suit of a person called Oastor. The learned District Judge of Moulmein has come to the conclusion, on grounds which seem to us insufficient, that Christensen deliberately neglected to attend Court on the 6th of January. As a matter of fact on that day Christensen was in Rangoon instructing Mr. McDonnell, who had been briefed to defend him in the criminal case. On the 8th December Christensen wrote a letter to Mr. McDonnell, in which he said he thought the criminal case would be postponed as the civil case had also been fixed for the same date. On the 5th January Christensen's clerk, Nga Poo, sent him a telegram addressed care of the station master Rangoon, in which he said "Mitchell civil case to-morrow." Nga Poo explains that the reason why he sent this telegram was

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that he had gone to see Mr. Sutherland's clerk on the 5th about the litigation and was informed by that clerk that the civil case was fixed for the 6th and not for the 7th. Nga Poo swears that as he was aware that his master was under the impression that both cases were fixed for the 7th, he at once sent off a telegram. Unfortunately that telegram was delivered about 6 o'clock on the evening of the 6th to a man called Kirk, who put it in a letter box where it remained till the next morning. The next morning Christensen wrote to Mr. McDonnell and told him that he had received this telegram and asked him what was to be done, and suggested to wire urgently to the Judge. The same day he sent two telegrams to lawyers in Moulmein asking them to appear before the Judge, as Mr. Sutherland who had been briefed in the case had withdrawn for want of instructions. This conduct does not appear to us to be the conduct of a man who is anxious to shirk appearing in Court. We do not believe the evidence of Abdul Kareem regarding the dates he has put down in Exhibit A. Evidence of this kind can be very easily manufactured. It is true that in Christensen's paper on the 1st October the dates for the civil suits are given as the 6th and 7th January, and it is also true that Mr. Sutherland denies that he told Christensen that the date of the civil suit was the 7th of January. Further Mr. Coelho in his affidavit swears that about the 6th of December, when he had a conversation with Christensen, he told him that the date of the civil suit was the 6th of January. Yet in spite of this two days later we find Christensen writing to Mr. McDonnell as though the date was the 7th of January. It appears to us that Mr. Christensen had been confused by reason of the three cases which had been fixed for the 7th of January, and was under a misapprehension about the date fixed for the present case. The case was a substantial one, and he had filed a written defence. In the ordinary course of events as a criminal suit was pending in Court about a matter which was also the subject of a civil suit, a Civil Court would wait until the criminal charge was heard before proceeding with the case, and no doubt Christensen thought that this procedure would be

followed in Moulmein. The next question is whether, if Christensen failed to attend the Court owing to a *bona fide* mistake, this Court has power to restore the case. There have been two recent decisions in the High Courts of India in which it has been held that a Court is not confined to a narrow construction of the expression "prevented by sufficient cause" in Order IX, rule 13. See *Somayya v. Subbamma* (1) and *Lalla Prasad v. Ram Karan* (2), where it was held that a Court has inherent power to restore in certain circumstances. Order IX, rule 9 of the Code of Civil Procedure, makes it compulsory on a Court to set aside a dismissal under rule 8, where the plaintiff satisfies the Court that there was sufficient reason for non appearance. It, however, cannot take away the Court's power to restore the case for any valid reasons. In this case the suit is a substantial one, and there appears to be a *bona fide* mistake as to the date, and it would, in our opinion, be unreasonable not to restore the suit upon payment of costs. We set aside the *ex parte* decree of the District Court with costs, five gold mohurs, to be paid by the appellant.

Decree set aside.

(1) 26 M. 599.

(2) 14 Ind. Cas. 187; 34 A. 426; 9 A. L. J. 666.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1590 OF 1918.

August 4, 1919.

Present:—Mr. Justice Seshagiri Aiyar
and Mr. Justice Moore.GANAPATHI BRAHMAYYA AND OTHERS—
DEFENDANTS—APPELLANTS

versus

KURELLA RAMIAH—PLAINTIFF—
RESPONDENT.

Contract Act (IX of 1872), s. 23—Agreement opposed to Excise Law—License to sell liquor—Clause prohibiting sale by stranger—Partnership between licensee and stranger, legality of—Debts incurred by partners—Creditor, right of—Burden of proof.

Where a clause in a license for the sale of spirituous liquor prohibits sale by a stranger and the

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employment of an agent, the taking of a partner by the licensee, which has the effect of not only selling a portion of the business to him but of making him an agent for the sale of liquor, is illegal. [p. 47, col. 2.]

Where the carrying on of a business *prima facie* legal becomes *malum prohibitum*, the burden of proving that the prohibition was known to a creditor of the business is on the debtor. [p. 48, col. 1.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Ellore, in Appeal Suit No. 206 of 1917, preferred against the decree of the Court of the District Munsif, Ellore, in Original Suit No. 550 of 1915.

FACTS.—A obtained a license from the Collector to vend Arrack. One of the conditions of the license was that the licensee should not employ an agent to sell Arrack. In violation of such condition A took B as his partner in the business under the license and O, who was fully aware of all these facts, lent money to the firm for the purposes of the partnership. O having brought a suit for the recovery of the money lent, the question was raised whether, in view of the fact that the partnership was such as would defeat the law, the money, which was admittedly for the purposes of that unlawful arrangement, was recoverable. The Court below decreed the amount against A alone.

Mr. P. Narayanamurthi, for the Appellant.—The partnership is illegal and the loan made for the furtherance of the objects of the illegal partnership with the full knowledge of the illegality is not, therefore, recoverable, *Nalan Padmanabhan v. Badri Nath* (1), *Medi Setti Pentayya v. Pilli Venkata Reddi* (2), *Thithi Pakurudasu v. Bheemudu* (3), *Marudamuthu Pillai v. Rangasami Mooppan* (4). But see *Natla Bapiraju v. Puran Achutha Rajajee* (5). The object of the prohibitions contained in the Abkari, Opium and other similar Acts is not merely to protect the public revenue. The prohibitions are based on public

policy. The lender has stipulated for a share in the profits of the partnership business which the loan financed. And so he abetted the evasion of the Statute. The suit ought, therefore, to have been dismissed.

Mr. A. Krishnaswamy Aiyar (with him Mr. P. Somasundaram), for the Respondent.—What the Abkari Act and the license prohibit is 'sale' by any person other than the actual licensee. A "transfer" is not always a sale. A partnership does not necessarily involve a "transfer," which is a very comprehensive word. Still less is it a "sale." Therefore, there is nothing to prohibit the partnership. I submit that the partnership is not illegal. See *Nalan Padmanabhan v. Badri Nath* (1), *Natla Bapiraju v. Puran Achutha Rajajee* (5).

There is no prohibition in the license. There is no agent employed in this case. The decision in *Natla Bapiraju v. Puran Achutha Rajajee* (5) is still good law. In *Nalan Padmanabhan v. Badri Nath* (1) the license in question contained the word 'transfer,' which word has *prima facie* been deliberately changed by the Revenue Authorities to 'sale' in the present case. Cf. also section 4 of the Opium Act with sections 15, 22, 24 and 25 of the Abkari Act. *Karsan Sadashiv Patil v. Gathu Shivaji Patil* (6) decides in the same way as *Natla Bapiraju v. Puran Achutha Rajajee* (5). See also *Gouri Shankar v. Mumtaz Ali Khan* (7).

The lender can recover the loan unless it is established affirmatively that he was a *particeps criminis*. *Hire Purchase Furnishing Co. v. Richens* (8), *Waugh v. Morris* (9), *Lindley on Partnership*, pages 110, 127, *Rajkristo Moitro v. Koylash Ohunder Bhattacharjee* (10).

Where the liability is joint, the whole must fall to the ground if the purpose for which it was advanced was to defeat the law. Where the liability is joint and several, as in the present case, either of the persons liable may be found to be

(1) 10 Ind. Cas. 126; 35 M. 582; 21 M. L. J. 425; 9 M. L. T. 459; (1911) 1 M. W. N. 371.

(2) 14 Ind. Cas. 148; (1912) M. W. N. 444.

(3) 26 M. 430.

(4) 24 M. 401.

(5) 5 Ind. Cas. 456; (1910) M. W. N. 549; 20 M. L. J. 337; 7 M. L. T. 176.

(6) 19 Ind. Cas. 442; 37 B. 320; 15 Bom. L. R. 227; (7) 2 A. 411.

(8) (1889) 20 Q. B. D. 387; 58 L. T. 460; 36 W. R. 365.

(9) (1873) 8 Q. B. 202; 42 L. J. Q. B. 57; 28 L. T. 265; 21 W. R. 438.

(10) 8 C. 24.

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liable for the whole. See *Jamna Bai v. Subb* *Mohitai Arergal v. Vasanta Rao* (11).

Mr. P. Narayanamurthi, in reply.—Where a person is the partner of another, each is the agent of the other. So the condition of the license is clearly violated. The law in England and India is the same, that where services are done or monies are advanced to further a declaredly illegal object and such object is carried out, no action will lie in respect of such services or monies. See *Bani Muncharam v. Regina Stanger* (12), *Ohoga Lal v. Piari* (13), *Pannichand v. Nanco Sanher Tawker* (14).

It goes without saying that the lender in this case is a *particeps criminis*. He knew all facts and advanced monies not to the license-holder whose individuality was already merged in the unlawful fact, but to the partnership, which is illegal.

[SESHAGIRI AIYAR, J.—The real question seems to me to be that where monies are advanced to two persons jointly of whom one could have carried out the object without any violation of the law, what is the extent of the liability?]

That would be the question if the loan was to the individuals and not to the partnerships as alleged even in the plaint. Here there is a violation of the law and a person who is fully aware of it advances monies for furtherance of the same violation and stipulates for a share of the profits derivable therefrom. I submit that the suit ought to be dismissed. There is no way of apportioning liabilities in this case, for everything is void *ab initio*.

[SESHAGIRI AIYAR, J.—Why can it not be half and half?]

I submit there is no principle to authorise such apportionment.

JUDGMENT.—The main facts of the case are not in dispute. The 1st defendants obtained a license to sell Arrack. The principal condition in it with which this second appeal is concerned is in these terms:—"Paragraph 16. The privilege of supply and

vend shall not, without the permission of the Collector previously obtained, be sold, exchanged or sub leased, nor, if the Collector has ordered, can an agent be appointed, without his permission previously obtained, for exercise of any such privilege." The 1st defendant took the 2nd defendant as his partner without obtaining the Collector's sanction. Plaintiff had dealings with both the defendants and the suit is for money due on those dealings.

The first question is whether the partnership became illegal by the 2nd defendant joining the business. Mr. A. Krishnasawmy Aiyar, Vakil for the respondent, argued that as the license does not in terms prohibit a partnership and as the word transfer is not to be found in it, the transaction was not illegal. He relied on *Karsan Sadashiv Patil v. Gatlu Shivaji Patil* (6) and on *Natla Bapiraju v. Puran Achutha Rajajee* (5). In the latter case, the learned Judges based their decision on the fact that the license was not before them. In *Karsan Sadashiv Patil v. Gatlu Shivaji Patil* (6) the learned Judges say that the omission of certain words in the new licenses issued by the Government of Bombay indicated a change of intention on the part of the executive not to treat partnerships as illegal. We are not in a position to gather the intention of the Madras Government on this subject. We must, therefore, give to the language of the clause in the license its ordinary meaning. The clause prohibits sale by a stranger and the employment of an agent. In our opinion the taking of a partner has the effect ordinarily of selling a portion of the business to him. It has certainly the effect of making him an agent for the sale of liquor. As these are prohibited, we think that the partnership is illegal. *Nalan Padmanabhan v. Badri Nath* (1), *Thithi Pakurudasu v. Bheemudu* (3) and *Marudamuthu Pillai v. Rangasami Mooppan* (4) have consistently adopted this view in this Court.

The next question is whether the plaintiff had notice of the illegality of the partnership. Mr. Krishnasawmy Aiyar relied on the observation of Lord Bowen, L. J., in *Hire Purchase Furnishing Co., v. Richens* (2) for this purpose. The learned Lord Justice had before him a case which would be governed in this country by section 263 of the Contract Act. It was held that

(11) 34 Ind. Cas. 213; 39 M. 409; 14 A. L. J. 534; 18 Bom. L. R. 432; 31 M. L. J. 18; 3 L. W. 540; 24 C. L. J. 74; 20 M. L. T. 31; (1916) 1 M. W. N. 452; 43 I. A. 92 (P. C.).

(12) 32 B. 581; 10 Bom. L. R. 318.

(13) 1 Ind. Cas. 52; 31 A. 58; 6 A. L. J. 7; 5 M. L. T. 55.

(14) 18 M. L. J. 456; 4 M. L. T. 107.

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where the carrying on of the business which is *prima facie* legal becomes *malum prohibitum* under certain circumstances, the burden of proving that the prohibition was known to the lessor was on him (*sic*). *Waugh v. Morris* (9) is also to the same effect. But these decisions do not affect the present case. As admitted by the plaintiff in his plaint, he knew that the 1st defendant alone had the license, he knew that the 2nd defendant was taken as a partner and that the partner carried on the business. Under these circumstances, it was incumbent on him to have made enquiries as to whether the Collector permitted the 2nd defendant to join in the business. The burden was on him and we must hold that he has failed to discharge it. We must take it that the 2nd defendant had knowledge of the illegality of the contract.

Now comes the third question, which was argued with great insistence by Mr. Narayanamurthy, Vakil for the appellants. The question is whether, if the transaction is illegal by virtue of the fact that an unauthorised person was included in it, the plaintiff can have no cause of action for dealings he carried on even against the 1st defendant. It is not denied that the 1st defendant could have legitimately carried on the business. Nor is it denied that if the plaintiff lent to the 1st defendant, he could have recovered. Does he lose his rights altogether because the 2nd defendant was joined in it? In other words, where the transaction is not *malum in se* but *malum prohibitum* to a certain extent, is a third party to have no relief? We adopt a statement of law contained in Lindley on Partnership, page 127. It is in these terms:—

"The illegality of a partnership affords no reason why it should not be sued. It cannot indeed be effectually sued by any person who, being aware of the facts, seeks to enforce a demand arising out of a transaction tainted with the illegality which affects the firm, but the illegality of the firm does not *per se* afford any answer to a demand against it arising out of the transaction to which it is a party and which transaction is illegal in itself. Unless the person dealing with the firm is *particeps criminis*, there can be no *turpis causa* to bring him within the operation of the rule *ex turpi causa non oritur actio*; and he, not being implicated in any

illegal act himself, cannot be prejudiced by the fact that the persons with whom he has been dealing are illegally associated in partnership." The cases to which Mr. Narayanamurthy drew our attention, notably *Bani Muncharam v. Regina Stanger* (12), are cases of transactions being unusual or illegal in themselves. In such cases the person who deals with the defendant is believed to have been *particeps criminis* and as such not entitled to recover anything. See also *Upfill v. Wright* (15). But where there is nothing illegal or opposed to public policy in the business itself and there is nothing which touches the conscience of the lender, these decisions have no application. It was a perfectly legal business which by the inclusion of the 2nd defendant became inoperative as a partnership.

The last question is whether the plaintiff is entitled to recover the whole amount Mr. A. Krishnasawmy Aiyar relied on *Jamna Bai Saheb Mohitai Avergal v. Vasanta Rao* (11) for the position that the 1st defendant should pay the whole amount. That was a case of a void contract. Here the question is to what extent was the 1st defendant alone benefited. Section 45 does not help us in such a case. We think the presumption is that he was benefited by half the loan. In modification of the decrees of the Courts below we give the plaintiff a decree for half the amount sued for with costs against the 1st defendant. The 2nd defendant will bear his own costs.

M.C.P.

Decree modified.

(15) (1911) I K. B. 506; 80 L. J. K. B. 254; 103 L. T. 834; 55 S. J. 189; 27 T. L. R. 160.

NANDAMUNI NADAR, *In re*.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 443 OF 1919.

October 7, 1919.

Present :—Mr. Justice Spencer and
Mr. Justice Krishnan.

In re NADAMUNI NADAR—ACCUSED
—PETITIONER.

Madras City Municipal Act (III of 1904), ss. 262, 325—License for storing timber—Permission of Municipality to put up a shed on timber yard, whether necessary.

A license obtained under section 325 of the Madras City Municipal Act does not cover the permission that is required under section 262 of the Act. [p. 49, col. 2.]

Therefore, a person who has obtained a license for storing timber is bound to take the permission of the Municipality for putting up a shed over it. [p. 49, col. 2.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the 2nd Presidency Magistrate, George Town, Madras, dated the 3rd May 1919, in C. C. No. 3767 of 1919.

FACTS appear from the judgment.

Mr. K. S. Krishnasawmy Iyengar, for the Petitioner:—The license obtained under section 325 for the Madras City Municipal Act for storing timber is enough to put a shed over the timber yard. No separate permission is necessary for the erection of the shed. The putting up of the shed is necessary to carry on the petitioner's business as a timber merchant.

The President of the Municipality had written to the petitioner that no separate license was necessary. That letter must be taken as a permission for the erection of a shed.

The Crown Prosecutor, for the Crown.—Sections 325 and 262 of the Madras Municipal Act relate to two distinct matters. The former requires licenses for timber depots and the latter relates to the erection of sheds with inflammable materials. A license under the former section will not cover the permission required under the latter.

The President's letter cannot be taken to be the permission. That letter does not define the period covered by the permission, nor does it give the boundaries over which the shed is to be erected. The latter is unauthorized by Statute.

ORDER.—The question in this case is whether a person who has obtained a license for storing timber is not bound to take the permission of the Municipality for putting up a shed over it.

There was a license given for selling or storing timber to the petitioner. Apparently in the year 1908, he applied to Mr. Lloyd, the then President of the Municipality, for a license to erect a shed in the timber-yard. Mr. Lloyd said in Exhibit I, "the undersigned will not insist on the Pandal license fees being paid on the sheds used in their depots, as the license granted under section 325, Act III of 1904, for using a place for the storage of timber covers, in the opinion of the undersigned, sheds necessary for the protection of timber so stored." Apparently Mr. Lloyd was under the impression that if there was license for the storage of timber that would cover the shed erected over it.

It was contended by the Vakil for the petitioner in this Court that the putting up of the shed is only necessary to carrying on the trade of a timber merchant. We are unable to agree with this contention. It is clear that the Legislature has provided two distinct licenses in respect of the different matters. Section 325 refers to timber depots and section 262 to the erection of sheds with inflammable materials. Therefore, in our opinion, the President was mistaken in thinking that the license under section 325 covered the permission required under section 262; this is in accordance with the view taken by a Bench of this Court in *Emperor v. Varadachariar* (1).

It was next argued by the Vakil for the appellant that Mr. Lloyd's letter must be taken at least as a permission for erecting a shed. The obvious answer to this argument is that suggested by the learned Crown Prosecutor. If permission is to be granted under section 325 of the City Municipal Act; the period during which the permission is to be availed of must be mentioned and the boundaries given. The letter of Mr. Lloyd does not purport to fix the period nor to give the boundaries over which the shed is to be erected. No Municipal President has the power to give authority for all time to come to erect sheds, and that is the

(1) 47 Ind. Cas. 672; 42 M. 7; 24 M. L. T. 180; 8 L. W. 581; 19 Cr. L. J. 948; (1919) M. W. N. 426.

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reason why the Legislature has imposed a restriction upon him to specify the period. Therefore, we cannot regard the letter written by Mr. Lloyd as permission to erect a shed. It follows that the prosecution was well advised and was right.

As regards the sentence, having regard to the letter of Mr. Lloyd, we do not think that the fine of Rs. 25 is justified in the circumstances. We reduce it to Rs. 5.

M. C. P.

Sentence reduced

LOWER BURMA CHIEF COURT.
CRIMINAL REVISION NO. 41B OF 1919.
March 27, 1919.

Present:—Mr. Justice Maung Kin.
NGA HLWA AND OTHERS—APPLICANTS
versus

EMPEROR—RESPONDENT.

Burma Gambling Act (I of 1892), s. 10—Field shed, whether place to which public have access.

A field shed which the owner has left after the completion of field work and which is not in the occupation of anybody, but which has not been abandoned to the use of the public, is not a place to which the public have access within the meaning of section 10 of the Burma Gambling Act.

Mr. Maung Gyi, for the Applicants.

JUDGMENT.—The gambling took place in a field shed belonging to one Kyi Nyo. It was not in the occupation of anybody at the time the gamblers went there to gamble. The owner had left it after the completion of field work. There is, however, no evidence to show that it had been abandoned to the use of the public. Clearly it was not a place to which "the public have access" within the meaning of the Burma Gambling Act.

As to the meaning of the words "place to which the public have access" and in particular of the word "place," which is to be read as *eiusdem generis* with the

words "street or thoroughfare" which precede it in section 10 of the Act, and as to whether it could possibly have a wider meaning, considering the mischief indicated in the preamble and the intention of the Legislature as understood from the tenor of the Act, see *Ah Kon v. King-Emperor* (1). See also the judgment of Mr. Burgess, J. C., in Criminal Revision No. 603 of 1892 (2), where an unoccupied te or hut which had "no door and only one wall, and to have been empty and to have belonged to nobody" was held to be not "a place to which the public have access." The following observations of the learned Judge must, however, be adverted to—"The gambling was at night, and without any of the publicity which the law seems to contemplate as constituting the nuisance to be suppressed." These observations might mislead one into thinking that they involve the proposition that if the gambling had taken place in the day, and with publicity, such as that it was carried on in full view of the public, the result of the case would have been different. I do not think that the learned Judge meant to lay down such a proposition. If he did it would be an *obiter dictum*, and with due respect I am not able to agree with him. The sole questions for consideration are, first, whether the hut was "a place" within the meaning of section 10 of the Act, and, second, whether it was one to which "the public had access." The fact that there was publicity about the gambling, such as that it was held in full view of the public, cannot alter the answers.

I set aside the convictions. The fines, which have been paid, will be refunded.

Convictions set aside.

(1) 2 L. B. R. 195; 1 Cr. L. J. 461.

(2) U. B. R. (1892—1896) I, 117.

RAMZAN v. EMPEROR.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 488 OF 1919.

October 24, 1919.

Present:—Mr. Justice LeRoussignol.

RAMZAN alias JANA—CONVICT—APPELLANT
versus

EMPEROR—RESPONDENT.

*Penal Code (Act XLV of 1860), ss. 304, 325—
Unpremeditated attack—Provocation—Offence, nature of.*

Where two persons on receiving provocation delivered an unpremeditated attack on the deceased but it was not known who struck the fatal blow:

Held, that both were guilty of an offence under section 325 of the Penal Code.

Appeal from the order of the Sessions Judge, Jhelum, dated the 17th July 1919, convicting the appellant.

Mr. *Devi Dayal*, for the Appellant.

JUDGMENT.—The appellant has been sentenced to ten years' rigorous imprisonment under section 304, Indian Penal Code, and the main contention on his behalf is that the offence committed falls under section 325, Indian Penal Code, inasmuch as the deceased Sultan received only one fatal blow.

The evidence, it is true, is not clear as to who struck that fatal blow, for I cannot agree with the view that several blows were dealt on the head of deceased. It is a most unfortunate thing that in these very serious cases we should have no better qualified expert than a Sub-Assistant Surgeon.

The attack does not appear to have been premeditated, and the appellant had received provocation, for the small daughters of deceased had plundered his fodder field.

There is no clear evidence as to what immediately preceded the attack, but there must have been recriminations and probably defiance on the part of deceased. That the appellant played the principal part in the attack, I have little doubt; first, because he was the owner of the crop, and Dalla was only a tenant, secondly, because there is evidence that he struck deceased after he had been knocked down, thirdly, because the witnesses separated him from his opponent, but there is no evidence that Dalla had to be so kept off the object of his attack.

Again, Ramzan's stick has never been found; Dalla's stick was produced, and appears to be of quite small dimensions.

For these reasons, though both appellants are guilty, their guilt is not equal. I accept

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Ramzan's appeal and reduce his sentence to seven years' rigorous imprisonment including 3 months' solitary confinement under section 325, Indian Penal Code.

Dalla's appeal also is accepted and his sentence is reduced to two years' rigorous imprisonment including 3 months' solitary confinement under section 325, Indian Penal Code.

Appeal accepted; Sentence reduced.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 403 OF 1919.

June 5, 1919.

Present:—Mr. Justice Walmesley and Justice
Sir Syed Shamsul Huda, KT,
MONMOHAN DEY—PETITIONER

versus

SURABALA DAS—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1908), s. 438—
Maintenance—Application for maintenance dismissed
for default—Second application, if lies.*

Where an application for maintenance under section 438, Criminal Procedure Code, is dismissed for default without any adjudication being made on the merits, it is open to the complainant to make a fresh application under that section. [p 52, cols. 1 & 2.]

Hakimi Jan Bibi v. Mouze Ali, 1 C. L. J. 214; 2 Cr. L. J. 215, distinguished.

Revision against the order of the Chief Presidency Magistrate, Calcutta, dated the 12th April 1919.

Babu Manmath Nath Mukerjee, for the Petitioner.

Babu Bir Bhusan Dutt (for Babu Bupendra Chandra Guha), for the Opposite Party.

JUDGMENT.

WALMESLEY, J.—This Rule was obtained by one Mon Mohan Dey—the respondent in a proceeding under section 483, Criminal Procedure Code. It appears that on the 11th November last year, the opposite party made an application to the Court of Presidency Magistrate under that section and on that a Rule was issued. After some adjournments, the matter was transferred to the Honorary Magistrate Mr.

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Rustomji for disposal and in his Court the present petitioner and the woman—the opposite party—and the child were examined. Then there were frequent adjournments for one cause or another and eventually, on the 3rd April 1919, the Rule was discharged on the ground that there were no witnesses for the prosecution present. On the 10th April 1919 the woman made a fresh application before the Chief Presidency Magistrate and a Rule was again issued upon the present petitioner and the proceedings instituted on that Rule are now pending. We have been asked to quash those proceedings, and the ground on which it is suggested that we should do so is that, after the Rule had been discharged by Mr. Rustomji, the woman had no right to make a second application under section 488, Criminal Procedure Code, and that the Magistrate erred in granting a Rule. Our attention has been drawn to the case of *Hakimi Jan Bibi v. Mouze Ali* (1) and to an unreported case. It appears to me that those cases may be distinguished on a very important ground, namely, that in them evidence was gone into and there was an adjudication by the Magistrate as to the paternity of the child. That is a very broad distinction. In the present case, the Magistrate Mr. Rustomji did not purport to come to any conclusion as to whether the child is or is not the son of the present petitioner. In my opinion, when the first Rule was discharged by Mr. Rustomji, it remained open to the woman to make a fresh application and the Magistrate was not in error in issuing a Rule on this fresh application. I think, therefore, the present Rule should be discharged and the Magistrate directed to go on with the present proceedings.

SHAMSUL HUDA, J.—I agree. There is no provision in the Criminal Procedure Code which bars a second application under section 488 of that Code. The only section to which reference may be made in support of the contention that such an application is incompetent is section 403, not that the section applies in terms to proceedings under section 488 but that a principle similar to that underlying section 403 may be applied by analogy to cases of this kind. If we refer

to that section, we find that in the explanation appended to it, it is stated that the dismissal of a complaint would be no bar to a trial on a fresh complaint; and that principle may be applied to this case. In this case, the complaint under section 488, Criminal Procedure Code, was dismissed for default and there was no adjudication regarding the merits. I do not think, therefore, there is anything in the law which prevents that second application from being proceeded with.

Rule discharged.

LOWER BURMA CHIEF COURT.

CRIMINAL APPEAL No. 488 OF 1917.

August 6, 1917.

Present:—Sir Daniel Twomey, Kt., C. J.
EMPEROR—APPELLANT

versus

SEIN KEE AND OTHERS—RESPONDENTS.

Burma Gambling Act (1 of 1899), s. 7, presumption arising under, rebuttal of.

Where numerous packs of cards as well as some dice were found in a house, but it was held proved that the persons who were playing cards in the house were nearly all employees of the house-owner, that they were playing for recreation and that though the play was for money no commission was taken:

Held, that the presumption arising under section 7 of the Burma Gambling Act from the discovery of the packs of cards and the dice was rebutted. [p. 52, col. 1.]

JUDGMENT.—When the Police raided Sein Kee's place of business under a warrant, numerous packs of cards were found as well as some dice. The presumption stated in section 7 of the Gambling Act clearly arose and this presumption holds good till the contrary is proved. The Sub-Divisional Magistrate considered that the presumption was rebutted, as he held it proved that the persons who were admittedly playing cards at the house were nearly all employees of the house-owner Sein Kee, that they were playing for recrea-

(1) 1 C. L. J. 214; 2 Cr. L. J. 213.

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tion, and that, though the play was for money, no commission was taken. The witnesses called to establish these facts for the defence were two of the accused who had been acquitted in this case. They are carpenters employed by Sein Kee, who is a cooper by trade, and the coopery was the place where the raid took place.

The Magistrate having acquitted the accused on the above grounds, the Local Government preferred this appeal against the order of acquittal. The only question is whether the Magistrate had sufficient materials for holding it proved that the house was not a common gaming house. He believed the defence witnesses and though they are Sein Kee's servants, I am not prepared to say that the Magistrate ought to have disbelieved them on that ground. He appears to have believed them because he thought their statements intrinsically reasonable and probable. If the card players with one exception (a customer) were employees of Sein Kee, this fact would render it improbable that the place was a common gaming house. The evidence that the players were employees is only that of the two men already referred to, but I can see no sufficient reason for rejecting it. If, as a matter of fact and notoriety, the place was a common resort of outside gamblers, the prosecution ought to have had no difficulty in proving it. Instead of doing so the prosecution relied on the bare presumption under section 7, and took the risk of its being rebutted.

I am unable to interfere with the order of acquittal. The appeal is dismissed.

Appeal dismissed.

CALCUTTA HIGH COURT.

CRIMINAL REVISIONS Nos. 604 TO 608 OF 1918.

August 26, 1918.

Present:—Mr. Justice Teunon and
Mr. Justice Cuming.

SITAL SINGH AND OTHERS—PETITIONERS
versus

EMPEROR—RESPONDENT.

Evidence Act (I of 1872), ss. 10, 30, 54—Witness—Co-accused, when can be competent witness—Statement of accused before trial, whether admissible against his co-accused—Penal Code (Act XLV of 1860), ss. 120B, 420.

Several persons were placed on trial together on charges of offences under section 420, read with section 120B, of the Penal Code. After the case had been opened, the Pleader for the Crown, with the consent of the Court, withdrew from the prosecution of one of the accused R, who was thereupon discharged and afterwards examined as a witness in the case:

Held, that the Magistrate by discharging R. separated his case from that of his co-accused and that he ceased to be on trial with his accomplices and, therefore, became a competent witness against them. [p. 54, col. 1.]

A statement made before trial, but after arrest, by a co-accused, though admissible against the person making it, is not admissible against his co-accused. [p. 54, col. 2.]

Criminal revisions against the order of the Additional Sessions Judge, 24-Parganas, dated the 27th April 1918.

Mr. Monnier (with him Babu Panna Lal Chatterjee), for Sital Singh, Petitioner in No. 604.

Mr. Camell (with him Babu Panna Lal Chatterjee), for Ujagir, Petitioner in No. 605.
Babu Satindra Nath Mukerjee and Maulvi A. K. Fazlul Huq, for Ganesh Kalwar and four others, Petitioners in No. 606.

Babu Manmatha Nath Mukerjee, for Jaiju Mahadeo and two others, Petitioners in No. 607.

Babu Panna Lal Chatterjee, for Arjun Misser and nine others, Petitioners in No. 608.

The Deputy Legal Remembrancer (Mr. Orr), for the Crown.

JUDGMENT.—In these five connected cases the twenty petitioners have been convicted under section 420 read with section 120B of the Indian Penal Code. In the Rules issued at their instance the questions raised are three, namely, (i) whether the evidence of an accomplice of the name of Ramraj was properly admitted, (ii) whether evidence regarding certain

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cocaine and gambling dens should have been admitted and (iii) whether the statement made before trial but after arrest by a co-accused of the name of Baijnath was admissible in evidence.

It appears that the petitioners, the accomplice Ramraj and others were placed on trial together on a charge of the offence of which the petitioners have been convicted. After the case had been opened, on the 14th of June 1917, the Pleader appearing for the Crown, one Nagendra Nath Banerjee, with the consent of the Court, withdrew from the prosecution of Ramraj, who was thereupon discharged. He was thereafter examined as a witness.

Nagendra Nath Banerjee was not a Public Prosecutor appointed by the Governor-General in Council or the Local Government, though he was in fact acting under the directions of the Public Prosecutor duly appointed for the district. The contention then is that he was not competent to withdraw from the prosecution, whether under section 494 or section 495 (2), and that the position of Ramraj as a co-accused remained unaltered.

We need not, however, consider the question of the authority of the Pleader appearing for the Crown. With him was a Court Sub-Inspector who joined with the Pleader in applying for the permission of the Court and in withdrawing from the prosecution. That he is a Public Prosecutor appointed in the manner specified in section 494 is conceded, but it is suggested that his signature to the written application is a subsequent addition. For this suggestion there is in effect no foundation, and against it we have the statement of the Trying Magistrate.

But this also is immaterial. Whether the case against Ramraj was properly withdrawn or improperly withdrawn, the fact remains that the Magistrate, by discharging him, separated his case from the case of his co-accused. He ceased to be on trial with his accomplices and he, therefore, became a competent witness. As this question was fully discussed in the decision of *Akhoy Kumar Mukerjee v. Emperor* (1), we need not enter into it more fully here.

(1) 45 Ind. Cas. 999; 45 C. 720; 27 C. L. J. 91 22 O. W. N. 405; 19 Cr. L. J. 663.

The second contention is that the evidence given regarding gambling and cocaine dens and the raids thereupon should have been regarded as evidence of bad character, and, therefore, as inadmissible under section 54 of the Evidence Act.

But the case being that the accused or some of them were first thrown together by their frequenting or running such dens, and that for the purpose of their criminal organisation, they continued to meet at such places, their evidence, though doubtless affording indications of bad character, could not be excluded. So also the evidence of the Excise Sub-Inspector as to his raids upon these places, though given in too great detail, leads up to the admissions said to have been made to him.

Lastly, the statement made by the co-accused Baijnath, on the 1st of January, which we have read, is not a confession. It was no doubt admissible as against Baijnath himself but not under section 30 of the Evidence Act against the others. On the authority of the decisions of *Emperor v. Abani Bhusan Chakrabutty* (2) and *Pulin Behary Das v. Emperor* (3) it was also not admissible under section 10. No doubt, therefore, the Courts below erred in using this statement against any one other than Baijnath. We find that in the case of certain of the petitioners reference was made to the statement, but no stress was laid upon it and the error, therefore, does not vitiate the result.

For the reasons given we discharge these Rules.

Rules discharged.

(2) 8 Ind. Cas. 770; 38 C. 169; 15 C. W. N. 25; 11 Cr. L. J. 710.

(3) 16 Ind. Cas. 257; 15 C. L. J. 517; 16 C. W. N. 1105; 13 Cr. L. J. 609.

NANAK CHAND v. EMPEROR.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 769
OF 1919.

September 20, 1919.

Present:—Mr. Justice Broadway.

NANAK CHAND AND ANOTHER—ACCUSED—
PETITIONERS
versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 195, 476—Order directing prosecution for forgery—Documents alleged to be forged not produced in sanction proceedings—Order, legality of.

N. and S. produced two bonds in the course of two civil suits which were eventually compromised. C., the defendant in both suits, filed a complaint against N. and S. under section 417 of the Penal Code, alleging that he had been deceived into the compromise. Evidence was recorded and the bonds examined by a Court witness, who was of the opinion that alterations had been made in them. Warrants of arrest were thereupon issued. On the date of hearing C. alone was examined but the two bonds were not produced by him or given in evidence and N. and S. were discharged. Subsequently the Magistrate commenced proceedings under section 476 of the Criminal Procedure Code and finally ordered the prosecution of both N. and S. under section 471 of the Penal Code. N. and S. moved the High Court on the revision side:

Held, that as the bonds were not given in evidence during the proceedings to which the petitioners were parties, the Magistrate had no jurisdiction to take action under section 476, Criminal Procedure Code. [p. 55, col. 2; p. 56, col. 1.]

Petition, under section 439, Criminal Procedure Code, for revision of the order of the Sessions Judge, Jhelum, dated the 6th February 1919, affirming that of the Magistrate, 1st Class, Jhelum, dated the 4th December 1918.

Lala Faqir Chand, for the Petitioners.

Mr. H. A. Herbert, Assistant Legal Remembrancer, for the Crown.

JUDGMENT.—In the course of two separate civil suits the petitioners, Nanak Chand and Sahib Ditta, produced two bonds. Charagh was a defendant in both these suits and compromised them on the 11th January 1918.

On the 2nd March 1918, Charagh filed a complaint against both the petitioners under section 417, Indian Penal Code, alleging that he had been deceived into agreeing to the said compromises. He was examined on 4th March 1918 and ordered to produce evidence and the original bonds and copies of the final order in the civil suits. This

order was under section 202, Criminal Procedure Code. The Magistrate was transferred and his successor, on 28th April 1918, directed the filing of copies and the production of evidence and sent for the original civil records.

On 11th May 1919, evidence was recorded and the bonds examined through Lala Hori Lal (summoned as a witness by the Court), who used a magnifying glass and expressed his opinion that certain alterations had been made in them.

Warrants of arrest were then issued and on the 4th June 1918, Sahib Ditta alone appeared. On 21st June 1918, the complainant and both the accused appeared and the case was fixed for the 3rd and then for the 22nd July 1918.

On this date Charagh alone was examined and the two bonds were not produced by him or given in evidence in any way. Nanak Chand was discharged and the case adjourned to 23rd August 1918, on which date Charagh filed an application withdrawing from the prosecution and Sahib Ditta was also discharged. On the 24th August 1911, the Magistrate commenced proceedings under section 476, Criminal Procedure Code, and finally passed orders on the 4th December 1918 holding that the two petitioners should be proceeded against under section 471, Indian Penal Code, and sent them to the District Magistrate.

Nanak Chand and Sahib Ditta have moved this Court on the revision side asking for the cancellation of the order.

Various points of an important nature were argued at the Bar, but it seems to me that the last point taken by Lala Fakir Chand must prevail and it is, therefore, not necessary for me to discuss or decide the others.

The point is that the documents in question were never produced or given in evidence during the proceedings to which the petitioners were parties. As has been shown above, the Court sent for the records on which the bonds were at a time when the petitioners had not been summoned to appear. Lala Hori Lal was examined before the issue of the warrants and the petitioners were then not parties to the proceedings at that time.

Since they appeared the bonds have not been produced nor given in evidence and,

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therefore, having regard to the provisions of sections 476 and 195, Criminal Procedure Code, the Magistrate had no jurisdiction to take the action he has taken. I accordingly accept this petition and set aside the order of the 4th December 1918. Should it be considered desirable to proceed against these persons, the law must be invoked in the proper manner.

Petition accepted.

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 476 OF 1918.

September 24, 1918.

Present:—Mr. Justice Fletcher and
Mr. Justice Walmsley.

MOHINI MOHAN GHOSE—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 206, 423 (c)—Trial by Jury—Appeal—Appellate Court, powers of—Appellate Court, whether can interfere in absence of misdirection where Jury have acted on mere circumstantial evidence—Misdirection.

In the case of a trial by Jury the questions that can be gone into by the Appellate Court lie within an extremely narrow compass, and that Court will not interfere with the unanimous verdict of a Jury. [p 56, col 2.]

Where in a trial by Jury, the Jury, having been properly warned and properly directed, deliberately by their verdict came to the conclusion that the circumstantial evidence given in the case connected the accused with the guilt and convicted him:

Held, that in the absence of misdirection, the High Court would not interfere merely on the ground that the Jury had convicted on circumstantial evidence alone. [p. 57, col. 1.]

Criminal appeal against the order of the Additional Sessions Judge, Hooghly at Howrah, dated the 22nd June 1918.

Babu Dasarathy Sanyal (with him Babu Mahesh Chandra Banerjee), for the Appellant.

Mr. Orr, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.

FLETCHER, J.—This appeal is preferred by the accused against the conviction and sentence passed on him by the learned

Additional Sessions Judge of Howrah. The accused was tried before the learned Sessions Judge and a Jury. The Jury by their verdict unanimously found the accused guilty. The learned Sessions Judge, agreeing with the unanimous verdict of the Jury, has sentenced him to undergo seven years' rigorous imprisonment. In a trial by Jury, of course, the questions that can be gone into in the Appellate Court lie within an extremely narrow compass. It would never do to have the Appellate Court interfere with the verdict of the Jury where they are unanimous, because the value of a trial by Jury, is that it should be a trial by fellow countrymen, and it has never been the rule to interfere with a trial by Jury, provided that there is no misdirection by the learned Judge to the Jury. In this case the conviction clearly rests upon circumstantial evidence. In many cases circumstantial evidence is the only evidence and, in many cases, it is stronger even than direct evidence. Now, in the present case, the circumstantial evidence is a finger print left on a cash box that was broken open at a burglary in the house of a gentleman, named Haridas Pain, on the 17th January 1916. It is alleged that four young men armed went into the house at 7 P.M. and broke open the cash box. The present accused was subsequently arrested and interned. He was confined in the Rajshahi Jail, and there his finger print impression was taken and, on a comparison by the officers controlling the special bureau attached to the Criminal Investigation Department for making comparison of finger prints, it was ascertained, or believed to be ascertained, that the finger print found on the cash box at the burglary at the house of Hari Das Pain, on the 17th January 1916, was the finger print of the present accused. Thereupon the accused was placed on his trial. As I have already said, the Jury, after the conclusion of the trial, unanimously found the accused guilty and the learned Judge agreed with that view. There has been an attempt by Mr. Sanyal in the present appeal to show that there was a misdirection, and the only misdirection that is suggested is that the Jury have acted on this circumstantial evidence with reference to the finger print. The learned Judge warned the Jury and told them that it was a matter purely

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for them to consider whether that evidence was sufficient to convict the accused or not, and the Jury, having been properly warned and properly directed, deliberately by their verdict came to the conclusion that the circumstantial evidence connected the accused with the crime, and unanimously convicted him. That was a verdict which we are forbidden by the express terms of the law from interfering with. In that view of the case, the present appeal fails and must be dismissed.

WALMSLEY, J.—I agree.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 52B OF 1919.

March 23, 1919.

Present:—Mr. Justice Parlett.

PO THWAI AND OTHERS—APPLICANTS

versus

EMPEROR—RESPONDENT.

Burma Gambling Act (I of 1890), ss. 6, 7—Criminal Procedure Code (Act V of 1893), ss. 79, 101—Search warrant under s. 6, whether can be endorsed to another officer—Search by officer to whom warrant is endorsed, legality of—Presumption under s. 7, whether arises.

Section 101 of the Criminal Procedure Code is not applicable to warrants issued under section 6 of the Burma Gambling Act. [p. 58, col. 1.]

The Burma Gambling Act contains no provision authorising the endorsement of a warrant issued under section 6 thereof by the officer to whom it is issued, to another officer. Therefore, the entry and search of a house by an officer to whom a warrant is so endorsed is not an entry under the provisions of section 6 of the Act, and consequently anything found as the result of such search cannot give rise to the presumption contained in section 7 of the Act. [p. 58, col. 1.]

Mr. Ah Yaw, for the Applicants.

JUDGMENT.—It is to be regretted that the District Magistrate did not instruct Counsel to argue this case. The first petitioner has been convicted under section 12 and the other seven under section 11 of the Burma Gambling Act upon a presumption drawn under section 7 of the Act which they failed to rebut, and have been sentenced to fines which they have

paid. On the 31st January the District Superintendent of Police issued a warrant under section 6 (1) of the Burma Gambling Act, directed to an Inspector of Police by name, to enter and search the first petitioner's house. On the 1st February the Inspector was unwell and on the 2nd February he endorsed the warrant for execution to a Deputy Inspector by name: and this officer executed the warrant. In consequence of what was then found, the petitioners were sent up for trial and convicted.

At the trial the point was raised that the Burma Gambling Act contained no provision authorising the endorsement of a warrant issued under section 6 of the Act by the officer to whom it was issued to another officer, and that the entry and search of a house by an officer to whom a warrant is so endorsed is not an entry under the provisions of section 6 of the Act, and consequently nothing then found gives rise to the presumption which section 7 requires to be drawn. Two rulings of the Punjab Chief Court, *Lal Chand v. Queen-Empress* (1) and *Vir Singh v. Queen Empress* (2), were cited to the Magistrate in support of this contention, but he declined to follow them as they were not binding on him. They are under section 6 of Act III of 1867, of which the relevant portion is worded similarly to section 6 of the Burma Gambling Act, and they are directly in point. Section 6 of the Burma Gambling Act gives extensive powers of entry, arrest, seizure, and search to certain Magistrates and the District Superintendents of Police on credible information, or other sufficient grounds affording reason to believe that any house is used as a common gaming house. If the Magistrate or District Superintendent of Police does not desire to make the entry and search himself, he is allowed by warrant to authorize any Officer of Police not below the rank of sergeant or officer in charge of a station to do so. If instruments of gaming are found in a house so entered by the Magistrate or District Superintendent of Police, or by the officer acting under the warrant of one of them, a presumption arises

(1) P. R. 1895 Cr.

(2) 22 P. R. 1895 Cr.

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under section 7 of the Act against the owner or occupier, and the persons found in the house, who can only escape conviction of an offence under the Act by rebutting the presumption. As searches under the Act may give rise to such serious consequences, the Legislature has naturally provided special safeguards for their proper institution and conduct, such as requiring the record in writing of the information, or grounds of belief on which action is taken, prescribing a somewhat high rank of Police Officer to whom a warrant may be directed, requiring all searches to be made in accordance with sections 102 and 103 of the Criminal Procedure Code, and providing for an immediate report of the proceedings taken. Section 101 of the Criminal Procedure Code is not made applicable to warrants issued under section 6 of the Burma Gambling Act. If the authority receiving the information does not himself act upon it, he is allowed and required at least to select the individual officer who shall do so and the latter is not empowered to delegate the duty to another. In my opinion, therefore, the warrant in this case could not be acted upon by the Deputy Inspector to whom it was endorsed by the Inspector. Accordingly the house was not entered under the provisions of section 6 of the Burma Gambling Act, and the presumption enjoined by section 7 did not arise. There was no other evidence on which the convictions could stand. They are reversed, the petitioners are acquitted, and their fines will be refunded to them.

Petitioners acquitted.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 272 of 1919.

June 10, 1919.

Present:—Mr. Justice Walmsley and
Justice Sir Syed Shamsul Huda, Kt.

Mir MOZE ALI—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal trial—Procedure—Offence triable by Court

of Session—Evidence in support of charge—Magistrate, duty of—Committal to Sessions.

Where a person is charged with an offence triable exclusively by a Court of Session and there is some evidence to support the story of the complainant, it is the duty of the Magistrate to commit the accused for trial by that Court, and not to convict him of other offences immediately connected with that offence and which ought to have been tried with it. [p. 59, col. 2.]

Criminal revision against the order of the Additional Sessions Judge, Bakergunj, dated the 24th February 1919, affirming the conviction and sentence passed by the Deputy Magistrate, Barisal, dated the 23rd December 1918.

Babus Manmatha Nath Mukherjee and Jyotish Chandra Guha, for the Petitioner.

Mr. Orr, for the Crown.

JUDGMENT.

WALMSLEY, J.—This Rule was issued at the instance of a head constable Mir Moze Ali and a constable Belat Ali. The former has been convicted under section 384, section 342 read with section 114; section 354 read with section 109, section 323 read with section 109 and section 448 of the Penal Code, while the latter has been convicted under section 384 read with section 109, and sections 354, 323, 448 and 342 of the Penal Code. Each of them has been sentenced to undergo six months' rigorous imprisonment.

In the Rule issued by us the District Magistrate was asked to show cause why the convictions should not be set aside, or an order passed directing that the petitioners be committed for trial to the Court of Session.

The facts are as follows: In September a dacoity was committed in a village within the jurisdiction of Uzirpur Thana, to the staff of which the petitioners belong. A man named Golam Ali was arrested and he made a confession implicating one Dulal Khan. The investigating Sub-Inspector was very anxious to arrest this Dulal Khan, as well as other men named by Golam Ali. He went to the village of Chandipur, and found Baru Bibi, the wife of Khurshed, at the house of her father Raham Ali. It was reported that this woman had an intrigue with Dulal Khan, and she was questioned. It is alleged that a serious incident took place at Chandipur but we are not concerned with that. She was sent from Chandipur to Baraikhal to

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the house of her husband Khurshed, and it is there that the alleged occurrence, which forms the subject-matter of these proceedings, took place on October 15.

It is said that on that morning the petitioners with a Dafadar and some Choukidars surrounded Khurshed's house: they demanded the surrender of Dulal Khan: on Khurshed saying that he was not there, the head constable bound his hands, and ordered the constable to go inside the room where Bara Bibi had retired, and compel her to divulge the whereabouts of Dulal Khan. Thereupon the constable, a Dafadar and a Choukidar entered the room, took Bara Bibi to the cookshed and committed a very serious assault on her: they kicked her, struck her with their fists and with the butt-end of a gun, stripped her and each in turn outraged her. The woman screamed, and called to her husband begging him to pay the men to go away, and after some haggling the head constable accepted eighty rupees, and went away with his men.

The charges against the petitioners are very grave indeed. If the woman's story is true, rape was committed on her in an aggravated form, and the fear which compelled the husband to pay money to the head constable was of the most horrible kind.

The question at once arises, why were the petitioners not committed to the Sessions? The explanation given by the learned Magistrate is that the story of rape is probably an exaggeration. So it may be, but we have to consider whether that is a satisfactory reason for not committing the accused. If the story depended only on the statement made by the woman, the explanation might be sufficient; but that is not the case. It appears that the woman's wearing cloth was found by the Chemical Examiner to bear traces of semen. That does not carry the case far, but it is a piece of corroboration, however slender. Khurshed says that his wife told him immediately afterwards that she had been outraged by the three men, and several witnesses speak to hearing cries from Bara Bibi implying more or less directly that she was being outraged. It appears to me that if this evidence is

believed, it may be enough to support a charge of rape, and that, therefore, the case ought to have been tried by a Court competent to deal with the offence of rape. I do not think I had better say more on the matter, for to say more might lead to misunderstanding. In my opinion, the accused ought to have been committed to the Court of Session for trial. The convictions and sentences must, therefore, be set aside, and the Magistrate must draw up charges in regard to the allegations of rape, and commit the accused for trial on those charges and on charges relating to the other offences.

The petitioners are now on bail. They will be allowed to remain on the same bail pending the disposal of the case by the Court of Session.

SHAMSUL HUDA, J.—In this case in view of its special circumstances we allowed the learned Vakil for the petitioners to place the whole evidence before us. If the case had come before us on appeal, having regard to the nature of the evidence, I would have felt very great hesitation in upholding the conviction. The very fact that most of the material witnesses have been disbelieved upon the gravest of the charges preferred against the accused, I mean the charge of rape under section 376 of the Indian Penal Code, would have rendered it unsafe to accept the rest of the prosecution story, but that charge was triable exclusively by the Court of Session and I can find no justification for the Deputy Magistrate disregarding it and trying the accused upon the other charges, which were intimately connected with that charge and ought to have been tried with it. I have anxiously considered the question whether having regard to the nature of the evidence in the case it is necessary for the ends of justice to direct a trial by the Court of Session, but I have come to the conclusion that in revision we should not take the responsibility of coming to a conclusion even incidentally regarding a charge upon which the accused has not been tried. It was due both to the prosecution and the defence that the charge of rape should be tried by a competent Court and I agree with my learned brother in the order passed by him. The accused are public servants and should be given the fullest opportunity of vindicating their

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character, as the conviction means other consequences not less serious than the punishment actually inflicted.

Order accordingly.

ODDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 84 OF 1919.

July 7, 1919.

Present:—Mr. Ashworth, A. J. C.

Hakim MOHAMMAD ISMAIL KHAN—

ACCUSED—APPLICANT

versus

EMPEROR—COMPLAINANT—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 193—Perjury—Proof, quantum of—Circumstantial evidence, value of.

To justify a conviction for perjury, it is sufficient if the statement of the accused is proved to be incredible; it is not necessary to prove that it is impossible. [p. 62, col. 2.]

To justify a conviction for perjury on circumstantial evidence, it must be shown that the evidence cannot be explained on any other reasonable hypothesis. [p. 62, col. 2.]

Criminal revision against the order of the Sessions Judge, Lucknow, dated the 12th June 1919, upholding the order of the City Magistrate, Lucknow, dated the 1st April 1919.

Mr. Niamat-Ullah, holding brief of Mr. St. G. Jackson, for the Applicant.

Mr. L. M. Banerji, Assistant-Government Advocate, High Court, Allahabad, for the Crown.

JUDGMENT.—In this case one Hakim Mohammad Ismail Khan applies in revision from an order of the Sessions Judge of Lucknow, upholding the applicant's conviction by the City Magistrate of Lucknow, on a charge under section 193, Indian Penal Code, and sentenced to two years' rigorous imprisonment.

The prosecution arose from the evidence given by the applicant in the well-known Ajudhia title case. In that case one Lal Tirbhuwan Nath had brought a suit to establish his right to succeed the late Maharaja Sir Partab Narain Singh of Ajudhia as the next heir of the Maharaja. The suit was

brought against the junior Maharani. In order to succeed the plaintiff had to prove that a Will admittedly executed by the Maharaja on the 17th July 1891 had been revoked, and that the junior Maharani was excluded from inheritance by unchastity. The present applicant was put forward as a witness for the plaintiff and in the course of his evidence made the statement set forth in the charge sheet. The gist of this statement is that "2½ or 3 months before the death of the Maharaja approximately," while the Maharaja was under the medical treatment of a Bengali *baid*, named Dwarka Nath Sen, the Maharaja in the presence of the *baid* and the witness signed a Will cancelling the Will of 1891 and explained that the reason was "that the acts of which he had deprived the senior Rani of the estate were committed by the junior Rani also." The material evidence on which the City Magistrate found this statement to be false and on which the Sessions Judge upheld the conviction was as follows:—The execution of the Will of 1891, the death of the Maharaja on the 9th November 1906 and the making of the impugned statement by the applicant were proved. Construing the applicant's statement in the light of the date of the death of the Maharaja, the applicant must be deemed to have said that the Will he saw was signed by the Maharaja between the 9th and the 24th of August 1906 or, to give effect to the word "approximately", between the beginning of August and the end of August 1906. It was proved by the evidence of Sir Harcourt Butler, the Lieutenant-Governor of these Provinces, that on the 14th October 1906 he visited the Maharaja and the Maharaja informed him of having made a Will in favour of the second Maharani, which was registered with Colonel Currie, and committed the Maharani to his care. When the interview took place the Maharaja was in perfect possession of his faculties. It was also proved by the evidence of Raja Harihar Bakhsh Singh, Talukdar of Saraura, that eight or ten days before the Maharaja's death, which would be at the end of October or beginning of November 1906, the Maharaja told him that he had made a Will in favour of the junior Maharani and asked him to take special interest in her affairs. The evidence of the Raja of Mahmudabad as given in the title

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case was also brought on the record under section 33 of the Evidence Act, and this evidence was to the effect that fifteen or 20 days before the Maharaja's death, that is to say at the end of August, the Maharaja told the witness that he had written a Will in favour of his *chhoti* Rani, and asked the witness to defend her. It was also proved that the *baid* Dwarka Nath Sen, spoken of by the present applicant as being one of the persons who witnessed the revocating document, attended the Maharaja from the 16th of October till the date of his death. In argument before me it is not attempted to impugn any of this evidence. It is also admitted that the Will spoken of by Sir Harcourt Butler, the Raja of Mahmudabad and Raja Harihar Bakhsh Singh must have been the Will of 1891. It is, however, maintained that this evidence is not conclusive of the guilt of the accused, and in order to show that it is not conclusive the following possibilities are suggested by the applicant's Counsel:—

(a) that the revocating Will deposed to by the applicant was signed and destroyed by the Maharaja before the interviews just stated or that the interviews took place before the incident deposed to by the applicant,

(b) that the *baid* Dwarka Nath Sen, although he attended the Maharaja from the 16th of October, may have been present at Ajudhia on a previous date and that the incident may have occurred on such previous date.

As to proposition (a), we may rule out the possibility of the revocating Will having been signed after the interviews, as, even if we were to give all possible effect to the word "approximately," where the applicant speaks of the incident having occurred 3 or 2½ months before the Maharaja's death, it is not possible to conceive that the witness could have meant that the incident took place after the interviews in question. It appears to be admitted by the applicant's Counsel that, if the Maharaja signed the revocating document in August, he would not be likely in ordinary circumstances to have enlisted the sympathy and help of his friends in September on behalf of the junior Maharani. It is argued, however, that there is evidence to show great vacillation on

the part of the Maharaja as to other matters besides the question of making the junior Maharani his heir, and as to this matter in particular. I am referred to the evidence of prosecution witness Syed Bakar Husein. This witness says that during his last illness the Maharaja mentioned his intention of becoming a *sanyasi* and that he thought of adopting some boy. I fail to understand how this evidence proves vacillation on the part of the Maharaja. The chief reliance, however, is placed on the evidence of the Raja of Mahmudabad. This witness had been shown a draft of a Will in favour of the *chhoti* Rani on a previous occasion at Lucknow and at the interview which preceded his death the Maharaja stated to the witness that this was his Will. In cross-examination the witness stated that, previous to the date when he was shown the draft of the Will in Lucknow, he had frequently seen the Maharaja in Lucknow. He goes on to state: "The Maharaja had made several drafts of the Will before this deed. I had seen those drafts. I saw those drafts probably after 1895. All those drafts which I saw were in favour of the *chhoti* Maharani. I do not remember whether there was any difference between the contents of the draft shown to me at Lucknow and those shown to me beforehand. I do not know when the Maharaja had made the Will, the draft of which was shown to me at Lucknow." The applicant's Counsel wishes me to infer from this that the Maharaja had been constantly drafting different Wills between 1895 and the date of his death. If this was so, it is possible that the Maharaja even during his last illness drafted a new Will, and so the applicant cannot be convicted of perjury, when he says he saw such a Will. It is clear, however, from the witness' statement that all the drafts were in favour of the *chhoti* Maharani and that he saw them after 1895 and that they were either all copies of the Will of 1891, or new drafts varying in detail but making the junior Maharani his heir. There is so much ambiguity about what the witness meant by the word "drafts" that the statement quoted from his evidence cannot be relied on to show that the Maharaja ever seriously intended to alter the Will of 1891. In any case the witness

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obviously refers to something that took place a long time before the Maharaja's last illness. It does not, therefore, appear to me that there was anything proved which would lessen the improbability of the applicant's story as to the execution by the Maharaja of a new Will in his last illness. It is also clear from the evidence as it stands that the alleged revoking Will could not have been witnessed by the *baid* Dwarka Nath Sen. The *baid* was only paid from the 16th of October and only claimed to be paid from that date. His presence, therefore, on the day, required to make the applicant's evidence true, is inconsistent with the evidence. The prosecution, by proving when the *baid* was present have done all that was in their power to prove that he was not present earlier. They cannot be expected to prove a negative by any other means. No question was asked of a single prosecution witness with a view to disclosing the possibility of the *baid* having been present at an earlier date, nor is there any evidence to suggest such possibility. It is suggested that, as the *baid's* fees were known before an emissary from the Maharaja went to bring him from Calcutta to attend the Maharaja, the *baid* must have been called to Ajudhia on some date previous to the last illness of the Maharaja. This does not follow by any means. Scores of people would know the fee of a well-known practitioner like the *baid*. The suggestion is also contrary to what was obviously implied by the applicant in his statement.

The chief ground taken by the applicant's Counsel is that, before a conviction of perjury can be justified, it must be shown that his evidence could not in the ordinary course of nature possibly have been true. He relies on a ruling reported as *Queen v. Ahmed Ally* (1) and in particular on a passage at page 27, where it was held by one of the two Judges deciding that case to be the true rule that, in order to justify a conviction of perjury, it is not enough to prove that a statement is incredible but it must be proved that it is impossible. It is said that this rule, though an early one, has never been dissented from. Be this as it may, I must with all respect express my dissent from it.

To justify the finding arrived at it was not necessary to have recourse to the proposition laid down. That case was one of a particular nature. In order to prove a fatal assault some of the prosecution witnesses had deposed to a death-bed statement by the deceased implicating the accused as his murderer. This evidence was countered by evidence of some defence witnesses that in his death-bed statement the deceased admitted sustaining his injuries by a fall. The medical evidence was to the effect that the deceased did not die owing to a fall and could not have made any death-bed statement. The first Court convicted on the medical evidence that the deceased could not have died by a fall. The High Court acquitted on the ground that the medical evidence against death resulting from a fall was not so certain and distinct that the Court could act upon it. Meanwhile the defence witnesses had been prosecuted for perjury. Obviously it had to be held that, so far as they spoke to death by a fall, their statement could not be disproved merely by the already distrusted medical evidence against death resulting from a fall, and so far as they spoke to a death-bed statement they could not be convicted of perjury on medical evidence which had been partly rejected. The definition of proof in the Evidence Act is of little positive assistance, but it is of some negative assistance. Its meaning clearly is that a fact may be held proved even though it is impossible to show that its existence is a mathematical or scientific certainty. This definition is of general application and thus applies to a case where the offence is one of perjury. I have no hesitation in saying that it is certainly sufficient if the statement of the accused party is proved to be incredible.

The learned Counsel is on safer ground when he states that the proof of this perjury is based solely on circumstantial evidence and appeals to the rule that, to justify a conviction on such evidence, it must be shown that this circumstantial evidence cannot be explained on any other reasonable hypothesis. In his argument, however, he ignored the importance of the word "reasonable" in the rule as formulated. It is to be remembered that when the plaintiff brought his suit against the

(1) 11 W. R. Cr. 25.

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Maharani of Ajudhia for the estate, he never foreshadowed the existence at any time of the revocating document deposed to by the present applicant. It is clear from the plaintiff's plaint that he or his legal adviser was not at the time aware that a Talukdar's Will could not be revoked by mere oral expression. At a later date he became aware of this and it became absolutely necessary for him to produce evidence of a revocating instrument. The applicant was put forward to depose to such a revocating instrument. His evidence is opposed to all probabilities and so far as it could be negatived by any fact, it has been negatived. I am unable to hold that the lower Courts were not justified in holding the statement of the applicant to have been false. Apart from this I am not hearing an appeal. There was certainly material on which the lower Courts could come to a finding that that evidence was false and, this being the case, it was not really necessary for me (though I have done so) to consider whether on this evidence I would have come to the same conclusion.

I have been asked to reduce the sentence of two years, on the ground that it is against a man of sixty or seventy years of age. I feel not the slightest disposition to do so. The plaintiff's suit occasioned an enormous amount of unnecessary expense. We are not dealing with the plaintiff but with one of his witnesses. But this witness was one of the chief agents of the plaintiff in carrying on this expensive and (in view of the finding of the Courts that heard the title case) baseless and vexatious litigation.

I, therefore, dismiss this application.

Application dismissed.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 227 of 1919.

April 9, 1919.

Present;—Justice Sir Asutosh Chaudhuri, Kt., and Mr. Justice Newbould.

PRAMATHA NATH BARAT—PETITIONER
versus

P. C. LAHIRI—RESPONDENT.

Calcutta Police Act (IV B. U. of 1866), ss. 3, 13 C—“Police Officer,” who is—Officer under suspension, whether Police Officer—Commissioner of Police, power of, to detain such officer in custody.

An Officer of the Calcutta Town Police when placed under suspension ceases to be a Police Officer, and the Commissioner of Police has no authority to order his detention in custody.

Criminal revision against the order of the Chief Presidency Magistrate, Calcutta, dated the 25th February 1919:

Mr. N. Sen (with him Moulvi A. K. Fazlul Huq and Babu Prabhat Chunder Dutt), for the Petitioners.

Mr. T. C. P. Gibbons, K. O., Advocate-General (with him Mr. Orr, Deputy Legal Remembrancer), for the Crown.

JUDGMENT.—The learned Advocate-General stating that he cannot support the order, we direct a fresh enquiry into this matter.

The learned Advocate-General very fairly states that he finds great difficulty in upholding the contention that a Police Officer in Calcutta, after suspension, continues to be a Police Officer. He also finds difficulty in supporting the contention that the circular relied upon is authorized by law. Having regard to the note made by the Commissioner of Police that Marsden had nothing to do with the case, the complainant withdraws his charge against him. Order is made to the effect that the case is only to proceed against the Deputy Commissioner, Rai P. C. Lahiri Bahadur, and Manik Lal Sadhu. We also understand from complainant's Counsel that he will consider whether he should proceed against Manik Lal Sadhu, having regard to the fact that he was merely an inferior Police Officer who was bound to carry out the orders of his superior.

The learned Advocate-General, on behalf of the Crown, says that he would advise that the man should be at once let out on bail as ordered by Mr. Keays, and

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upon that no order need now be made by us.

We see no reason why the case should not be tried by the Chief Presidency Magistrate. We leave it to him to try it himself or to make it over to some other Magistrate.

Rule made absolute.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 1104 OF 1918.

January 15, 1919.

Present:—Mr. Justice Richardson and
Justice Sir Syed Shumsul Huda, Kt.
HIRA LAL GHOSE—PETITIONER

versus

MAKHAN LAL DAW—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898)—Penal Code (Act XLV of 1960), ss. 420, 477—Valuable security—Document presented to Sub-Registrar by executant but taken back before registration and destroyed—Civil suit filed—Criminal trial, whether advisable.

The petitioner executed a *kabala* in favour of the complainant and presented it for registration, but took it back from the Registrar before registration on the pretext that he could not understand whether it was a mortgage or a *kabala*, and having thus obtained possession of the document tore it to pieces. The complainant preferred a complaint and also instituted a Civil suit for specific performance of the contract. The Sub-Registrar did not complain. On the contrary when asked by the trying Magistrate to report on the case he reported in favour of the petitioner:

Held, that having regard to the circumstances of the case it was inadvisable that a charge under section 420, or section 477, Indian Penal Code, should be enquired into by a Criminal Court.

Criminal revision against the order of the Sessions Judge, Hooghly, dated the 25th November 1918, modifying that of the Honorary Magistrate, Howrah, dated the 10th September 1918.

Babus Manmathanath Mukerjee and Nogendra Nath Ghose, for the Petitioner.

Babu Dasrathi Sanyal for Babu Atulya Charan Bose, for the Opposite Party.

JUDGMENT—In this case the petitioner was tried on a charge of cheating by Babu M. N. Haldar, Honorary Magistrate of Howrah, and was discharged under section

250 of the Criminal Procedure Code. It was alleged on behalf of the prosecution that the accused had executed a *kabala* in favour of the complainant and presented it for registration, but took it back from the Sub-Registrar before registration on the pretext that he could not understand whether it was a mortgage or a *kabala*, and having thus obtained possession of the document, he tore it to pieces.

The learned Honorary Magistrate discharged the accused finding that no consideration had passed and, therefore, the accused was justified in destroying the document.

The learned Sessions Judge has, however, set aside the order of discharge and directed a further enquiry into the case.

This Rule was obtained on behalf of the petitioner calling upon the opposite party to show cause why the order for further enquiry should not be set aside.

We have heard the learned Vakils on both sides and we are of opinion that in this case the prosecution should not be allowed to proceed. The learned Sessions Judge expresses no opinion on the question as to whether the consideration had passed or not. It is not said that the *kabala* was delivered to the purchaser, and if before it was delivered, it remained the property of the petitioner, the question arises whether it was a valuable security within the meaning of section 477, Indian Penal Code. As regards the charge of cheating, the person who was cheated was the Sub-Registrar himself and he does not complain. In fact when he was asked to report on the case by the Honorary Magistrate, he reported in favour of the petitioner. We are also informed that a civil suit has been filed by the complainant for specific performance of the contract. Having regard to these circumstances, we think it is inadvisable that a charge under section 420 or section 477 should be enquired into by a Criminal Court.

We, therefore, make this Rule absolute.

Rule made absolute.

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LOWER BURMA CHIEF COURT.

CIVIL REGULAR No. 331 of 1918. •

February 20, 1919.

Present :—Mr. Justice Robinson.

F. M. EZRA—PETITIONER

versus

M. EZRA—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 20—Restitution of conjugal rights, suit for—Forum, proper—Jurisdiction—Residence, meaning of—Opportunity to respondent to resume relations, whether necessary.

In suits for restitution of conjugal rights jurisdiction is given either by the residence of the respondent within the jurisdiction of the Court, or by the fact that the cause of action arose within the jurisdiction. But residence within the meaning of section 20 of the Civil Procedure Code must not be merely temporary residence as that of a traveller, but actual permanent residence. [p 66, col. 1.]

Before a suit for restitution of conjugal rights is filed, it is essential that the respondent should be given an opportunity of a conciliatory character to resume conjugal relations. A demand threatening legal proceedings if not complied with is not sufficient [p. 66, col. 1.]

Mr. Barnabas, for the Petitioner.

Mr. Villa, for the Respondent.

JUDGMENT.—This is a suit for restitution of conjugal rights by the wife against her husband. The parties were married in Rangoon on the 7th April 1916 according to Jewish rites in the Jewish synagogue. Petitioner states that after marriage she went with her husband to Calcutta for two months and then to Dacca. After some time petitioner went back to Calcutta with her parents-in-law for confinement and remained with them there while respondent remained at Dacca. Thereafter trouble arose with her parents-in-law, with the result that the respondent came down to Calcutta. Petitioner insulted her father-in-law in the presence of her husband and the parties discussed a divorce. This was agreed to, provided petitioner was taken for the divorce to Rangoon where her parents lived. Petitioner and respondent came to Rangoon. Petitioner went to live with her parents, and respondent went to a hotel. That evening he went to Mrs. Sassoon, petitioner's aunt, and informed her of the position of affairs. Petitioner and her father were sent for and an interview took place in Mrs. Sassoon's house at which respondent offered Rs. 500 for a divorce. This was refused. Subsequently he consulted his father by wire and then offered to pay

the full amount of the dower agreed to at the time of marriage, viz., Rs. 3,555. This offer was refused, petitioner's father demanding Rs. 10,000, apparently because he thought respondent's father was a wealthy man. Negotiations for a divorce having fallen through, respondent tried to return to Dacca, but on his way to the steamer was served with a summons in the suit. The plaint was filed on the 30th October or seven days after the parties had come to Rangoon. I have no doubt the facts are as I have stated them above. Petitioner, her father and brother-in-law have given evidence, and all of them tell a different story. It is admitted that there is no reason why the brother-in-law should not speak the truth. I have no doubt that his version of the facts is a true one. The petitioner declares that she was guilty of no improper conduct towards her parents-in-law, but that they turned against her and eventually her husband turned against her. She says that her husband told her that he was going to take her to Australia, and start in business there, and that he brought her to Rangoon with the idea of obtaining a steamer for Penang. She declares that she never heard any suggestion of a divorce until the meeting on the night of their arrival in Rangoon. Her brother-in-law, however, states that the petitioner's mother had been to Calcutta to see her, and on her return said that there was trouble, and that probably there would be a divorce. I am unable to believe petitioner or her father, and am satisfied that there never was any idea of the parties going to Australia, yet the petitioner declares that her husband stated at the meeting the idea of going to Australia. The brother-in-law says that no mention was made of Australia, yet the petitioner declares that her husband stated at the meeting that the idea of going to Australia was only a bluff to get her to Rangoon in order that he might divorce her there. The respondent says the petitioner agreed to the divorce, provided he brought her to Rangoon where her parents lived, which is apparently in accordance with Jewish custom. That being so, the question arises whether this Court has jurisdiction to try the suit. The parties are not governed by the Indian Divorce Act, and the question of jurisdiction has

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to be decided in accordance with the provisions of the Code of Civil Procedure. In suits for restitution of conjugal rights jurisdiction is given either by the residence of the respondent within the jurisdiction of the Court, or by the fact that the cause of action arose within the jurisdiction. It is urged that the respondent was residing in Rangoon while the suit was filed. But residence within the meaning of section 20 must not be merely temporary residence as that of a traveller, but the actual permanent residence where there is a permanent residence. *Nusserwanji Pestonji Wadia v. Eleonora Wadia* (1). Respondent was residing at Dacca. His presence in Rangoon was purely for the purpose of the divorce, and of an entirely temporary character, and does not give this Court jurisdiction. The cause of action in this case is the abandonment of the wife by the husband and his refusal to give her the benefit of his society and protection in his own house. There was no question of such abandonment in Calcutta seeing that the parties agreed to a divorce, and came to Rangoon only to effect it. Petitioner alleges that she refused to divorce on any terms and that she claimed her right to live with her husband. Her evidence is untrustworthy. She speaks of having sent him a letter which never reached him. She says she asked him to take her back in that letter, and then says she merely asked him for money, and then asked him to come and see her and her child. There was no demand, therefore, on the husband to take the wife back. The principles of English law in these matters are to be followed by the Courts in this country when the Indian Divorce Act applies; and in my opinion in suits for restitution of conjugal rights it is essential that opportunity should be given to the respondent before any suit is filed. In England that opportunity must not be merely in the form of a demand threatening legal proceedings if not complied with, but must be of a conciliatory character. However, in the present case there has been no such opportunity given, and this suit was undoubtedly hurried on merely to serve the respondent before he went back to his home. It is possible that a demand would result in the matter being amicably settled.

(1) 20 Ind. Cas. 492; 38 B. 125; 15 Bom. L. R. 593.

I must, therefore, dismiss the suit, which can be brought again after the proper formalities have been complied with, when it is to be hoped that the matter will be amicably settled. Under the circumstances there will be no order as to costs.

Suit dismissed.

MADRAS HIGH COURT. FULL BENCH.

APPEAL AGAINST APPELLATE ORDER No. 87
OF 1918.

October 1, 1919.

Present—Sir Abdur Rahim, Kt., Offg. Chief
Justice, Mr. Justice Oldfield,
Mr. Justice Sadasiva Aiyar,
Mr. Justice Seshagiri Aiyar and
Mr. Justice Burn,

MUTHU KORAKKI CHETTY AND
OTHERS—DEFENDANTS—RESPONDENTS—
APPELLANTS

versus

MAHAMAD MADAR AMMAL AND
OTHERS—PLAINTIFFS—PETITIONERS—
RESPONDENTS.

*Limitation Act (IX of 1908), Sch. I, Art. 180—
Civil Procedure Code (Act V of 1908), O. XXI, rr. 90,
92—Execution of decree—Sale—Application to set
aside sale, made and admitted after statutory period—
Sale set aside in part—Application by purchaser for
delivery in respect of items preserved—Limitation,
suspension of.*

Held, by the Full Bench (Oldfield, J., dissenting) that where an application to set aside a Court sale, made beyond the statutory period after confirmation of the sale, is admitted and is in part disallowed, the period of limitation for an application by the auction-purchaser to be placed in possession must be computed from the date the application to set aside the sale was disallowed, and not from the date of the order of confirmation passed before the application to set aside the sale was made. [p. 74, col. 2; p. 79, col. 1; p. 81, col. 1.]

Oldfield, J.—The existence of the cause of action for an application for delivery, to which Article 180 of Schedule I to the Limitation Act applies, is not suspended during the pendency of proceedings for setting aside the sale, for once time has commenced to run its running is not suspended. [p. 77, col. 1.]

Appeal against the decree of the District Court, Ramnad at Madura, in Appeal Suit No. 402 of 1917, preferred against

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the order of the Court of the District Munsif, Paramakudi, dated the 13th September 1917, in E. A. No. 343 of 1917, in Execution Petition No. 1131 of 1912, in Original Suit No. 680 of 1910.

This appeal coming on for hearing on the 24th and 25th March 1919, upon perusing the petition of appeal and the orders of the lower Courts and the material papers in the case and upon hearing the arguments of Mr. K. Bhashyam Aiyangar, for the Appellants, and of Mr. B. Sitarama Rao, for the Respondents, and the case having stood over for consideration till the 3rd April 1919, the Court (Oldfield and Seshagiri Aiyar, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

OLDFIELD, J.—Petitioner, whose legal representatives are the respondents, bought properties at Court auction in execution of his own decree on 25th March 1913 and the sale was confirmed on 26th April 1913. On 3rd January 1914, before the three years, within which he could apply for possession under Article 180, Schedule I, Limitation Act, had elapsed, an application for the setting aside of the sale was presented and was admitted out of due time on the ground of fraud. On it the sale was set aside as regards some items and sustained as regards others, the order to this effect being passed in the Court of first instance on 25th June 1915 and in the Appellate Court on 13th May 1916. The present petition for delivery was presented on 19th February 1917. On these facts the questions raised are whether that petition is in time and incidentally whether such a petition is sustainable in the circumstances with reference to the earlier or later order of confirmation.

The latter question arises on the argument, accepted by the lower Appellate Court, that the delivery asked for is to be based on the second order of confirmation and could not have been asked for until it had been passed and a fresh sale certificate had been drawn up. For the suggestion in the judgment under appeal that such a fresh certificate is necessary we have been shown no warrant. There is no reason for holding that delivery can be asked for or should be granted only of the whole property sold and not of

particular items included in it. Whether or no the Court's last order included any explicit cancellation of the certificate as regards the items affected by it, this argument cannot be regarded as substantial, there being no reason why the original certificate should be treated as superseded so far as the items, of which the sale was sustained, were concerned and not as amended in conformity with the order in respect of the others. It is urged, however, more generally either that the admission of the application for cancellation of the sale deprived the previous confirmation of the finality, which enabled petitioner to ask for delivery in accordance with it or that in any case time did not run and petitioner was under no obligation to apply so long as the confirmation, which would be the basis of his petition, might possibly or probably be set aside.

In dealing with the first of these contentions it is to be observed that there is no question of suspension of petitioner's right to apply during any part of the period in question pending an appeal. For the application for cancellation of the sale was not an appeal, being made under Order XXI, rule 90, to a Court of first instance; and it is not suggested that the subsequent appeal related to the items, of which delivery is now claimed. There is no question of an explicit injunction or other direct obstacle to petitioner's obtaining relief. Reference has not been made to any provision of law as authorizing the view that a mere attack on an order can render it ineffective or suspend its efficacy or stop the running of time, which has once begun to run against the person who obtained it.

This is material, as entailing the failure of the first of the two contentions above referred. With reference to the second, although the conclusion proposed is the same, the principle relied on differs slightly. That principle is not that the validity of the order of confirmation is affected by the filing of the petition for its cancellation, but that the running of time for action on it is suspended directly. It is, to adopt the language used by my learned brother in *Doraisami Padayachi v. Vaithilinga Padayachi* (1), the suspension, not of

(1) 41 Ind. Cas. 581; 33 M. L. J. 46.

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the existence of the cause of action, but of the running of time. For this contention also no statutory basis has been alleged. The question is only of the effect of the authorities to be referred to.

In *Somasundaram Pillay v. Vannilinga Pillay* (C. M. A. 355 of 1915) Ayling, J., and my learned brother endorsed the principle that, "if circumstances exist which would render a suit or application infructuous, a party should not be compelled to institute it, until the impediment which stands in the way is removed," and in *Secretary of State v. Raja Vadrevu Ranganyakama* (Appeal Suits Nos. 113 and 402 of 1917) the decision of Abdur Rahim, J., which prevailed, seems to me to entail that, as I put the point in dispute, the running of time is suspended so long as any pending proceeding, in which any matter essential to the determination of the claim is in issue, remains undecided. The authorities now relied on are with one exception, *Bajinath Sahai v. Ramgut Singh* (2), referred to in my judgment in that case and one ground or another rejected as inapplicable to the facts then before us and as insufficient to support the general proposition then necessary for the appellant plaintiff's success. They in fact, as I understand the points actually decided in them, fall into three classes: those firstly in which the plaintiff was allowed the time occupied in seeking one remedy, usually specific performance of an agreement, before he sought another, for instance damages to which he ultimately discovered his right; those next (and *Bajinath Sahai v. Ramgut Singh* (2) is one of them) in which his right to sue was suspended whilst he had or in good faith believed that he had secured what he claimed; and lastly those, if the decision in *Jogesh Chunder Dutt v. Kali Churn Dutt* (3) is correct, in which an outstanding adjudication could have been pleaded against his claim. None of these classes accordingly, if the actual result of the cases comprised in them is regarded, covers the case before us. For here throughout the right of the petitioner to apply for

delivery of the items, in respect of which he is applying, was known to be enforceable and to require enforcing; and there was no obstacle in the way of its being enforced in the shape of any actual collateral adjudication. There was in fact merely the possibility of one; and I do not think that the principle relied on covers or should be extended to cover such a case.

The difficulty, however, arises, not from the actual conclusions in these cases, but from the way, in which the reasons for those conclusions are stated. For, especially in *Bajinath Sahai v. Ramgut Singh* (2) there is much to suggest that a general rule was being enunciated and that the intention was to hold generally in favour of the right of a plaintiff or applicant to defer institution of his proceedings, so long as any reasonable doubt existed regarding his position and the necessity for or possibility of proceedings being taken. It is not clear how that language or the principle underlying the judgments, in which it occurs, can be reconciled with the other interpretations of the Limitation Act, to which my learned brother has referred in the judgment, which I have had the advantage of reading; and I, therefore, agree to the reference proposed by him.

The question referred is:—

Whether the existence of the cause of action for an application for delivery, to which Article No. 180, Schedule I, Limitation Act, applies, is suspended during the pendency of proceedings for the setting aside of the sale?

SESHAGIRI Aiyar, J.—I agree that the question raised by my learned brother should be referred to the Full Bench. The sale in question was made in Court auction on the 25th of March 1913. It was confirmed on the 26th of April in the same year. An application to set aside the sale followed. The final order was on the 2nd of June 1915. It is in these terms: "In the result I set aside the sale so far as the interest of petitioners Nos. 1 to 3 in the properties sold is concerned and dismiss the petition so far as petitioners Nos. 4 and 5 are concerned." The present application is for delivery of the right, title and interest of the defendants against

(1) 33 C. 775 (P. C.); 23 L. A. 45; 7 Sar. P. C. J. 1.
(2) 3 C. 30; 1 C. L. R. 5 (F. B.).

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whom the application to set aside the sale was dismissed. The District Judge held that time began to run only from the 25th of June 1915. The question for consideration is whether he is right. The Article applicable is 180, and under it the starting point is the date on which the sale becomes absolute. There can be no doubt that this language in column 3 of the third schedule has been taken from Order XXI, rule 92 of the Code of Civil Procedure. The article is a new one. Under the old Code there were differences of opinion as to whether an application for delivery must be made only in execution or whether a suit can be instituted even though more than three years had elapsed from the date of the confirmation of the sale. The new article has been introduced with a view to remove these doubts. The suggestion made by the learned Vakil for the respondent that the application may be brought under Article 181 should be rejected. His contention that as in 1915 the sale was partly confirmed and partly set aside, Article 180 is not in terms applicable, is not well founded. It is true there are no provisions in the Code of Civil Procedure for a second confirmation either partially or wholly when the application to set aside a sale succeeds or fails. I do not think that is a good reason for applying the residuary article where there is one which in terms applies to the applications made.

Mr. Sitarama Rao then argued that although in terms the sale was confirmed and made absolute on the 26th of April 1913, the confirmation must be deemed to have been suspended until the 25th of June 1915, when the final order on the application to set aside the sale was made. The strongest case that was quoted by him is *Bajinath Sahai v. Ramgut Singh* (2). That decision was given with reference to Article 12 of the Limitation Act. The short facts were that a sale was confirmed by the Collector in 1882 and was upheld in appeal by the Commissioner. In 1884, the Revenue Board set aside both these orders. On an application for review the Board discharged its own order in 1886. The suit was brought in 1887, within a year of the last order of the Board of Revenue but more than a year

after the order confirming the sale. The Judicial Committee held that the suit was in time. By the language of Article 12 time begins to run from the date when the sale is confirmed. The Judicial Committee at page 785 say: "Their Lordships are of opinion that there was no final, conclusive and definitive order confirming the sale, while the question whether the sale should be confirmed was in litigation, or until the order of the Commissioner of the 25th January 1884 became definitive and operative by the final judgment of the Board of Revenue on the 21st August 1886, or (in other words) that for the purpose of the Law of Limitation there was no final or definite confirmation of the sale until that date." They further on say: "It cannot be said in the opinion of their Lordships, when the parties were litigating before the Revenue Courts as to whether the sale should be confirmed or not, because that was the object of the litigation before the Revenue Courts, that the sale had become either final or conclusive." The same language might not be inaptly employed in the present case. So long as the judgment-debtors or any of them disputed the finality of the sale by seeking to set it aside, it may be said that there was no final or conclusive sale or, to use the language of Lord Davay, "that for the purpose of the Law of Limitation the sale had not become absolute" until the 25th of June 1915. In *Bajinath Sahai v. Ramgut Singh* (2) it was pointed out that the Board of Revenue acted without jurisdiction in interfering with the order of the Commissioner. Still the Judicial Committee held that these infructuous proceedings before the Board had the effect of suspending the operation of the confirmation of the sale. The view taken by the Calcutta High Court in *Janak Prosad v. Net Ram* (4) also supports the respondent. *Sabapathy Chetty v. Rengappa Naicken* (5) is also in his favour.

As against these decisions it must be said that the language of the Limitation Act is so explicit that it is not open to us to import considerations like those

(4) 22 Ind. Cas. 497.

(5) 13 M. L. J. 225; 26 M. 495.

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which influenced the Judicial Committee into the present case. Other decisions of the Privy Council containing similar observations were quoted before us and I shall now refer to them. In *Musammot Ranees Surno Moyee v. Shooshee Mokhee Burmonia* (6), which was a case in which a revenue sale was set aside by the Collector, the landlord sued to recover arrears of revenue within three years of the setting aside of the sale. It was contended that the claim for arrears was barred by limitation, as the suit was brought more than three years after the rent became due. Their Lordships say: "It seems to their Lordships to be perfectly clear, that the cause of action accrued at the time at which, the sale having been set aside, the obligation to pay this sum of money revived." They further on say: "That, upon the setting aside of this sale, and the restoration of the parties to possession, they took back the estate, subject to the obligation to pay the rent; and that the particular arrears of rent claimed in this action must be taken to have become due in the year in which that restoration to possession took place." This decision does not by itself lend support to the contention of the respondent. But this has been relied on in very many subsequent cases as indicating the view of the Judicial Committee that there can be a suspension of a cause of action during the period when it would be infructuous to sue on the original cause of action. The next Privy Council case relied on was *Bassu Kuar v. Dhum Singh* (7). Some general observations in that judgment are often quoted at the Bar. Their Lordships said: "It would be an inconvenient state of the law if it were found necessary for a man to institute a perfectly vain litigation under peril of losing his property if he does not. And it would be a lamentable state of the law if it were found that a debtor who for years has been insisting that his creditor shall take payment in any particular mode can, when it is decided that he cannot enforce that mode, turn round and say that the lapse of time has relieved him from

paying at all." In a later case in *Nritya-moni Dassi v. Lakhan Ohunder Sen* (8) their Lordships expressed their concurrence with the view taken in *Lakhan Ohunder Sen v. Madhusudan Sen* (9). When the Calcutta decision is examined, it will be found that the learned Judges introduced a theory of suspension of limitation which is not warranted either by sections 14 or 15 of the Limitation Act. Sitting with Ayling, J., I had to consider the applicability of these cases in *Somasundaram Pillay v. Vannilinga Pillay*, C. M. A. No. 355 of 1915. Sitting with the learned Chief Justice a similar question was considered in *Doraisami Padayachi v. Vaithilinga Padayachi* (1). Speaking for myself I must say that I always felt with reference to these Privy Council decisions, there is as much to be said against my view as in favour of it. The dicta of the Judicial Committee in the above cases may be said to conflict to some extent with the view of the Board in *Soni Ram v. Kunhaiya Lal* (10) and in *Rani Kuar Mani Singh Mandhata v. Nawab Bahadur of Murshidabad* (11). In the latter case their Lordships suggest that no suspension or extension of limitation is allowable unless the same is specifically provided in the Limitation Act. In *Soni Ram v. Kunhaiya Lal* (10) the right of a mortgagor to redeem became inoperative for a time owing to the fusion of rights as mortgagor and as purchaser. After the dissolution of this dual capacity, he applied to redeem the property and claimed to deduct the time during which the fusion subsisted. Sir John Edge in delivering the judgment of the Board stated: "There is nothing in Act XV of 1877 which would justify this Board in holding that, once that period of limitation had begun to run in this case, it could be suspended. Their Lordships

(8) 33 Ind. Cas. 452; 43 C. 660; 20 C. W. N. 522; 30 M. L. J. 529; (1916) 1 M. W. N. 332; 3 L. W. 471; 18 Bom. L. R. 418; 24 C. L. J. 1; 20 M. L. T. 10 (P. C.).

(9) 35 C. 209; 7 C. L. J. 59; 3 M. L. T. 90; 12 C. W. N. 326.

(10) 19 Ind. Cas. 291; 35 A. 227; 25 M. L. J. 131; 13 M. L. T. 437; 17 C. W. N. 605; 11 A. L. J. 389; (1913) M. W. N. 470; 17 C. L. J. 488; 15 Bom. L. R. 489; 40 I. A. 74 (P. C.).

(11) 50 Ind. Cas. 202; 36 M. L. J. 210; 17 A. L. J. 20; 2 C. W. N. 531; 29 C. L. J. 355; 25 M. L. T. 341; 21 Bom. L. R. 611; 1 U. P. L. R. (P. C.) 16; (1919) M. W. N. 318; 46 C. 694 (P. C.).

(6) 12 M. I. A. 244; 2 B. L. R. (P. C.) 10; 11 W. R. (P. C.) 5; 2 Sar. P. C. J. 424; 2 Suth. P. C. J. 173; 20 E. R. 331 (P. C.).

(7) 11 A. 47; 15 I. A. 211; 5 Sar. P. C. J. 260.

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consider that if they were to hold that, by reason of the fusion of interests between 1833 and 1898, the period of limitation was suspended, they would be deciding contrary to the express enactment of that section that 'when once time has begun to run no subsequent disability or inability to sue stops it.' This language can equally be well applied to the present case. Once time began to run under Article 180 on the sale becoming absolute, the subsequent inability consequent on the application to set aside the sale cannot stop the limitation which had already begun to run. Apart from other cases I think there is a conflict between *Bajinath Sahai v. Ramgut Singh* (2) and *Soni Ram v. Kanhaiya Lal* (10), both of which are decisions of the Judicial Committee. I, therefore, agree that the question should be referred for the decision to the Full Bench.

This appeal came on for hearing on the 4th and 5th September 1919, in pursuance of the Order of Reference to a Full Bench.

Mr. B. Sitarama Rao, for the Respondent.—*Bajinath Sahai v. Ramgut Singh* (2) is conclusive on the point under reference. There is no final and definite order confirming the sale when proceedings under Order XXI, rule 90, are pending, even if such proceedings were *ultra vires* of the Court, provided only that the parties act in good faith. It is either that time did not run at all or that there is a suspension and revival of the cause of action. *Musammatt Ranees Surno Moyee v. Shooshee Mokhee Burmonia* (6) explained in *Odhyaya Pershad v. Mahadeo Dutt* (12) and *Huro Pershad Roy v. Goral Das Dutt* (13). In *Bassu Kuar v. Dhum Singh* (7) the question came to be considered as one of failure of consideration giving rise to a fresh cause of action. The same view is taken in *Udit Narain Misr v. Muhammad Minnatulla* (14), *Amma Bibi v. Udit Narain Misra* (15), *Rajagopalan v. Kasivasi Somasundaram*

(12) 17 W. R. 415.

(13) 9 O. 255 at p. 259; 12 O. L. R. 129; 9 I. A. 82; 4 Sar. P. C. J. 363.

(14) 25 A. 618; A. W. N. (1903) 117.

(15) 1 Ind. Cas. 890; 31 A. 68; 9 O. L. J. 512; 11 Bom. L. R. 525; 19 M. L. J. 295; 6 M. L. T. 89; 36 I. A. 44 (P. O.).

Thambiran (16). In *Dalip Singh v. Kundan Lal* (17) the principle of English law that time would be suspended during the time that there is a fusion of interests, was not accepted as being inapplicable. Time was deducted in *Rangayya Appa Rao v. Bobba Sriramulu* (8) on the ground that the prior litigation was found to be necessary.

The principle in *Musammatt Ranees Surno Moyee v. Shooshee Mokhee Burmonia* (6) has been applied in *Lakhan Chunder Sen v. Madhusudan Sen* (9) and upheld on appeal in *Nrityamoni Dassi v. Lakhan Chunder Sen* (8). See also *Surjiram Marwari v. Berhamdeo Persad* (19), *Janak Prosad v. Net Ram* (4), *Rup Ohand v. Mukunda Mahadev* (20), *Brij Indar Singh v. Kanshi Ram* (21) went upon the facts, see also *Venugopal Mudali v. Venkatasubbiah Chetty* (22).

Article 180 omits mentioning the Civil Procedure Code to provide for any contingency. Section 14 of the Limitation Act applies only to a case of suspension. If in the present case the time is suspended, section 14 will apply; if the cause of action is fresh, section 14 has no application.

Mr. K. Bhashyam Aiyangar, for the Appellant.—The question referred is whether time is suspended and, therefore, the cases cited do not help the solution of it. In considering the question, section 14 of the Limitation Act provides for such cases. But the present case does not fall within its scope. For clause (2) applies only where time is lost by an infructuous application which the Court finds itself unable to entertain. That is not the present case. *Vidhaya Theertha Swamigal v. Venkatarama Iyer* (23).

Time, once started, cannot stop or be suspended on account of what takes place

(16) 30 M. 316; 17 M. L. J. 149.

(17) 18 Ind. Cas. 726; 35 A. 207; 11 A. L. J. 244.

(18) 27 M. 143 (P. O.); 8 C. W. N. 162; 14 M. L. J. 16 Bom. L. R. 241; 31 I. A. 17; 8 Sar. P. C. J. 617.

(19) 1 C. L. J. 337.

(20) 25 Ind. Cas. 67; 38 B. 656; 16 Bom. L. R. 444.

(21) 42 Ind. Cas. 43; 33 M. L. J. 486; 22 M. L. T. 362; 6 L. W. 592; 126 P. W. R. 1917; 15 A. L. J. 377; 19 Bom. L. R. 866; 3 P. L. W. 313; 26 O. L. J. 672; 104 P. R. 1917; (1917) M. W. N. 811; 22 C. W. N. 189; 127 P. L. R. 1917; 45 C. 94; 44 I. A. 218 (P. O.).

(22) 28 Ind. Cas. 367; 39 M. 1196; 17 M. L. T. 208; (1915) M. W. N. 211.

(23) 45 Ind. Cas. 460; 33 M. L. J. 682.

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subsequently. See *Hukum Ohand Boid v. Pirthichand Lal Ohowdhury* (24). Section 14 provides for the exclusion of time and not for its suspension. See also *Syud Abdool Juleel v. Kanchun Dossee* (25). A fresh cause of action is not possible, for the sale in the present case had been confirmed and time had started. Under the law the sale was unimpeachable. Hence there was a final and definitive order confirming the sale. Hence *Baijnath Sahai v. Ramgut Singh* (2) will not help the question. A fresh cause of action is possible only when possession is refused. *Hanuman Kamat v. Hanuman Mandur* (26), see also *Kaliba Mavulvija v. Saran Bivi Saila Ammal* (27). Even in *Nrityamoni Dass v. Lakhan Ohunder Sen* (8) it was conceded that time would run from the time that an effective adjudication is made. See also *Rani Kuar Mani Singh Mandhata v. Nawab Bahadur of Murshidabad* (11).

OPINION.

ABDUR RAHIM, OFFG. C. J.—The question referred to the Full Bench arises under Article 180 of the Limitation Act.

A person, who purchased certain properties at a Court auction in execution of his own decree on the 25th of March 1913, applied for delivery of possession on the 19th of February 1917. An order confirming the sale was made on the 26th of April 1913, but on the 3rd of January 1914, that is more than 30 days afterwards, an application was made on behalf of the judgment-debtor for the setting aside of the sale. That application was disposed of by the Court of first instance on the 25th of June 1915, the Court setting aside the sale in respect of some of the items and upholding it as regards the other items. That order was appealed from and the Appellate Court dismissed the appeal on the 13th of May 1916.

It will thus be seen that the application for delivery of possession of the property would be barred under Article 180 if the time of 3 years allowed by the second column be reckoned from the 26th of April

(24) 50 Ind. Cas. 444; 36 M. L. J. 557; 17 A. L. J. 514; 28 C. W. N. 721; 21 Bom. L. R. (32); (1919) M. W. N. 258; 50 C. L. J. 71; 46 C. 670; 26 M. L. T. 131; 10 L. W. 416 (P. C.).

(25) 24 W. R. 143.

(26) 19 C. 123 (P. C.); 18 I. A. 158; 6 Sar. P. C. J. 91.

(27) 28 Ind. Cas. 290; 38 M. 260; 28 M. L. J. 847.

1913, when the sale was confirmed under rule 92 of Order XXI of the Civil Procedure Code, no application for setting aside the sale having been made by that time; but it would be within time if the period of limitation commenced on the 25th of June 1915, the date of the order adjudicating upon the application made under rule 90 to set aside the sale on the ground of irregularity or fraud, by which the sale as regards some of the items was set aside and the sale as regards the other items was upheld.

There can be no doubt that Article 180 applies to cases where the sale is confirmed and thereupon becomes absolute under the provisions of rule 92. That rule contemplates that such an order is not to be made until the application to set aside the sale under rule 89 or 90 or 91, if any, has been disposed of and disallowed. The question under reference would hardly arise in cases where the application to set aside the sale is made in the ordinary way within the period of 30 days under Article 166. The difficulty has evidently arisen because, no application to set aside the sale having been made within 30 days, the Court had in the usual course made the order confirming the sale.

The question then is, when the Court entertains an application to set aside the sale after the order confirming the sale has been made but before the period of 3 years allowed to the purchaser for applying for delivery of possession has expired, whether time must be reckoned against the applicant from the date of the order of confirmation of sale, or whether that order should be treated as not having the effect of making the sale absolute within the meaning of Article 180 but that the sale should be deemed to have so become absolute from the date when the application for setting it aside was disposed of. I do not think the fact that the sale was set aside in respect of some of the items included therein and upheld as regards the other items should make any difference as to the application of Article 180, for we are not concerned with the properties the sale of which has been set aside and as regards the rest possession of which alone is sought, the point for decision is whether the entertainment of the application to set

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aside the sale had or had not the effect of preventing the sale becoming absolute within the intendment of Article 180. Even without the help of the Privy Council ruling which I shall presently notice, I should answer that, in the given circumstances, the sale did not become absolute until the petition made to set it aside had been disallowed. Rule 92 has primarily, in contemplation cases where the application to set aside the sale is made within the limit of 30 days allowed by the law, so that any order confirming the sale would be ordinarily made after the disposal of such applications. But if the Court in this case was justified—and I take it that it was—in entertaining the application to set aside the sale after it had made the order confirming the same, can it be said that, whatever be the result of the application, the order confirming the sale remained effective so as to make the sale absolute from the date on which it was drawn up? To my mind, obviously not. The effect of entertainment of the application to set aside the sale after the order of confirmation must, having regard to the intention of the Legislature as disclosed in this rule and quite apart from any general theory in such connections, be to render the order ineffective so as to make the sale absolute. If we were to proceed upon an absolutely literal interpretation of the language of rule 92 without paying due regard to the intention of the Legislature, this case would have to be treated as lying outside that rule, for it requires that the order of confirmation should be made after the disposal of any application to set aside the sale. If so treated, there would be no difficulty in the application of Article 180. Whether it is the practice to issue a second certificate on the disposal of such an application or not cannot, to my mind, affect the application of Article 180; but I should suggest that a fresh certificate ought to be issued, if not in all cases, at least in those cases where the sale is only partly upheld as the result of an application made to set it aside after the passing of the order confirming the sale.

Upon a proper interpretation, therefore, of Article 180 read with rule 92 of Order XXI, Civil Procedure Code, I should hold that, where an application is made for

delivery of possession of property sold in execution of a decree, the sale does not become absolute within the meaning of the third column of Article 180 until the application made to set aside the sale under rule 89 or 90 or 91 has been disallowed and the sale upheld, although an order confirming the sale had been passed before the application to set aside the sale was made. The question referred to the Full Bench, I may mention, is framed in the form as it is, apparently with a view to ascertain the scope and effect of certain rulings of the Judicial Committee which have latterly been the subject of much discussion in this Court. But I do not feel myself bound by the frame of the question to state my conclusion as to the application of the Article 180 to circumstances such as arose in this case with reference only to the mode of computation mentioned in the question.

Of the Privy Council rulings, the one that has the closest application to the facts of this case is that of *Bainath Sahai v. Ramgout Singh* (?). There, stating shortly the effect of the judgment of the Judicial Committee as given in the head note, the Board of Revenue of Bengal discharged an order of the Commissioner, dated January 25th, 1884, which had confirmed a sale by the Collector in 1882, but afterwards on August 21st, 1886, discharged its own order and revived that of the Commissioner. It was held that the confirmation of sale dated only from the last order of August 21st, 1886, within the meaning of Article 12 of Act XV of 1877, which provides one year for a suit to set aside a sale for arrears of Government revenue, or for any demand recoverable as such arrears, from the date on which the sale is confirmed, or would otherwise have become final and conclusive had no such suit been brought. At page 785 their Lordships say that they did not base their decision on the provision of section 14 of the Limitation Act, which provides for the exclusion of the time of proceeding *bona fide* in a Court without jurisdiction, but because they were of opinion "that there was no final, conclusive and definitive order confirming the sale, while the question whether the sale should be confirmed was in litigation, or until the order of the Commissioner of the 25th

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January 1884 became definitive and operative by the final judgment of the Board of Revenue on the 21st August 1886, or (in other words) that for the purpose of the law of limitation there was no final or definitive confirmation of the sale until that date."

I do not think that much light would be obtained on the present question by discussing in detail the other rulings of the Privy Council cited before us, a summary of which is set out in the Order of Reference and which I also had the occasion to discuss previously in *Secretary of State v. Raja Vadrevu Ranganayakama*, Appeals Nos. 113 and 402 of 1917. No doubt there are general observations in some of the cases, such as *Bassu Kuar v. Dhum Singh* (7), where it is stated: "It would be an inconvenient state of the law if it were found necessary for a man to institute a perfectly vain litigation under peril of losing his property if he does not", or that the right of plaintiff to bring an action to recover certain property would be suspended because of certain intermediate litigation [see *Lakhan Chunder Sen v. Madhusudan Sen* (9) and *Nrityamoni Dassi v. Lakhan Chunder Sen* (8)] in which his title to the property happened to be under investigation. But it is hardly to be inferred from such observations that the Privy Council intended to lay down any rule or rules for exclusion of time other than those mentioned in various sections of the Limitation Act, such as 12, 14, etc. Or that when time has once begun to run, it will be suspended otherwise than according to the provisions of section 9 or any other similar provision of the Limitation Act itself. In *Mussumat Raneer Surno Moyee v. Shooshi Mokhee Burmonia* (6) their Lordships had to determine when the cause of action accrued with reference to section 32 of Act X of 1859, whether at the end of each Fasli year when the rent became due or on the date of the decree reversing the auction sale of the Putnee Talook belonging to the plaintiff Zamindar, and they decided in favour of the date of the decree reversing the auction sale. I do not see that any general principle of interpretation or application of the Limitation Act can be deduced from this decision which would be of any guidance in the present case. In *Bassu Kuar v. Dhum Singh* (7) in a suit for specific performance for sale of land, it

was ruled that the plaintiff's cause of action for recovering the debt, which was the consideration for the agreement for sale which failed, arose on the date the decree refusing specific performance was passed, because a new obligation was imposed on the defendant by that decree. The cases in *Udit Narain Misr v. Muhammad Minnatulla* (14) and *Jamna Das v. Najm-un-nissa Bibi* (28) were also of a similar nature. And in all these cases the article under consideration was No. 97 of Act of 1877, which was applicable to suits for money paid upon an existing consideration which afterwards failed. In *Rangayya Appa Rao v. Bobba Sriramulu* (18) the Judicial Committee held that until the Puttah was settled under the special provision of the Local Act VIII of 1865, time did not run, but that limitation was to be computed only from the date of the final decree determining the rent. I must, however, observe that it would almost look that in my judgment in *Secretary of State v. Raja Vadrevu Ranganayakama*, Appeals Nos. 113 and 402 of 1917, I tried to deduce from these cases a principle of general and unlimited application to the effect that where the rights of the parties have been subjected to determination by the Court, it is from the date of the determination of such rights that limitation should be computed. But on further consideration I am persuaded that any such deduction would be unjustified, if it be meant thereby to introduce a rule of exclusion or suspension of time covering a larger ground than that traversed by sections 12, 14, 15, 16, 19 and other similar provisions of the Limitation Act. I need hardly say that I do not desire to express any opinion on the question of limitation involved in the *Secretary of State v. Raja Vadrevu Ranganayakama*, Appeals Nos. 113 and 402 of 1917, as a Letters Patent Appeal is now pending from my judgment. But as I have already suggested, it is not necessary to attempt to deduce any rule of general application in order to answer the question which arises in this case and that the answer, as I have stated, should be that time should be computed from the date of the order disallowing the petition to set aside the sale, and not from the date of confirmation passed before the application to set aside the sale was made.

OLDFIELD, J.—The question I propose to

(28) 28 A. 466; 3 A. L. J. 228; [A. W. N. (1906) 89.

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answer is that which has been referred and not any other, which may appear to afford a ground of disposal of the appeal, in which the reference has been made.

That question is whether the existence of the cause of action for an application for delivery is suspended during the pendency of proceedings for the setting aside of the sale, and I do not understand it as raising the distinct question whether the order of confirmation, which had been passed in the case before the referring Judges, had been deprived of the finality which it originally possessed. The distinction is clearly marked in my referring order by the reference to the judgment of Seshagiri Aiyar, J., in *Doraisami Padayachi v. Vaithilinga Padayachi* (1) and I propose to adhere to it.

The conflict we have to resolve is between, on the one hand, the unrestricted language of sections 3 and 9, Limitation Act, which has more than once, as the referring order of Seshagiri Aiyar, J., shows, been regarded as subject only to the exceptions allowed by some specific provision of law, and on the other certain decisions of the Judicial Committee and the language used in them, which are relied on as involving the existence of an equitable power to relax the provisions of the Act in such cases as the one before us.

It is unnecessary to extract the sections of the Act or to insist on their unrestricted character except by pointing out, what will be material in the sequel, that section 3 is affected by section 14 in the case of an application, only when the applicant has been prosecuting, not when, as in the case under reference, he has been on his defence, in another proceeding. That is involved by the reference in section 14 to prosecution in good faith, by the terms of explanation II and by the absence of any reason for supposing that a change in the law was intended when the clear language in the corresponding section of the former Act XV of 1877 was abandoned. Subject, however, to this, sections 3 and 9 are comprehensive. In order to evade them, reliance has been placed on decisions of the Judicial Committee, the effect of which was stated in the recent judgment in *Somasundaram Pillay v. Vannilinga Pillay*, O. M. A. No. 355 of 1915, to which Seshagiri Aiyar, J., was a party, as being that "if circumstances exist, which would render a

suit or application infructuous, a party should not be compelled to institute it, until the impediment in the way is removed." It is for us to decide whether this general principle can be deduced from the cases relied on.

Those cases have been referred to in my order of reference as falling into three classes; and I adhere to that classification in supporting the conclusion, which the fuller argument we have now heard in my opinion entails, that the proceedings in each case were really regarded as in time with reference, not to any extension of the period available for taking them, but to the adoption of a starting point for limitation, which was discovered, either, where none had been available before or in supersession of one already in existence. This is, if I understand the opinion to be given by Seshagiri Aiyar, J., correctly, in accordance with the view which he would take, although I should respectfully describe it as putting a more accurate, not a more liberal, construction on column 3 of the schedule.

Thus in the first class of cases referred to, those in which the plaintiff, after claiming one remedy in good faith, but unsuccessfully, sought another to which his right was ascertained in the previous proceedings, the decision in *Bassu Kuar v. Dhum Singh* (7) was based statedly on the fact that from the date, on which an agreement to convey property in satisfaction of a debt was held unenforceable, a new liability for money paid on a consideration which failed was imposed on the debtor in supersession of his liability under the agreement or for the debt; and the *dictum* relied on here, "It would be an inconvenient state of the law if it were found necessary for a man to institute a perfectly vain litigation on pain of losing his property" can be fairly applied, as stating not any general principle, but merely an *argumentum ab inconvenienti* in connection with the reference immediately preceding it to the period during which the decree of the Court of first instance upholding the agreement was in force. This is in fact the explanation of the decision, which was given in *Jamna Das v. Najm-un nissa Bibi* (23) and approved by the Judicial Committee in *Udit Narain Misra v. Muhammad Minnatulla* (14) and *Amra Bibi v. Udit Narain Misra* (15).

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The next class of cases comprised those in which the plaintiff, having obtained all he wanted in previous proceedings, had, when those proceedings were set aside, to take fresh ones in connection with which limitation was pleaded; and the decisions in his favour are easily intelligible with reference to the date of his deprivation of the relief he had secured. Thus in *Musammatt Raneesurno Moyee v. Shooshee Mokhee Burmonia* (6) the plaintiff's claim having, as the committee pointed out, once been satisfied by the sale, which was afterwards set aside, it was only when it ceased to be satisfied that the cause of action afterwards sued on became available; and, although Sir R. Collier in *Huro Pershad Roy v. Gopal Das Dutt* (15) referred to this case, as establishing an exception to the operation of the Statute, and in explaining it spoke of the "period of time in which the Statute might not run," he described the exception as "rather apparent than real" and the whole tenor of his judgment was consistent with the view I am taking. Another case in this class, *Lakhun Chander Sen v. Madhusudan Sen* (9), calls for notice, because there is no doubt that the judgments in it contain language, in which a suspension of the running of time is referred to. The facts, however, need cause no difficulty. For they were that certain defendants in a suit for possession and account in respect of a share, from which the plaintiffs alleged dispossession, succeeded in obtaining a decree for ascertainment of their own share; and the suit for such ascertainment, which they had to bring when the decree in their favour was set aside, was held to be in time, as it might be consistently with the principle under discussion, on the ground that their cause of action arose, only when they were deprived of the relief they had once obtained. In the High Court, however, although the judgment mentions the inability of these parties, so long as the decree in their favour subsisted, "to institute a fresh suit for the object, which had been successfully attained," their case is described as having been that their rights were suspended; and *Prannath Roy Chowdry v. Rookea Begum* (29) and the observa-

tion of Lord Eldon in *Pulteney v. Warren* (30) are referred to, the former dealing with the existence of sufficient cause within the meaning of Bengal Regulation III of 1873, section 14, and the latter with the English principle reproduced in our section 15 (1). The Judicial Committee also, in shortly approving the High Court's decision, referred to the suspension of limitation and the deduction of the period spent in the previous limitation. The High Court, however, had relied on *Musammatt Raneesurno Moyee v. Shooshee Mokhee Burmonia* (6) and the Judicial Committee had also referred to the existence of an effective decree, which was capable of being enforced until set aside; and in these circumstances these judgments indicate only that, although the existence of alternative grounds for their conclusions was present to the minds of the Courts concerned, it was not thought worth while to maintain the distinction between them for the purpose in hand. In the last case of this kind to which I need refer, *Bajinath Suhai v. Ramgut Singh* (2), the ground of decision is clearly not any suspension of the right to sue. For the judgment statedly expresses no opinion on the applicability of section 14 of the Act and is based on the absence of any sale, which the plaintiff could have sued to have set aside, until the cancellation order obtained by him in good faith had been displaced.

In the remaining classes of cases the plaintiff's claim depended on the principle stated in the judgment of Macpherson, J., in *Jagesh Ohunder Dutt v. Kali Ohurn Dutt* (3) as deducible from *Shama Purshad Roy Chowdry v. Huro Purshad Roy Chowdry* (31), that on the reversal of the main decree, which was the basis of subsequent decrees, the latter are superseded and a suit lies to recover what has been wrongfully paid under them. This principle is of course not one of limitation and its exact scope may come under discussion in another case now pending, to which reference is made in the judgment of the learned Chief Justice. But *Jagesh Ohunder Dutt v. Kali Ohurn Dutt* (3) is material at present, because consistently with it, when the limitation applicable to the suit it authorises was considered in *Kalichurn* (30) (1801) 6 Ves. 73 at p. 93; 31 E. R. 944; 5 R. R. 226. (31) 10 M. I. A. 203; 3 W. R. 11 (P. O.); 2 Suth. P. O. J. 103; 19 E. R. 948.

(29) 7 M. I. A. 323; 4 W. R. 37 (P. O.); 19 E. R. 231; 1 Suth. P. O. J. 367; 1 Sar. P. O. J. 692.

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Dutt v. Jogesh Chunder Dutt (32) it was held that time ran from the date of the superseding judgment under Article 120, not from the erroneous receipt of the payment under Article 62, and no provision relating to suspension was relied on. The decision in *Narayana v. Narayana* (33) proceeded on similar grounds; and both authorities exemplified the conclusion reached in connection with the first class of cases already dealt with, that an accurate application of the third column of Schedule I, rather than reliance on suspension of the running of time, is the means by which apparent hardship to plaintiffs should be avoided.

In the foregoing representative instances from each of the classes of cases referred to in argument have been dealt with: and the result is that none supports the general equitable principle, for which the respondents before us contend. It has been pointed out that section 14 of the Limitation Act is inapplicable to the case submitted to us and no other positive provision has been relied on. I would, therefore, answer the question referred in the negative, that in the circumstances stated, if time has begun to run, its running is not suspended.

SADASIVA AYYAR, J.—The question referred to the Full Bench is whether the existence of the cause of action for an application for delivery to which Article 180 of Schedule I of the Limitation Act applies, is suspended during the pendency of the proceedings for the setting aside of the sale.

The relevant dates are as follows:—

(a) the Court auction sale took place in March 1913;

(b) the sale was confirmed on the 26th April 1913;

(c) application to set aside the sale was made on the 3rd January 1914;

(d) the sale was set aside as regards the interests of some of the judgment-debtors, and it was upheld as regards the others on 25th June 1915;

(e) the application for possession of the interests of the judgment-debtors the sale of whose interests was finally confirmed on 25th June 1915 was made on 19th February 1917.

If the time between 3rd January 1914

(when the application to set aside the whole sale was made) and 25th June 1915 (when the final order confirming part of the sale was made) is deducted, then the application of 19th February 1917 is within the period of three years from the date when the sale became absolute, which is the date mentioned in column 3 of Article 180.

The matter in controversy was argued in two aspects on behalf of the decree-holder-purchaser (1) that even if the cause of action for the application for possession as made arose when the sale of the interests of all the judgment-debtors was confirmed on 26th April 1913; in other words, that even if the application for possession dated 19th February 1917 is based on the cause of action for possession of the entire interests which arose on 26th April 1913, (the date when the first order of confirmation was made); to put it again differently, even if the time of three years began to run from 26th April 1913 itself, notwithstanding that the application was for possession of a fraction of the interests sold on that date, the running of time was suspended between 3rd January 1914 and 25th June 1915, (2) that a new cause of action arose on 25th June 1915 when the final order confirming the sale of the interests of some only of the judgment-debtors was made and that the time for calculation of the period of limitation for the application of 19th February 1917 arose only on 25th June 1915.

Section 9 of the Limitation Act says: "When once time has begun to run, no subsequent disability or inability to sue stops it." Though the section, in terms, relates only to a suit and not to an application, in *Jivraj v. Babari* (34), *Bhagwant Ramchandra v. Kaji Mahamad Abas* (35) the words "to sue" have been taken as including "to apply in execution." Further the Court auction-purchaser who has made the application for possession can hardly be said to rely on any "subsequent disability or inability," (that is, subsequent to the date of sale), to make the application, as "disability" and "inability to sue" are not the same as "inconvenience" or "fatality" of suing—one of the two branches of his contention is that his right to apply for

(32) 2 O. L. R. 354.

(33) 13 M. 437.

(34) 29 B. 68; 6 Bom. L. R. 639.

(35) 15 Ind. Cas. 829; 36 B. 498; 14 Bom. L. R. 387.

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possession of those interests whose sale was finally confirmed, arose only on the date of that final confirmation and that as the original confirmation of 1913 was modified by the final confirmation of 25th June 1915, he obtained a new cause of action for making the application in conformity with that final order. In *Bajinath Sahai v. Ramgut Singh* (2) their Lordships of the Privy Council held that a suit for setting aside a sale made on the 25th September 1882 by the District Collector and confirmed by the Commissioner on 25th January 1884, though brought in July 1887 (more than one year from the date of such confirmation), was not barred by Article 12 of Act 15 of 1877, because the Board of Revenue, whether with or without jurisdiction, had set aside the Commissioner's order, though it afterwards discharged its own order on 21st August 1886. Their Lordships held that limitation for the suit commenced only from the final order of the Board dated 21st August 1886, because there was no "conclusive and definitive order" confirming the sale while the question whether the sale should be confirmed was under litigation, and until the order of the Commissioner on the 25th January 1884 became definitive and operative by the final judgment of the Board of Revenue on 21st August 1886; in other words, that for the purposes of the law of limitation, there was no final or definitive confirmation of the sale until that date. Their Lordships do not rely upon section 14 of the Limitation Act, which relates to the exclusion of time during which proceedings in Court without jurisdiction are being prosecuted; but put it on the broad ground that the sale itself became "confirmed" within the meaning of the expression in the third column of Article 12 of the Limitation Act only on the date when the proceedings closed before the Board of Revenue, that is, in August 1886, though there had been a confirmation by the Commissioner in 1884 itself. I think the present case is a stronger case for the purchaser than the case reported as *Bajinath Sahai v. Ramgut Singh* (2). Whereas Article 12 uses the expression "when the sale is confirmed," Article 180 uses the expression "when the sale becomes absolute." If, on an application made to set aside the sale, an order setting aside the sale in part is passed (as

it has been passed in this case), the sale as made cannot be said to have become "absolute," though a formal confirmation after the expiry of 30 days had taken place. Further, whereas in *Bajinath Sahai v. Ramgut Singh* (2) the Commissioner's confirmation order of 1884 was ultimately upheld by the final order of the Board of Revenue in 1886, the confirmation order of 1913 in this case was modified ultimately by the final order of 1915. I think the principle underlying the decision of their Lordships both in *Musammatt Raneesurno Moyee v. Shooshee Mothee Burmonia* (6) and *Bajinath Sahai v. Ramgut Singh* (2) might be invoked in favour of the applicant in this case. That principle (as I understand it) is that whenever proceedings are being conducted between the parties *bona fide* in order to have their mutual rights and obligations in respect of a matter finally settled, the cause of action for an application or for a suit, the relief claimable wherein follows naturally on the result of such proceedings, should be held to arise only on the date when those proceedings finally settle such rights and liabilities. (The case where the proceedings are by way of appeal is specially provided for by Statute law and the decisions based on those special provisions are irrelevant and merely confuse the mind in its analysis of the relevant precedents.)

I shall refer to only one more authority. In *Nrityamoni Dassi v. Lakhan Ohunder Sen* (5) their Lordships of the Privy Council confirmed the Full Bench decision of the Calcutta High Court in *Lakhan Ohunder Sen v. Madhu Sudan Sen* (9). The judgment of their Lordships on the question of law involved begins by saying, "Their Lordships concur generally with the reasons given by the Appellate Court for overruling the plea of limitation". In the judgment in *Lakhan Ohunder Sen v. Madhusudan Sen* (9) the learned Judges of the Calcutta High Court (the Appellate Court) not only do not rely upon section 14 of the Limitation Act, but expressly say: "We feel grave doubt whether the case falls within that section." But they rely upon the principle of the Privy Council decision in *Musammatt Raneesurno Moyee v. Shooshee Mothee Burmonia* (6) and hold that the right of the plaintiffs to bring an action to recover the property was suspended between the 20th of April 1903 and

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the 22nd of February 1904, because on the 20th April 1903, they had, as defendants, in a former suit, obtained a decree for the same relief as was claimed in their present action which decree, however, was reversed (on the appeal filed by the plaintiffs of that suit) on 22nd April 1904. Thus the suspension was not by reason of section 14 of the Limitation Act but by reason of the principle that a person is not bound to bring an unnecessary suit or to make futile and unnecessary applications during the course of other litigation proceedings in which he and his opponent had been *bona fide* engaged for the ascertainment and settlement of the same rights. The rule of law derivable from the decisions of their Lordships seems to have thus two applications according to circumstances: (a) creating a fresh cause of action under some circumstances (b) suspending the running of time in other circumstances. In *Lakhan Chunder Sen v. Madhusudan Sen* (9), affirmed by the Privy Council in *Nritamoni Dassi v. Lakhan Chunder Sen* (8), the "suspension" principle was applied in the case of a suit also. Mr. Rustomji in his book on Limitation published in 1915 [after *Lakhan Chunder Sen v. Madhusudan Sen* (9) and before *Nritamoni Dassi v. Lakhan Chunder Sen* (8)] remarks as follows at page 41 under section 91 about the decision in *Lakhan Chunder Sen v. Madhusudan Sen* (9):—"It is difficult to see under what provision of the Limitation Act, the Court held that there was a suspension of the right of suit." But as their Lordships of the Privy Council have confirmed *Lakhan Chunder Sen v. Madhusudan Sen* (9) approving generally the ratio of its decision, we must hold that notwithstanding section 9 of the Limitation Act, there are exceptional cases where such suspension, even as regards the running of time on the cause of action for a suit, can take place. I think that, in either aspect (I am myself inclined to think that in the present case, a new cause of action for this special application for possession of the interests in respect of which alone the sale was finally confirmed arose in 1915), the application for possession in 1917 in this case is not barred by limitation.

SESHAGIRI AIYAR, J.—I had to consider the Privy Council decisions quoted before us on a number of occasions. I was, therefore, at first disinclined to write a

separate judgment in this case. But as in a case depending upon this judgment and which was posted before Sadasiva Aiyar and Burn, JJ., and myself the subject-matter is of a value which will enable the parties to go before the Privy Council, and as I think that some of my observations in the previous judgments have been expressed more broadly than they need have been, I have resolved to give expression to my views on the present occasion. By common consent of both parties, notwithstanding the somewhat limited scope of the question referred, arguments were addressed to ascertain the exact scope of the pronouncements of the Judicial Committee on the point, whether in addition to the exceptions enumerated in the Limitation Act it is open to Courts to import a new principle of equity regarding the articles in the First Schedule to that Act.

Mr. Sita Rama Rao contended that the decision in the case which led to the reference is governed by *Bajinath Sahai v. Ramgut Singh* (2). In my opinion this contention is right. But I base that conclusion not on the ground that there is a general principle of equity apart from the Statute, but because in the present case, the construction to be placed on the third column of Article 180 of the First Schedule is concluded by that decision.

It was suggested in the course of the argument that the decisions of the Judicial Committee on this subject are not reconcilable with each other. After giving my best consideration to this argument, I do not think that this argument is well founded. Broadly speaking, the decisions of the Board fall under two heads. Under the first head come *Musammatt Ramee Surno Moyee v. Shooshee Mckhee Burmonia* (6), *Bassu Kuar v. Dhum Singh* (7), *Bajinath Sahai v. Ramgut Singh* (2), *Rangayya Appa Rao v. Bobba Sriramulu* (18), *Amma Bibi v. Udit Narain Misra* (15) and *Nritamoni Dassi v. Lakhan Chunder Sen* (8). Under the second *Huro Pershad Roy v. Gopal Das Dutt* (13), *Soni Ram v. Kanhaiya Lal* (10) and *Rani Kuar Mani Singh Manthata v. Nawab Bahadur of Murshidabad* (11). It was argued, not without some plausibility, that the first class of cases recognises the doctrine that where a party in

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whose favour a cause of action has arisen cannot usefully pursue a remedy at the time, his right of action is postponed to a subsequent date. It was next argued that the second class of cases takes a too literal view of the provisions of the Act, and ignores the above principle of equity. This ingenious suggestion of a conflict between law and equity is not borne out by a close examination of the authorities.

In the cases coming under the second head the Judicial Committee have laid down that there can be no saving of limitation apart from the provisions of the Limitation Act. They have drawn attention to sections 9 and 14 of the Act and have held that exemptions not covered by these and the other sections should not be imported by Courts, to relieve a party from the bar of limitation. I do not think in the first class of cases this principle is overlooked. What has been done is to put a liberal (rather in the language of Oldfield, J., an accurate) construction on the somewhat loosely expressed words in column 3 of the First Schedule. The sections have been more clearly worded than the third column of the First Schedule. In a case decided by five Judges of this Court to which I was a party, almost every one of us pointed this out with reference to Article 134 of the Limitation Act. There are other instances of a similar kind. The Judicial Committee have, therefore, placed a liberal construction upon the words in the third column to the schedule. Let us take for example *Bajinath Sahai v. Ramgut Singh* (2) and the present case. In *Bajinath Sahai v. Ramgut Singh* (2) the party through no fault of his found himself in this unfortunate position. The only authority which could confirm the revenue sale was the Commissioner; no appeal is allowed from his decision. But an appeal was taken to the Board of Revenue against his order, and that body admittedly set aside the order though it had no jurisdiction to do so. Both parties were not aware of this defect of jurisdiction. Both of them submitted to the interference by the Board of Revenue. At a subsequent stage the Board of Revenue confessed that their orders were *ultra vires* and passed proceedings to the effect that the confirmation by the Commissioner was right. In these

circumstances the Judicial Committee pointed out that the cause of action arose only when the Board of Revenue vacated their former order and ruled that the order of the Commissioner was valid. This decision does not ignore either section 9 of the Limitation Act or import a theory of suspension not sanctioned by section 14. In the view of the Judicial Committee, the cause of action should not be regarded as having taken place on a date when no step could be taken to obtain delivery owing to the interference by the Board with the order of confirmation. That is to say, they held that the third column of the schedule should be construed as if it said that the cause of action arose only when a remedy based on it was available. I shall now examine the case before us. The decision in *Bajinath Sahai v. Ramgut Singh* (2) would apply word for word to the facts of the present case. Here there was a confirmation of sale. But the Civil Procedure Code has provided the procedure for that confirmation being challenged; it was in fact challenged; and although one might think that the challenge came after the time allowed by law, it was allowed to be agitated; the Court upheld the challenge to some extent. The third column of Article 180 ignores these considerations, and insists upon a party, if it is literally interpreted, filing a petition for delivery which owing to the pendency of the petition challenging the confirmation could not be granted. If this case were before the Judicial Committee, I make bold to say that they would hold that the cause of action really arose only when there was a final decision on the challenge. Similar explanation can be given with regard to every one of the cases which are catalogued under the first head. None of them contravenes the provisions of the Limitation Act as embodied in sections 4 to 31. All of them may be said to go, to some extent, behind the actual words of the third column and to import into the decision considerations based on the intention of the Legislature; but none of them introduce a principle which adds to or subtracts from the statutory exemptions. That is my view of the decisions of the Judicial Committee. Therefore, in my opinion the true rule deducible from these

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various decisions of the Judicial Committee is this: that subject to the exemptions, exclusion, mode of computation and the excusing of delay, etc., which are provided in the Limitation Act, the language of the third column of the First Schedule should be so interpreted as to carry out the true intention of the Legislature, that is to say, by dating the cause of action from a date when the remedy is available to the party. This is a rule of construction and not a rule of law. I would answer the reference as above, leaving each case to be dealt with in the light of these observations.

BURK, J.— * * * * *
I agree with the conclusions come to by the learned Officiating Chief Justice in the judgment just pronounced.
M.C.P.

Reference answered.

LOWER BURMA CHIEF COURT.
SECOND CIVIL APPEAL No. 105 of 1918.
January 9, 1919.

Present:—Mr. Justice Ormond.

MA SA AND ANOTHER—DEFENDANTS—
APPELLANTS

versus

SAN TUN U—PLAINTIFF—RESPONDENT.

Buddhist Law, Burmese—Marriage of virgin below twenty years of age—Consent of parents, whether necessary.

Under Burmese Buddhist Law a virgin under twenty years of age must have the consent of her parents to her marriage. If such consent is not obtained, the marriage is not a good marriage.

Where, however, a minor is steadfastly determined to marry her lover and continues of the same mind, such consent is not necessary.

Mr. J. A. Maung Gyi, for the Appellants.

JUDGMENT.—The plaintiff sued Ma Sa, a girl of eighteen years of age, for restitution of conjugal rights, and he joined her paternal aunt Ma Nyo as second defendant because she enticed away Ma Sa on the day after her marriage back to her mother's house. There was no necessity to make Ma Nyo a party. Ma Sa lived with her mother,

and Ma Nyo in Ma Nyo's father's house. Ma Nyo looked after the girl, but she was not her adoptive mother. Ma Sa's mother denies that she ever consented to the marriage. Ma Sa denies the marriage, and says she never consented to be plaintiff's wife. The plaintiff obtained a decree, and the defendants appeal. The plaintiff-respondent, though served, does not appear in this appeal.

The plaintiff's case is that Ma Sa's grandfather and maternal aunt Ma U Gale agreed to the marriage, which was performed in Ma U Gale's house, and that Ma Sa's mother was present; that they slept the night at Ma U Gale's house and that the next day Ma Sa was induced to return to her grandfather's house by Ma Nyo. Both Courts have found as a fact that there was a marriage. The Township Court has found that the mother was present at the marriage. The District Judge is silent as to that.

Under the *Dhammathats* a virgin under twenty years of age must have the consent of her parents to her marriage. See *Queen-Empress v. Aga Ne U* (1), the *Rajabala* quoted in section 33 of the Digest and *Manugye*, Book VI, section 28. In the Full Bench case of *Orown v. Chan Mya* (2) it was held by two Judges out of three that if the girl (a minor aged fourteen) "is steadfastly determined to marry her lover, and continues of the same mind," the consent of the guardian is not necessary. In the present case it is clear that the girl was not "steadfastly determined to marry her lover," and if the mother's consent was not obtained—her father is dead—I do not think the marriage was a good marriage, even if a marriage ceremony had in fact been performed.

The case is remanded to the District Court for a finding as to whether Ma Sa's mother consented to the marriage or not.

Case remanded.

(1) S. J. 202.

(2) 1 L. B. R. 27 at p 27 (F. B.).

BRUSHAN v. DEO NARAIN.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEALS NOS. 388 AND 389 OF 1917.

JUNE 5, 1919.

Present:—Pandit Kanhaiya Lal, J. C.

BHUSHAN—DEFENDANT—APPELLANT
versus

DEO NARAIN, DEAD, AND ON HIS DEATH

Musammât GANGA DEI AND OTHERS—

PLAINTIFFS, Fahu TEJ PARTAB

BAHADUR SINGH—DEFENDANT

—RESPONDENTS.

Oudh Sub-Settlement Act (XXVI of 1866)—Subordinate proprietors in Oudh, position and rights of—Family arrangement, what is—Test to be applied—Reversioners, right of, to challenge alienation.

The Oudh Sub-Settlement Act of 1866, which was enacted for the purpose of securing a better determination of certain claims by subordinate proprietors in Oudh, emphasised that the rights of subordinate proprietors which were to be enforced were those which they held on or before the 13th February 1856 and that the settlement was not intended to enlarge the rights which the holders of subordinate tenures possessed. [p 82, col. 2; p. 84, col. 1.]

The true test to be applied to a transaction, challenged by the reversioners as an alienation not binding upon them, but which is alleged to be a family settlement, is whether the alienee derives title from the holder of the limited interest or life-tenant. There may be a family arrangement between heirs or possible claimants by inheritance, but there can be no family arrangement as between legatees or alienees to which the reversionary heirs are not parties. [p. 84, col. 1.]

Appeals against the decree of the District Judge, Fyzabad, dated the 11th June 1917, confirming that of the Additional Sub-Judge, Fyzabad, dated the 15th January 1917.

Mr. S. N. Roy, for the Appellant.

Mr. M. Wasim, for Respondents Nos. 2 to 5.

Mr. H. N. Misra, for Respondents Nos. 4 and 5.

JUDGMENT.—In the suit which has given rise to these appeals the plaintiffs claimed a two-thirds share in certain under-proprietary land, which belonged to Jaduram Pande who founded a Purwa or hamlet which was called by his name. The said land was situated in that hamlet. Jaduram Pande died before the annexation of Oudh, leaving a widow, Musammât Nidha, and three daughters, Musammât Maina, Musammât Mulhar and Musammât Ganesha. Musammât Nidha was in possession of the said land at the time of the confiscation of Oudh.

On the 25th October 1864 she obtained a decree from the Settlement Court against the then superior proprietor and her name was entered in pursuance of that decree as an under-proprietor. Musammât Maina, one of her daughters, died in her lifetime.

On the 21st June 1875 Musammât Nidha executed a Will, by which she devised the said land to Jageshar, the eldest son of Musammât Maina, to her two daughters, Musammât Mulhar and Musammât Ganesha, and to a paternal relation of her husband, named Bindha, in equal shares. The total area of the land covered by the bequest was 156 *bighas*, 6 *biswas*. On the 15th July 1884 she executed a codicil and made a re-distribution of the land, giving 54 *bighas*, 1 *biswa*, 10 *biswansis* to Jageshar and 34 *bighas*, 1 *biswa*, 10 *biswansis* to each of the other three. She died on the 2nd March 1890.

By virtue of a private arrangement between the legatees, Jageshar agreed to obtain mutation of names in his favour in respect of 6 *bighas* less than what was awarded to him by the codicil and gave those 6 *bighas* to Musammât Mulhar, Musammât Ganesha and Bindha in equal shares.

In 1884 Musammât Mulhar got her share mutated in favour of Bhushan and Mata Badal, the relations of her husband, as she was herself childless. In 1901 Jageshar, Gayadin and Lachmi Narain filed a suit against Bhushan and Mata Badal for a declaration that Musammât Mulhar had no right to give away her share to any person so as to prejudice the rights of the reversionary heirs of her father. That suit was dismissed on the ground that it was barred by time.

On the 15th February 1905, Musammât Ganesha died, leaving a son, Gayadin. She had two other sons, Lachmi Narain and Badal, who had died in her lifetime without leaving any issue. The property standing in the name of Musammât Ganesha was on her death entered in the name of Gayadin.

Musammât Mulhar died on the 13th January 1906. On her death a right of action accrued to Jageshar and Narpat, the sons of Musammât Maina, and Gayadin, the son of Musammât Ganesha, to claim the property belonging to their maternal grandfather, Jaduram Pande. Narpat died on the 11th January 1914, leaving a son, Deo Narain. Gayadin and Deo Narain and their transferees

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have filed the present suit for possession of such portion of the property of Jaduram Pande as appertains to their two-thirds share, leaving out of account the area which is already in the possession of Gayadin by inheritance from *Musammât Ganesha*. Jageshar did not join in the suit.

The Courts below have decreed the claim. Their finding is that *Musammât Nidha* had only a life-interest in the property inherited by her from her husband, that the bequest made by her became inoperative after her death and that the plaintiffs became entitled to the property claimed by them on the death of *Musammât Mulhar*, the last surviving daughter of Jaduram Pande. The suit was brought within twelve years from the date of her death and was, therefore, held to be within time.

On behalf of the defendants-appellants it is contended that *Musammât Nidha* became the owner of an absolute interest in the under-proprietary right by virtue of the decree which she obtained from the Settlement Court and that at all events the plaintiffs were bound by the arrangement into which *Musammât Mulhar* and *Musammât Ganesha* had entered, when they on the death of *Musammât Nidha* got mutation of names effected in favour of themselves and the two other legatees, Jageshar and Bindha, in certain proportions.

The effect of the settlement decree was, however, not to give *Musammât Nidha* greater rights than she possessed at the time of the confiscation. In *Jehan Kadar v. Afsar Bahu Begam* (1) their Lordships of the Privy Council pointed out that the aim of the Government in making an enquiry into previous titles at the time of the settlement was to avoid making any arbitrary, or wholly new, re-distribution of property. In the letter of the 10th October 1859, the Government of India accordingly said that as regards Zemindars and others, not being Taluqdars, an opportunity must be allowed at the next settlement to all disappointed claimants to bring forward their claims and all such claims must be heard and disposed of in the usual manner. The confiscation had the effect of annulling the proprietary rights of every kind in the soil, inferior as

well as superior, but as the Government of India pointed out in their letter of the 12th September 1860, the policy of the Government was "to leave the confiscation of 1858 in force only in the cases of persons who persisted in rebellion, and generally so far as to restore in its integrity the ancient Talukdari tenure, wherever it had existed at the time of the first occupation of Oudh in 1856, but had been set aside by the Revenue Officers." "But the Governor-General in Council", the letter went on to say, "never intended that in Taluqdari estates confiscated under the general order and conferred in consequence of the persisted rebellion of the Taluqdar on a new grantee, all the holders of the subordinate rights, though themselves not persisting in rebellion and though pardoned by the Queen, should be merged in the consequences of the Taluqdar's guilt and become partakers of his punishment." The Government of India added: "It was the intention of Government that all such subordinate holders, unless specially deserving of punishment for persistent rebellion, should be restored to the rights they possessed before the rebellion, whether the parent estates were ancestral, acquired or conferred, and that every such holder shall be maintained in his rights under the new grantee precisely as if the Taluqa had not been confiscated or as if having been confiscated, it had been settled with the hereditary Taluqdar." (Syke's Taluqdari Law, page 116).

In the Records of Rights Circular, issued on the 8th January 1861, it was stated that the rule on which we must take our stand for determining the amount payable to the Taluqdar by the under-proprietors of persons holding intermediate interests between him and the *ryot* was to maintain the rights they were found possessed of in 1855 or just before the annexation of the Province and no others. It is true that those instructions were issued for the purpose of determining the rights existing or enforceable as between the Taluqdars and the subordinate proprietors, but it is significant that the rights which the subordinate proprietors were allowed to enforce were rights of which they were possessed before. The Oudh Sub-Settlement Act (XXVI of 1866), which was enacted for the purpose of securing a better determination of certain

(1) 12 C. 1 (P. C.); 12 I. A. 124; 4 Sar. P. O. J. 630; 9 Ind. Jur. 322; Rafique & Jackson's P. O. No. 91.

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claims by subordinate proprietors in Oudh, similarly emphasized that the rights of subordinate proprietors, which were to be enforced, were those which they held on or before the 13th February 1856. The settlement was not intended to enlarge the rights which the holders of subordinate tenures possessed. The decrees of the Settlement Courts settled the rights of the claimants as against the superior proprietor but left the rights of other persons as against the former unaffected. The instructions issued to Settlement Officers also declared that the decrees would in no way affect the rights of the persons claiming to share in the rights and interests of the decree holders.

At the time when *Musammāt Nidha* obtained the decree, she had three daughters in existence, whose rights the decree she obtained against the superior proprietor could not have prejudicially affected. The decree operated as a restoration of such rights as she held before, and as observed in *Ganesha v. Nageshar Bakhsh Singh* (2), the right of the reversionary heirs of her husband remained intact. *Musammāt Nidha* had, therefore, no more than a life-interest in the property covered by the decree and she had no right to bequeath the same so as to prejudice the rights of the reversionary heirs of her husband. The re-distribution made by the legatees of the property bequeathed to them by *Musammāt Nidha* did not operate as a family arrangement, binding on the reversionary heirs, because though after the death of *Musammāt Nidha* her daughters represented the estate, they had applied in the capacity of legatees and none but the legatees had consented thereto. As explained in *Kunahaya Lal v. Bohra Kishori Lal* (3), the true test to be applied to a transaction, which is challenged by the reversioners as an alienation not binding upon them, is whether the alienee derives title from the holder of the limited interest or life-tenant. There may be a family arrangement between heirs or possible claimants by inheritance; but there can be no family arrangement as between legatees or alienees to which the reversionary heirs are not parties.

It is further contended that Gayadin had

(2) 34 Ind. Cas. 257; 19 O. C. 1; 3 O. L. J. 144.

(3) 35 Ind. Cas. 683; 14 A. L. J. 881 at p. 889; 18 A. 679.

acquiesced in the arrangement by obtaining mutation of the property entered in the name of *Musammāt Ganesha* in his own favour on her death, but his acceptance of that property does not imply that he had surrendered his right to the remainder. No other pleas have been pressed.

The appeals are, therefore, dismissed with costs.

Appeals dismissed.

LOWER BURMA CHIEF COURT. FULL BENCH.

CIVIL REFERENCE No. 4 OF 1919.

April 11, 1919.

Present:—Sir Daniel Twomey, Kt., Chief Judge, Mr. Justice Ormond, Mr. Justice Maung Kin and Mr. Justice Pratt.
MAUNG KYI—APPELLANT

versus

MA MA GALE AND ANOTHER—RESPONDENTS.
Evidence Act (I of 1872), s. 91—Promissory note, suit on—Failure to prove pro-note—Original contract, whether can be relied upon.

By the Full Bench (Pratt, J. dissenting).—Where money is lent and at the same time a promissory note is given for the loan, the creditor can sue for the money due as on the original contract of loan, if the pro-note cannot be proved. [p. 92, cols. 1 & 2.]

Per Pratt, J.—Where the promissory note has been given at the same time the loan was taken, the creditor cannot sue for the money due as on the original contract of loan if the promissory note cannot be proved, unless he is in a position to prove that the loan and the giving of the note are separate transactions and that the note is not a reduction to writing of the loan transaction. [p. 94, col. 2.]

Mr. Doctor, for the Appellant.

Mesrs. Villa and Ohari, for the Respondents.

ORDER OF REFERENCE.

MAUNG KIN, J.—According to the plaint the first and second defendants went to the plaintiff in December 1916 and told him that they wanted to trade in paddy with money taken from him that season. Subsequently the third defendant offered to stand surety for advances to be made to the first and second defendants by the plaintiff. In accordance with this agreement the first defendant took Rs. 1,200 from the plaintiff and signed a promissory note for that sum on the 23rd of January 1917. Again on the 18th Feb.

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ruary she took Rs. 2,400 and signed another promissory note for that sum. The plaintiff asks for a decree against all three defendants on the two promissory notes.

It has been admitted, and there is no doubt that execution of the notes has not been proved. The defense, therefore, claims that the suit must fail. The trial Court passed a decree for the sum sued for with costs against the first and second defendants, holding that the first defendant alone took the money from the plaintiff and not together with the second defendant, that the third defendant stood surety for the first defendant, and that the promissory notes were only evidence of the original contract of loan. The Divisional Court on appeal made the following observation on the last finding:—

"After reading *Nga Waik v. Nga Ohet* (1), I think this is so. It is quite true that the promissory notes did not express the whole contract which was for the supply of paddy to plaintiff in return for money advanced by him, but then no money was advanced till the promissory notes were executed. As far as I can see, there was no contract till they were executed. The cause of action was not completed before the promissory notes were executed, to adopt the distinction made in the quotation from Sir R. Garth made in the judgment cited."

The Court then proceeded to dismiss the suit. It seems clear that though there was a talk about advances to be made by the plaintiff to the first and second defendants in December 1916, it did not materialise until the 23rd of January and that, therefore, the taking of the money and the signing of the promissory note on the 23rd January must be taken to be one transaction, likewise the taking of the other money and the execution of the other promissory note of the 18th February. The legal question for determination then is, whether the plaintiff, having failed to prove the promissory notes, would be at liberty to sue for the amounts borrowed on the original contracts of loan.

The leading case on the subject is *Shah Akbar v. Sheikh Khan* (2) and the law on the subject was stated by Garth, C. J., as follows:—"When a cause of action for money

is once complete in itself, whether for goods sold, or for money lent, or for any other claim, and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may, always as a rule, sue for the original consideration, provided that he has not endorsed or lost or parted with the bill or note, under such circumstances as to make the debtor liable upon it to some third person. In such cases the bill or note is said to be taken by the creditor on account of the debt, and if it is not paid at maturity, the creditor may disregard the bill or note and sue for the original consideration..... But when the original cause of action is the bill or note itself, and does not exist independently of it, as for instance, when on consideration of A depositing money with B B contracts by a promissory note to re-pay it with interest at six months date, here there is no cause of action for money lent or otherwise than upon the note itself, because the deposit is made upon the terms contained in the note, and no other. In such a case the note is the only contract between the parties, and if for want of a proper stamp or some other reason the note is not admissible in evidence the creditor must lose his money."

The facts in that case as stated by Garth, C. J., were these:—"The plaintiff had a claim against the defendants for the value of a share in a partnership business and it was verbally agreed between them that, in settlement of that claim Rs. 250 should be taken as the value of the share, which sum was to be paid by the defendants to the plaintiff. The defendants did in fact give the plaintiff Rs. 25 in part payment of that sum, but they were unable at that time to pay the rest... Then came the giving of the note which the lower Court treats, and we think properly treats, as a sort of loan transaction. The plaintiff gave the defendants a receipt for the remaining Rs. 225 in return for which the defendants gave the plaintiff this promissory note." The learned Chief Justice then goes on to say:—"It was, therefore, a loan of the Rs. 225 to the defendants upon the terms contained in the promissory note, and as there was no loan independently of the note, the note itself was the best

(1) U. B. R. (1907-1909), Evidence, 5.

(2) 7 C. 256; 8 C. L. R. 528.

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evidence of the transaction, and as it could not be proved for want of a proper stamp the plaintiff could not recover upon it. The learned Chief Justice then considered the question whether the plaintiff could recover the Rs. 225 as upon the account stated. He held that the plaintiff could not for two reasons, namely, (1) he had given the defendants a receipt for that sum allowing them to retain it upon the terms of the note; and he had thus converted his original claim upon the account stated into a claim upon the promissory note; (2) his claim upon the account stated, if he had any, was barred by limitation.

So far as I can understand what happened in that case was, that there was first of all a settlement of accounts between the parties when the sum of Rs. 250 was found due by the defendant to the plaintiff. The defendant was unable to pay the whole amount thus found due and only paid Rs. 25 towards the debt. The plaintiff then gave a receipt for the sum of Rs. 225, which meant that the amount found due was thereby discharged. The promissory note was then signed by the defendant in favour of the plaintiff for the sum of Rs. 225. The promissory note could not be proved and it was contended that the plaintiff could sue either on the settlement of the accounts or on the contract of loan which must have preceded the execution of the promissory note.

The learned Chief Justice held that the plaintiff could not sue on the settlement of the accounts, because what was found due in consequence thereof had been discharged by the plaintiff's receipt to the defendant and that the loan of Rs. 225 to the defendant was upon the terms contained in the promissory note and as there was no loan independently of the note, the note itself was the best evidence of the transaction, and as it could not be proved for want of a proper stamp, the plaintiff could not recover upon it.

In *Pramatha Nath Sandal v. Dwarka Nath Dey* (3), *Sheik Akbar's case* (2) was considered by Petheram, C. J., and Rampini, J. The suit in that case was on a promissory note bearing a stamp of one anna. The defendant admitted the loan but pleaded pay-

ment. The trial Judge held that the promissory note should have been stamped with a two anna stamp and refused to admit it in evidence. He also held that the plaintiff had no cause of action independently of the document and dismissed the suit. The High Court held that the plaintiff had a cause of action independently of the document and also that an implied contract to re pay the money lent always arises from the fact that money is lent, even though no express promise, either written or verbal, is made to re pay it. *Sheik Akbar's case* (2) was relied on by the defendant. Petheram, C. J., quoted the second paragraph of the passage in which Garth, C. J., laid down the law on the subject and observed as follows:—"These words, taken alone, may seem to indicate that when a bill or note is taken for a debt the action must be brought upon the bill or note; and that if for any reason the document is excluded, the action must fail; but a reference to the earlier portion of the judgment shows that such was not the meaning of the Chief Justice, and that when he spoke of a deposit he did not mean a loan, as he then says where money is lent and a bill or note given for the loan which is not paid at maturity, the creditor may disregard the note and sue on the original consideration."

In *Krishnaji Narayan Parkhi v. Rajmal Manikchand Marwadi* (4), *Sheikh Akbar's case* (2) was considered by Jenkins, C. J., and Candy, J. They followed Petheram, C. J., as to the interpretation of the law laid down by Garth, C. J., Before Jenkins, C. J., and Candy, J., it was contended that section 91 of the Evidence Act excludes a suit on the original consideration where the promissory note is inadmissible in evidence. Jenkins, C. J., observed on this point:—"In my opinion such a contention is not well founded. It is perfectly true that the terms of the contract contained in the Hundi can, apart from the conditions which permit secondary evidence, only be proved by the Hundi but this does not prevent proof of the loan independently of the note." Candy, J., however, cited *Hira Lal v. Datadin* (5), in which the case came before the High Court with special reference to the provisions

(3) 23 C. 851.

(4) 24 B. 360; 2 B. L. R. 25.

(5) 4 A. 135; A. W. N. (1881) 144.

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of section 91 of the Evidence Act and quoted the following observations of Straight, J., with approval:—"The existence of the promissory note does not debar the plaintiff from resorting to his original consideration."

In *Parsotam Narain v. Taley Singh* (6) it was held by Aikman, J., that when money is lent on terms contained in a promissory note given at the time of the loan, the lender suing to recover the money so lent must prove those terms by the promissory note, and that if for any reason such as the absence of a proper stamp, the promissory note is not admissible in evidence, the plaintiff is not entitled to set up a case independent of the note. The learned Judge disagreed with the interpretation of *Sheikh Akbar's case* (2) as made by Petheram, C. J., in *Pramatha Nath Sandal's case* (3), and after discussing Garth, C. J., and Petheram, C. J.'s judgments finally came to the following conclusion:—"Garth, C. J., did not mean that when money is lent upon a promissory note it is open to the creditor to disregard the note and sue for the loan. What he meant was that when a loan has been made, and the debtor subsequently gives a note, the creditor may disregard the note. And the learned Judge proceeded to observe:—"Had the learned Judges who decided the case in *Pramatha Nath Sandal v. Dwarka Nath Dey* (3) considered Sir Richard Garth's judgment carefully, they would have seen that Sir Richard Garth did not mean to exclude loans from the second category of cases, for when he comes to apply the principles he had laid down to the case before him, he says:—"It was, therefore, a loan of Rs. 225 to the defendants upon the terms contained in the promissory note and as there was no loan independently of the note, the note itself was the best evidence for the transaction, and as it could not be proved for want of a proper stamp, the plaintiff could not recover upon it." In support of his view Aikman, J., quotes Garth, C. J., in a subsequent case similar to *Sheikh Akbar's case* (2), namely, *Radhakant Shaha v. Abhoychurn Mitter* (7), where Garth, C. J., had said: "The second point taken by the appellants was that, even although

the instrument itself was not admissible in evidence, the plaintiffs were entitled to recover upon proving the consideration for the bill. Of course, if the consideration for the bill had been an independent cause of action, complete in itself before the bill was given, the plaintiff's argument would have been well founded. But here it is stated in the plaint, and it is evidently the fact, that the Rs. 500, which was the consideration of the bill, was advanced by the plaintiffs to the defendants upon this particular bill, and as the bill itself is the best evidence of the terms upon which the advance was made, the plaintiffs could not establish their case without proving the bill. The law upon this subject was fully explained by this Court in the case of *Sheikh Akbar v. Sheikh Khan* (2)."

Aikman, J., also pointed out that the case of *Hira Lal v. Datadin* (5) was a case in which the plaintiff advanced money to the defendant on a deposit of jewels, and the defendant subsequently gave the plaintiff a promissory note for a balance due on the advance, which note being insufficiently stamped was inadmissible in evidence. Aikman, J., then proceeded to hold as follows:—"When a plaintiff lends money on terms contained in a promissory note given at the time of the loan, he must prove those terms by the promissory note. It appears to me that the decisions which have held otherwise ignore the provisions of sections 91, 65 and 22 of the Evidence Act; and I do not think that it can be denied that these decisions condone and encourage evasion of the Stamp Act."

In *Banarsi Prasad v. Fazal Ahmed* (8), Stanley, C. J., and Knox, J., held that where a plaintiff sued for the recovery of a loan secured by a promissory note and it was found that the promissory note was inadmissible in evidence as it had been cancelled, evidence of the debt is admissible *aliunde*. The learned Judges quoted the first set of words of Garth, C. J., in *Sheikh Akbar's case* (2) and said the law was clear.

In *Ram Sarup v. Jasoda Kunwar* (9) it was held that if a creditor has a cause of action for the recovery of money for which his debtor has executed a promissory note,

(6) 26 A. 178; A. W. N. (1903) 217.

(7) 8 O. 721; 11 O. L. R. 310.

(8) 28 A. 293; 3 A. L. J. 25; A. W. N. (1906) 9.

(9) 13 Ind. Cas. 138; 34 A. 158; 9 A. L. J. 72.

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separate from and independent of the note, he can recover upon such cause, in case the note for any reason cannot be put in evidence. Nor is the creditor necessarily debarred from suing on the original cause of action by the fact that it arose out of the same transaction in the course of which the promissory note was executed. The learned Judges (Richards, C. J., and Banerji, J.) overruled Aikman, J., and quoted with approval the remarks of Petheram, C. J., in *Pramatha Nath Sandal's case* (3).

In recent times the Madras authorities have been all one way.

In *Pothi Reddi v. Velayudasivan* (10) there was a contract to re-pay a loan of money with interest and the money was paid. A promissory note specifying these terms was executed later in the day by the defendant and given to the plaintiff. The promissory note was not stamped. The plaintiff brought a suit to recover the unpaid balance of the loan on the oral contract to pay. Collins, C. J., and Parker, J., held that the plaintiff could not succeed. *Sheikh Akbar's case* (2) was cited in support of the plaintiff's case. The learned Judges observed: "We do not understand the learned Judges to have ruled that in all cases where the original cause of action is the bill or note itself it is open to the plaintiff—if the note be lost or not receivable in evidence—to frame his suit as one for money lent independently of the note. We cannot assent to such a doctrine, and to do so would entirely nullify the provisions of section 91 of the Evidence Act."

In *Chinnappa Pillai v. Muthuraman Chettiar* (11) it was held, following *Pothi Reddi's case* (10), that where the loan and the execution of the promissory note were contemporaneous and constituted one transaction, a suit based on the original consideration is not maintainable. In *Muthu Sastrial v. Visvanadha Pandara Sannadhi* (12) the case was one where the loan and the promissory note were parts of the same transaction. Sadasiva Aiyar and Spencer, J.J., held that the lender could not sue

on the original consideration for want of a proper stamp. Sadasiva Aiyar, J., remarked as follows:—"As regards the contention that, apart from the promissory note, there was an independent obligation implied from the receipt of the plaintiff's money by defendant and that that obligation could be established by proof of that fact, I think we are bound by the decisions in *Pothi Reddi v. Velayudasivan* (10) and *Somasundaram v. Krishnamurthi* (13). It is contended that *Pothi Reddi v. Velayudasivan* (10) is not good law, as the learned Judges misunderstood any observation of Garth, C. J., in the case of *Sheikh Akbar v. Sheikh Khan* (2) on which they relied in support of their position. I am not satisfied that the learned Judges did so misunderstand *Sheikh Akbar v. Sheikh Khan* (2). Even if they misunderstood *Sheikh Akbar v. Sheikh Khan* (2), they give independent reasons as follows:—"It is a necessary condition of every written contract that the terms should be orally settled before they are reduced to writing and to hold, when such a contract has been reduced to writing, that a plaintiff can take advantage of the absence of a stamp on the promissory note to sue at once for the return of money which he may have contracted to lend for a fixed period, would entirely defeat the provisions of section 91 of the Evidence Act."...To import the doctrines laid down in English cases about vague obligations to re-pay arising out of equity and not out of contract, or about obligations which can be enforced if the plaintiff skilfully draws up his plaint as one on account for money had and received concealing the real contract of loan which had been reduced to the form of a document is, it seems to me, merely trying to nullify section 91 of the Indian Evidence Act."

In Upper Burma we have the case of *Nga Waik v. Nga Ohet* (1) cited and relied upon by the learned Divisional Judge. This case superseded two cases, *Maung Hlaw v. Nagassat* (14) and *Ewing v. White* (15), of the same Court. In *Nga Waik's case* (1) Mr. (now Sir George) Shaw reviewed the case law extant up to

(10) 10 M. 94.

(11) 10 Ind. Cas. 669; 9 M. L. T. 281.

(12) 21 Ind. Cas. 864; 26 M. L. J. 19; 38 M. 660; 14 M. L. T. 520; (1914) M. W. N. 85.

(13) 17 M. L. J. 126.

(14) U. B. R. (1897-01) II, 890.

(15) U. B. R. (1897-01) II, 391.

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the 15th of July 1907, when his decision was given. He came to the conclusion that Aikman, J.'s views in *Parsotam Narain v. Taley Singh* (6) were correct and that Petheram, C. J., and Rampini, J., in *Pramatha Nath Sandal's case* (3) were not correct in their interpretation of Garth, C. J.'s judgment in *Sheikh Akbar's case* (2). The same opinion was passed on Jenkins, C. J., and Candy, J.'s views on the subject in *Krishnaji's case* (4). In Lower Burma we have the case of *Bally Singh v. Bhugwan Dass Kalwar* (16) where Twomey, J., followed *Nga Waik's case* (1). In *Nga Waik's case* (1) the execution of the promissory note was, as in the present case, not proved.

Since the decision in *Nga Waik's case* (1) Aikman, J.'s ruling has been overruled in *Ram Sarup's case* (9). It will be seen that Petheram, C. J.'s interpretation of Garth, C. J.'s judgment has been followed in Bombay and we find no contrary decision since then in Bombay and it has been also followed in Allahabad as lately as in 1912. In *Bajinath Das v. Salig Ram* (17) it was held by Karamat Husain and Tudball, JJ., that if money is lent on a document which is inadmissible in evidence, the suit on the document must fail, but the plaintiff would not be debarred from bringing an action for money had and received and such a suit must be treated as a suit for money had and received, if the pleadings are properly framed. The learned Judges observed:—
"None of the cases cited to us expressly lays down that where a pro-note which is inadmissible in evidence is taken in consideration of the money advanced, the plaintiff cannot sue for money had and received by the defendant for the plaintiff's use." Moreover, Jenkins, C. J., held the view that though section 91 of the Evidence Act may exclude proof of the pro-note otherwise than by the document itself or by secondary evidence, when such evidence is admissible, this does not prevent proof of the loan independently of the note. This view seems to have been founded upon the assumption that when there is a loan there is an implied contract to re-pay.

I am inclined to the following views:—
The interpretation by Aikman, J., of Garth, C. J.'s ruling in *Sheikh Akbar's case* (2) is correct, but section 91 of the Evidence Act only prevents proof of the contents of the pro-note otherwise than by the document, or when admissible, by secondary evidence of it, but that section cannot operate as a bar to a suit brought to recover the money lent on the implied contract to re-pay.

These views are in conflict with Twomey, J.'s view in *Bally Singh's case* (16). Since Sir George Shaw's ruling in *Nga Waik's case* (1) Aikman, J.'s ruling has, as I said before, been overruled by a Bench of the Allahabad High Court. Moreover, the point is of great importance and is likely to arise again. I would, therefore, refer to a Bench, full or otherwise, as the learned Chief Judge may determine, the following question:—

"Where money is lent and at the same time a promissory note is given therefor, can the creditor sue for the money due as on the original contract of loan, if the pro note cannot be proved?"

JUDGMENT OF THE FULL BENCH.

TWOMEY, C. J.—The question referred to the Bench is as follows:—"Where money is lent and at the same time a pro-note is given therefor, can the creditor sue for the money due as on the original contract of loan, if the pro-note cannot be proved."

The only decision of the Chief Court dealing with the question is that given in *Bally Singh v. Bhugwan Dass Kalwar* (16), in which the point was not fully argued and the Indian decisions subsequent to the Upper Burma case of *Nga Waik v. Nga Chet* (1) were not brought to the notice of the Court, I, therefore, followed the decision in the Upper Burma case, which fully adopted the reasoning of Sir Richard Garth in the Calcutta High Court ruling *Sheikh Akbar v. Sheikh Khan* (2). Our learned colleague in his order of reference mentions *Sheikh Akbar v. Sheikh Khan* (2) as the leading case on the subject. Although that case has not been expressly overruled, its authority has been impaired by subsequent decisions of the Calcutta High Court. Petheram, C. J. and Rampini, J., in *Pramatha Nath Sandal v. Dwarka Nath*

(16) 23 Ind Cas 975; 7 L. B. R. 101; 7 Bur. L. T. 95.

(17) 16 Ind. Cas. 33.

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Dey (3) held that an implied contract to re-pay always arises from the fact that money is lent, even though an express promise either written or verbal is made to re-pay it. They treated the bill or note given for the money in that case as security for the advance. In *Moti Lal Saha v. Monmohan Gossami* (18) Rampini and Pratt, JJ., allowed the plaintiffs to prove their loan by other evidence, where the promissory notes which they produced in proof of the loans turned out to be forgeries. The Bombay High Court in *Krishnaji Narain Parkhi v. Rajmal Minikchand Marwadi* (4) followed the Calcutta ruling of Petheram, C. J., and Rampini, J., and held that section 91 of the Evidence Act does not bar oral evidence in cases of this kind. In the Allahabad High Court, Sir Richard Garth's ruling in *Sheikh Akbar's case* (2) was strictly applied by Aikman, J., in *Parsotam Narain v. Taley Singh* (6). The learned Judge held that when a plaintiff lends money on terms contained in a promissory note given at the time of the loan, he must prove those terms by the promissory note, and that the decisions which have held otherwise ignore the provisions of sections 91, 65 and 22 of the Evidence Act. But the decision of Aikman, J., was definitely overruled by a later Bench decision of the Court. See *Ram Sarup v. Jasodha Kunwar* (9). It now appears to be settled law in Calcutta, Allahabad and Bombay that a creditor who has lent money and taken a promissory note from the borrower may sue for the amount of his debt if for any reason the promissory note cannot be put in evidence. The Madras High Court for a long time consistently followed the ruling of Sir Richard Garth in *Sheikh Akbar's case* (2). But the remarks of the learned Judges in *Chokalingam Chetty v. Annamalai Chetty* (19) show a distinct re-approachment to the views of the other High Courts. See also *Jambu Ohetty v. Palaniappa Ohettiar* (20), in which it was held, following the English Law on the subject, that it is a question of fact with regard to promissory notes or bills or Hundis whether the parties intended them to operate as absolute or conditional payment,

and the presumption is that the effect of giving and taking a note or bill is that the debt is conditionally paid, the onus being on the party affirming the contrary to show that absolute discharge was intended by the parties.

It appears, therefore, that the weight of authority is in favour of an affirmative answer to the question referred.

Section 91 of the Evidence Act prevents the contract embodied in the promissory note from being proved except by the note itself; but it is going much further to hold that the lender cannot recover on the original consideration if the promissory note is excluded. He would have a good cause of action if no promissory note had been executed, and we have to consider carefully whether he loses this cause of action altogether if he is so unfortunate as to have taken a promissory note which turns out to be a nullity. Section 91 offers no obstacle if it is held that there is in all cases of money lent a cause of action apart from the promissory note. On this point the learned Judges (Collins, C. J., and Parker, J.) in the Madras High Court in *Pothi Reddi v. Velayudasican* (10) remarked as follows: "it is a necessary condition to every written contract that the terms should be orally settled before they are reduced to writing, and to hold, when such a contract has been reduced to writing, that a plaintiff can take advantage of the absence of a stamp on the promissory note to sue at once for the return of money which he may have contracted to lend for a fixed period, would entirely defeat the provisions of section 91 of the Evidence Act." But is the defendant entitled to take advantage of the absence of a stamp so as to evade his liability altogether? It is true, as the learned Judges pointed out in the above case, that the reduction of a contract to writing is necessarily preceded by an oral settlement of the terms. But in the case of a loan for which a promissory note is executed, there is something more than a preliminary settlement of terms. One part of the contract is actually executed by payment of the money and the promissory note can be regarded merely as security for re-payment or as providing for the mode of re-payment. The whole question

(18) 5 C. W. N. 56.

(19) 34 Ind. Cas. 417.

(20) 26 M. 526; 13 M. L. J. 252.

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before us terms on whether a separate independent cause of action can be implied from the payment and acceptance of the money and whether this implied cause of action revives if the promissory note is excluded. In *Sheikh Akbar's case* (2) it was admitted that there may be a complete separate cause of action before the bill or note is given, but Sir Richard Garth mentions another class of cases as furnishing no cause of action independently of the bill or note, i.e., "where the original cause of action is the bill or note itself." If *B* gives *A* a promissory note on the spot for the amount lent, *A*, according to *Sheikh Akbar's case* (2), can sue only on the promissory note. But if the case be that *A*, having lent money to *B*, induces *B* at some later time (it may be only an hour later) to give him a promissory note by way of collateral security, then *A* can either sue on the promissory note, or if the promissory note be for any reason inadmissible in evidence, he can sue on the original consideration. In the one case the promissory note is regarded as a mere reduction to writing of the loan transaction: in the other case it is regarded as being itself a definite transaction furnishing a separate cause of action. And according to *Sheikh Akbar's case* (2) it is only in the second case that the plaintiff can resort to the original consideration if the promissory note has to be excluded. But the defect in a promissory note which excludes it from evidence may be regarded as constituting a failure of consideration which furnishes a good ground of action in a suit for the recovery of the money actually paid over. It is settled law that if *A*, having lent money to *B*, agrees to take instead of immediate payment a negotiable instrument for the amount lent and the negotiable instrument is afterwards at maturity dishonoured, then *A's* original rights are revived, that is to say, he can sue *B* for his money. The reason is that the giving of the negotiable instrument was only a conditional satisfaction of the debt, and as the condition is not fulfilled, the consideration for *A's* loan to *B* has failed. The debt which was conditionally paid is treated as subsisting throughout. So when a promissory note is given for a debt, whether earlier or

contemporaneous, the promissory note is presumably given by way of conditional payment, and if for any reason the promissory note should afterwards turn out to be inadmissible in evidence, the condition has failed and the lender should be allowed to recover on his original rights.

In *Sheikh Akbar's case* (2) it is said that "Where the cause of suit is inseparable from the giving of the bill or note, it is obvious that the onus of proving the lost instrument must fall upon the plaintiff, and that he cannot make out a *prima facie* case without proving it." This is said to be a very material and practical distinction between the two classes of cases referred to in Sir Richard Garth's judgment. But it does not seem to follow necessarily that the cause of suit is inseparable from the giving of the note merely because the payment of the money and the giving of the note form one transaction. The promissory note may be, and I think usually is, given as security for the advance, and there seems to be no reason why the plaintiff should not be allowed to sue for his money in such a case without proving the promissory note. It would be for the defendant (as in the other class of cases) to say:—"Yes, but I gave you a promissory note for the amount of loan;" the onus would be on the defendant to prove the note and his defence would fail if for any reason he could not do so.

His defence would fail equally if it appeared that the note was not a valid note, for there is always an implied condition that a note signed by a debtor and given to his creditor in satisfaction of the debt is a valid note. The general effect of taking a bill or note as conditional payment is to suspend the right of action on the original debt during the currency of the instrument. But where the instrument is void or of no effect on account of want of stamp or forgery, the creditor is entitled to sue at once on the original debt. (*Vide* English cases cited in Chitty on Contracts, 16th Edition page 805.)

It should be noted that in the suit out of which the present reference arose, the existence of promissory notes for the debt was not set up by the defendant as a bar to the plaintiff's claim. Two sums

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of money aggregating Rs. 3,600 were admittedly advanced by the plaintiff to the first defendant for the purchase of paddy. It was the plaintiff's case that promissory notes were executed by the defendant at the time when the advances were made. Execution was denied and the Courts found that execution was not proved. The defendant admitted receiving the money but pleaded that she had supplied paddy in full satisfaction. The case, therefore, stood as if no promissory notes were in question; and in these circumstances I think it is clear that the plaintiff is not debarred from suing for the balance which he alleges to be still due of the money advanced by him, basing his claim on the implied promise to re-pay. I would answer the reference in the affirmative.

ORMOND, J.—A promissory note constitutes a complete cause of action in itself. Section 91 of the Evidence Act applies where the terms of a contract are reduced to writing. In the case of a loan where the borrower executes a promissory note in favour of the lender, the borrower in effect says: "I will re-pay the amount borrowed and I will give you a promissory note for the same amount"—that is the original contract. There are two distinct promises made by the borrower: (I) that he will pay the amount borrowed to the lender; and (II) that he will pay the amount due on the promissory note to the holder of the note. Each promise constitutes a separate cause of action; and it is only the second promise that is reduced to writing. The first promise remains as a separate and distinct oral promise and section 91 of the Evidence Act, therefore, does not apply to it.

The note is generally given as security for the re payment of the loan and affords the lender an additional and alternative remedy.

It may, however, be taken by the lender in substitution for and in satisfaction of the first promise, as was the case in *Shaik Akbar v. Sheikh Khan* (2). In that case evidence could not be given to prove the promissory note because the note had not been properly stamped. The learned Judges apparently assumed that the plaintiff must nevertheless be deemed to have accepted the note in satisfaction of the debt. In such a case,

however, where the note is executed by the defendant, it is generally presumed (and I think rightly so) that the plaintiff accepts the note in satisfaction of the debt, upon the implied condition that the document given by the defendant is a valid and effective promissory note; and that if the promissory note is ineffective for want of a stamp it does not operate as a payment of the debt. The debt is then not discharged but subsists as a separate cause of action.

In all cases where the defendant repudiates the promissory note, e. g., by denying execution, as is the case here, the plaintiff is at liberty to accept the plea and proceed with his suit upon the assumption that there was no promissory note.

In the present case the note was with the plaintiff and was negotiated; and the defendant, so far from proving that the note was taken in satisfaction of the debt, denied the fact of there being a promissory note at all. I would, therefore, answer the question referred in the affirmative.

MAUNG KIN, J.—I am of the same opinion as my learned colleagues, the Chief Judge and Ormond, J.

PRATT, J. I regret that I am unable to agree with the views expressed by my learned colleagues.

In *S. Muthu Nadar v. S. Armuga Nadar* (21) after studying the Upper Burma case of *Nga Waik v. Nga Ohet* (1) and the rulings referred to therein, I expressed the opinion that *prima facie* section 91 of the Evidence Act would seem to prohibit the oral proof of a loan, when it had been made on a promissory note.

My attention was not then called to *Bally Singh v. Bhugwan Dass Kalwar* (16), or it would have confirmed me still more in my opinion to know that a Judge of this Court had already held that it was not necessary to go further than the law as enunciated in the Upper Burma case referred to.

I am in complete accord with the interpretation put by the learned Judicial Commissioner in *Nga Waik v. Nga Ohet* (1) on Sir R. Garth's exposition of the law in the case of *Sheikh Akbar v. Sheikh Khan* (2). As he says: "There can be no manner of

(21) Special Civil First Appeal No. 77 of 1917.

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doubt that Sir R. Garth distinguished between cases in which a cause of action is complete in itself before the promissory note is given, cases, that is, where, e. g., the loan and the giving of the promissory note are different transactions, and the note is not a reduction to writing of the loan transaction, and cases where the bill or note is given as part of the original transaction, as the written record of that transaction; and that he did not intend to say that in the second of these two classes of cases the creditor may disregard the bill or note and sue on the original transaction."

It is true that there have been further rulings of the Indian Courts on the point since *Nga Wain v. Nga Ohet* (1), but after careful perusal of the leading cases I see no reason to consider the view taken in *Nga Wain's case* (2) unsound.

In *Moti Lal Saha v. Monmohan Gossami* (18) a Bench of the Calcutta High Court held that, when a promissory note was a forgery, plaintiffs could succeed, if they were able to prove the loan by independent evidence. That ruling does not appear to conflict with Sir R. Garth's in *Sheikh Akbar's case* (2) since if the promissory note was a forgery, it could not be said that the contract had been reduced to the form of a document.

I do not agree with the interpretation put upon Sir R. Garth's judgment in *Pramatha Nath Sandal v. Dwarka Nath Dey* (3).

Granting further, as there laid down, that an implied contract to re-pay the money lent always arises from the fact that money is lent, even though no express promise, either oral or verbal, is made to re-pay it, it seems to me that, once a promissory note is taken, the implied promise is merged in the written promise, and section 91 of the Evidence Act applies to exclude proof of the promise except by the written record.

I notice that in this case as well as in the Bombay case of *Krishnaji Narayan Par. khi v. Rajmal Manikchand Marwadi* (4) the fact of the loan was admitted, so that it was not necessary to prove it by independent evidence.

The Bench decision of the Allahabad High Court in *Ram Sarup v. Jasoda Kunwar* (9) to the effect that where a plaintiff is able to prove a loan independently and

without the assistance of the note, he ought to succeed though the taking of the loan and the giving of the note were simultaneous transactions, is not to my mind reconcilable, as it stands, with the provisions of section 91 of the Evidence Act. In the Madras case of *Ohokalingam Ohetty v. Annamalai Chetty* (19) the bearing of section 91 of the Evidence Act upon the question in issue was not discussed at all.

The earlier Madras cases of *Jambu Chetty v. Palaniappa Ohettiar* (20) and *Pothi Reddi v. Velayudisivan* (10) are in favour of the view that oral evidence of a loan cannot be given, when it has been advanced on a promissory note, which is not admissible in evidence, unless the note is not a record of the loan transaction, or in other words unless there is a cause of action separable from the note.

Pothi Reddi v. Velayudasivan (10) was followed in the later Madras case of *Muthu Sastri- al v. Visvanadha Pandara Sannadhi* (12) and I agree with Aiyer, J.'s view that to treat the money paid at the very time of the execution of a promissory note, which is inadmissible in evidence, as giving rise to an independent contractual or other obligation seems inadmissible.

Section 91 of the Evidence Act provides that where the terms of a contract have been reduced to the form of a document, no evidence shall be given in proof of terms of such contract, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible. The section to my mind clearly applies to a promissory note, which is the embodiment in writing of the contract to re-pay a loan.

The terms of the reference are:—"Where money is lent and at the same time a promissory note is given therefor, can the creditor sue for the money due as on the original contract of loan, if the promissory note cannot be proved."

It might be argued with considerable show of reason that, if the promissory note cannot be proved, it cannot well be held to have been given. If no note was given, the creditor could obviously sue on the original loan.

It would certainly be a simple solution of the problem to hold that a note, which could be proved, could be treated as co-existent. A perusal of the order of reference, however, shows that in the present case two notes are in existence, and plaintiff

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relied thereon, but failed to prove their execution. The position, therefore, is that the terms of the contract to re-pay the loan have been reduced to the form of a document in each instance, but the evidence is inadequate to prove the execution of these documents by the debtor. The promissory notes having been given at the time the loans were taken, the presumption to my mind would ordinarily be that there was no cause of action independently of the notes. This, however, would be a matter of evidence in each individual case, and if in any particular instance there was a cause of action on the loan, independently of the promissory note, the plaintiff would be able to sue as on the original contract of loan.

I am not prepared to go so far as to hold that there is in all cases a cause of action independently of the promissory note.

Where a plaintiff has lent money on terms contained in a promissory note, he is bound, I consider, to prove those terms by the promissory note and is not entitled to resort to oral evidence of the loan. The written contract to re-pay is not merely collateral; it is of the very essence of the transaction.

It is certainly an apparent injustice that a creditor, who has obtained a valueless promissory note in exchange for a loan, should be debarred from recovering his debt because of the existence of a note the execution of which he is unable to prove, but that is undoubtedly the effect of section 91 of the Evidence Act as I read it. The law expects men to use ordinary prudence and to exercise reasonable precautions in the conduct of their business transactions. If a creditor takes a document for a debt and fails to ensure that his document is legally admissible in evidence or to produce satisfactory evidence of its execution, he is penalised by not being allowed to prove his debt by oral evidence. It is perhaps hardly necessary to remark that if the creditor has been induced by fraud or misrepresentation to accept a valueless promissory note, he will be at liberty to repudiate the note and sue for the recovery of the money advanced.

In a case like the present, where the contract to re-pay the loan has been reduced to the form of a document at the time of making the advance, I do not consider any real assistance is to be gained by dis-

cussing whether the promissory note is to be treated as conditional payment of the loan or otherwise.

As Aiyar, J., puts it in *Muthu Sastrial* (12) already quoted, "To import the doctrines laid down in English cases about vague obligations to re-pay arising out of equity and not out of contract, or about obligations which can be enforced if the plaintiff skilfully draws up his plaint as one on account for money had and received, concealing the real contract of loan which had been reduced to the form of a document, is, it seems to me, merely trying to nullify section 91 of the Evidence Act."

I cannot see my way to answer the reference in the affirmative without evading what I hold to be the clear intention of section 91 of the Evidence Act.

The crux of the matter is whether the loan transaction is independent of and separate from the giving of the promissory note, and I find considerable difficulty in giving a general answer to the reference as made without regard to the circumstances of the particular case. My answer would be that where the promissory note has been given at the same time the loan was taken, the creditor cannot sue for the money due as on the original contract of loan, if the promissory note cannot be proved, unless he is in a position to prove that the loan and the giving of the note are separate transactions, and that the note is not a reduction to writing of the loan transaction. I would remark that in the suit, of which the present reference is the outcome, defendant admitted receipt of the advances but pleaded re-payment. In view of the admission, therefore, it became unnecessary to prove the loans by separate evidence and I would hold that under the circumstances plaintiff was entitled to recover unless defendant established her plea of re-payment.

Answered affirmatively.

NARAIN PRASAD v. DURGA SINGH.

ODDH JUDICIAL COMMISSIONER'S
COURT.

FIRST CIVIL APPEAL No. 74 OF 1917.

August 12, 1919.

Present:—Mr. Lyle, A. J. C., and

Mr. Ashworth, A. J. C.

NARAIN PRASAD—DEFENDANT No. 2—
APPELLANT

versus

DURGA SINGH—PLAINTIFF,

Thakur AMAR SINGH—DEFENDANT

No. 1—RESPONDENTS.

Debtor and creditor—Debt, failure to demand, for very long period—Presumption—Oudh Laws Act (XVIII of 1876), s. 13—Pre-emption—Price, whether entered in good faith—Fancy price, whether fictitious—Judgment, statement in, that criminal proceedings will be started against witness or party, propriety of.

Where it is found that a money-lender has allowed a debt to remain outstanding for a very long period without obtaining some document or security for it and without at any time demanding payment, the presumption is that the debt has been paid off. [p. 96, col. 2.]

In a suit for pre-emption in order to determine whether the price entered in the sale-deed has been fixed in good faith, the Court is entitled to examine whether there is any very great difference between the price and the market value of the property. If the price entered in the sale-deed greatly exceeds the market value, that fact would be relevant to the issue of good faith but it would be open to the vendee to show special circumstances which induced him to pay a fancy price for the property. [p. 97, col. 2.]

If a Court in the course of its judgment finds that a witness has given false evidence or that a party has rendered himself liable to criminal proceedings, there is no impropriety in stating in the judgment that separate proceedings will be taken against such witness or party. [p. 98, col. 1.]

Appeal from the decree of the First Subordinate Judge, Sitapur, dated the 17th March 1917.

The Hon'ble Syed Waqir Hasan, the Hon'ble Pandit Gokaran Nath Misra, Pandit Jagmohan Nath Ohak and Babu Bhairon Prasad, for the Appellant.

Mr. A. P. Sen and Mir Muzaffar Husain, for Respondent No. 1.

JUDGMENT.—On the 5th May 1915 Thakur Amar Singh, defendant No. 1, executed a sale-deed of certain property for a sum of Rs. 55,000 in favour of Narain Prasad, defendant No. 2. On the same day Thakur Amar Singh executed a deed of mortgage of other property in favour of Narain Prasad for a sum of Rs. 32,000.

The suit out of which this appeal arises was brought by Thakur Durga Singh, a

member of the same family as Amar Singh for pre-emption of the property sold to Narain Prasad. In his plaint he alleged that he had a preferential claim to purchase the property against defendant No. 2 who was a stranger, that the notice required by section 10 of Act XVIII of 1876 had not been issued, that the amount of the consideration stated in the sale-deed was fictitious and that the real sale price was Rs. 32,000.

The purchaser, Narain Prasad, defended the suit on the ground that as it was admitted that over Rs. 62,000 was due to him from the vendor, the plaintiff was not entitled to dispute the correctness of the consideration stated in the sale deed and that the consideration was in fact Rs. 55,000.

The learned Subordinate Judge has held that as both the sale-deed and the mortgage-deed were executed on the same day for the purpose of paying off a number of old debts due from the vendor to the purchaser, the two documents must be considered as portions of a single transaction. He has further found that certain of the items mentioned as consideration for the mortgage had been fraudulently entered for the purpose of swelling the total amount of the debt due to Narain Prasad and thereby enabling a fictitious price to be entered in the sale-deed, that two of the items mentioned in the sale-deed are also fictitious, that the actual price agreed upon between the vendor and the vendee was Rs. 35,000, which was in fact the fair market value of the property. On these findings he has given the plaintiff a decree for pre-emption on payment of Rs. 35,000. Against this decree Narain Prasad has appealed.

The points taken in arguing the appeal are that the lower Court was not right in the present suit in discussing the genuineness of the consideration entered in the mortgage-deed, that in fact the consideration entered in the sale-deed was genuine and that the property which the plaintiff seeks to pre-empt was sold for Rs. 55,000.

The sale deed and the mortgage-deed were executed at the same time after a settlement of accounts between the parties for the purpose of paying off all the debts due to Narain Prasad and there can be no doubt that they formed parts of the same transaction. The argument of the learned

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Counsel for the respondent is that the total sum due from Amar Singh to Narain Prasad was inflated in order that a greater consideration than the sum actually agreed upon might be entered in the sale-deed. As pre-emption could be claimed only in respect of the property transferred by virtue of the sale-deed, the parties would naturally, if they wished to defeat a claim for pre-emption, enter only such items in the sale-deed as they might hope to be able to prove to be genuine and the items by which the total amount due was inflated would naturally find place in the mortgage-deed. In other words, Narain Prasad for the purpose of preventing pre-emption would be prepared to accept by the sale-deed property worth only Rs. 35,000 in complete discharge of debts amounting to Rs. 55,000, if at the time Amar Singh agreed to increase the mortgage-debt by a similar amount. The plaintiff-respondent would be entitled to show that although all the items mentioned in the sale-deed represent actual debts due from the vendor, yet there was an agreement between the vendor and the purchaser by which the latter was compensated for accepting property of admittedly less value in complete discharge of those debts, as such an agreement between the purchaser and the vendor would be the strongest evidence that the price fixed in the sale deed was not fixed in good faith. It would follow, therefore, that in the present instance as the sale-deed and the mortgage-deed are parts of the same transaction, the plaintiff-respondent would be entitled to show that the consideration entered in the mortgage-deed had been inflated by the inclusion of fictitious items, especially when the price stated in the sale-deed is admittedly very much greater than the ordinary market value of the property. As, however, we are of opinion that apart altogether from a consideration of the mortgage-deed two of the items mentioned as consideration in the sale-deed itself are fictitious and that, therefore, that price has not been fixed in good faith, it is unnecessary for us further to discuss whether the consideration of the mortgage-deed has also been inflated. The two items to which we refer are:—first, the item of Rs. 2,515-5-6, which is stated to be com-

posed of the sum of Rs. 700 due on account of the value of the stamp used in the mortgage-deed of the 21st of July 1891 with interest thereon and, secondly, a portion of the item of Rs. 5,716-10, said to be due for increased amount of revenue of village Mankapur from the 21st July 1894 with interest. The learned Subordinate Judge has found both these items fictitious and we have no hesitation in agreeing with him. The learned Advocate for the appellant would urge with regard to the first item that it represents a real debt, as in paragraph 9 of the mortgage-deed of the 21st of July 1891 it is stated that in addition to the amount for which the mortgage was executed, Rs. 700 was further owed to the mortgagee on account of the price of stamp and other registration expenses and that a separate document will be executed for that amount; and he further points out that there is no evidence of the re-payment of this debt. It is admitted that no deed was executed for this debt and it is difficult to believe that had the debt not been paid off, the creditor who is a money-lender would have allowed it to remain outstanding for 24 years without obtaining some document or security for it and without at any time demanding payment. In the case of *Oswald v. Legh* (1) it was held that where a period of twenty years has been allowed to elapse without any demand, that fact of itself gives rise to a presumption that a bond has been paid off. We find that subsequent to 1891 there were many transactions between the parties and that earlier debts were incorporated in subsequent deeds but nowhere is there any mention whatsoever of this debt. There is also no evidence that in the creditor's account books this debt has been carried forward after the year 1903. It is urged on behalf of the appellant that other debts have also not been carried forward in the accounts, but we are unable to say whether this contention is correct or not, as all the account books have not been produced. In the peculiar circumstances of the case it was certainly for the appellant to explain why the item had not been carried forward in his accounts after the year 1903. The

(1) (1798) 99 E. R. 1039; 1 T. R. 270.

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learned Advocate for the appellant also urges that the plaintiff-respondent should have examined Amar Singh as he would have been the best witness to say whether the debt had been paid or not, but the plaintiff-respondent's case was that the vendor and the vendee were acting in collusion to defeat his claim for pre-emption. We think that the plaintiff-respondent was justified in not citing the vendor as one of his witnesses. We find that there had been a previous litigation with regard to a 4-annas share of the same village between the plaintiff on one hand and the vendor and the vendee on the other hand, in which the plaintiff had been successful and had obtained a decree for possession of the 4-annas share with mesne profits thereon, and in that suit he had been opposed by both the vendor and the vendee. He, therefore, had good reason, apart altogether from his collusion with the vendee in the present case, to suppose that the vendor was unlikely to give evidence in his favour and the fact that the debt, even if it had not been re-paid, would have been time-barred over 20 years ago, is also a clear indication that it has not been entered in the sale-deed in good faith.

With regard to a portion of the item of Rs. 5,716-1-0 for the increased revenue of village Mankapur from 21st of July 1894 it is admitted by the learned Advocate for the appellant that this amount is not correct, but it is urged that a *bona fide* mistake was made without any intention to defraud. It is urged that at the time of preparing the account the appellant had not all his account books before him and that a mistake was, therefore, possible. We find ourselves unable in the circumstances to accept this argument. We have pointed out that there had been a previous litigation between the vendee and the plaintiff respondent with regard to a 4 annas share of this village and in that litigation the plaintiff-respondent had been successful. The vendee knew that the plaintiff-respondent was entitled to claim pre-emption and in the circumstances the probabilities are that the vendee would do his utmost to defeat such a claim. In any case one would have expected that in preparing the account of the amount due from the vendor he would have prepared it from his account books. We find

that although enhanced revenue from the year 1894 has been included, no enhancement in fact was made up to the year 1900 and the account books of the appellant show that the revenue of Rs. 335 8-0 entered in the mortgage-deed of 1891 is the exact amount that was paid every year up to 1900. On these considerations we hold that the whole item of Rs. 2,615-5-6 and a considerable portion of the item of Rs. 5,716-1-0 entered in the consideration are fictitious.

In order to determine whether the price entered in the sale-deed has been fixed in good faith, we are entitled to examine whether there is any very great difference between the price and the market value of the property. If the price entered in the sale deed greatly exceeds the market value, that fact would be relevant to the issue of good faith [*Dwarka v. Ludar* (2), *Ram Sarup Sahu v. Karam Ullah Khan* (3)]; but it would, of course, be open to the vendee to show special circumstances which induced him to pay a fancy price for the property. In the present case admittedly the ordinary market value of the property is not more than Rs. 35,000, while the price entered in the sale deed is no less than Rs. 55,000. The reasons alleged by the vendee why he was willing to pay such a very high price are that his old debts were being paid off, that the village borders on one of his own villages, that there is a metalled road through the village and that as there is a Kothi of Raja Swami Dayal Seth at Lalpur near the village, he wanted to build a house for himself close to that Kothi for safety's sake. These reasons do not seem to us to be at all adequate and we do not think it at all likely that the appellant merely on these grounds would have been willing to accept property worth not more than Rs. 35,000 in full discharge of debts amounting to Rs. 55,000.

We, therefore, hold that the price entered in the sale-deed was not fixed between the parties in good faith and it follows, therefore, under section 13 of Act XVIII of 1876 that the market value of the property must be taken as the pre-emption price. The market value is certainly not more than Rs. 35,000, as the annual profits amount only to about 3 per cent.

(2) 4 O. C. 247 at p. 248.

(3) 25 Ind. Cas. 403; 36 A. 1434; 12 A. L. J. 602.

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of this sum and the learned Advocate for the appellant has not attempted to show that the property is worth more than this.

The result is that the appeal fails and is dismissed with costs.

We have been asked by the learned Counsel for the appellant to expunge the note at the end of the lower Court's judgment, in which it is stated that after the decision of the appeal that Court will consider the propriety of issuing notices to Bhola Nath and Partab Narain to show cause why they should not be prosecuted under certain sections of the Indian Penal Code. The learned Subordinate Judge held that the unregistered promissory notes which were mentioned in the mortgage-deed were fictitious and Partab Narain, who was the scribe of the notes, himself gave evidence that they were written on the date of the sale-deed and were antedated. If a Court in the course of its judgment finds that a witness has given false evidence or that a party has rendered himself liable to criminal proceedings, there is no impropriety in stating in the judgment that separate proceedings will be taken against such witness or party. In deciding this appeal we have not discussed the genuineness of the unregistered promissory notes referred to. Without expressing any opinion as to whether a prosecution should be instituted or not, we see no reason for holding that the lower Court was not justified in recording the note and we, therefore, decline to direct that it should be expunged.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 922 of 1917.

August 1, 1919.

Present:—Mr. Justice Shah and

Mr. Justice Hayward.

MAHMADSAHEB APPALAL KAJI

—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA

AND ANOTHER—RESPONDENTS.

Bombay Revenue Jurisdiction Act (X of 1876), s. 4

(k)—Bombay Titles to Rent-free Estates Act (XI of 1852)—Jurisdiction of Civil Courts—Kaji inam—Resumption by Collector—Suit for declaration that order directing resumption is illegal, whether cognisable by Civil Court.

A suit by the holder of a *kaji inam*, based upon a decision of the Assistant Inam Commissioner under the Bombay Titles to Rent-free Estates Act, 1852, for a declaration that an order of the Collector that the plaintiff should pay certain rent in respect of the *inam* lands or that the lands should be forfeited is illegal and *ultra vires*, is cognisable by a Civil Court under section 4 (k) of the Bombay Revenue Jurisdiction Act, and the circumstance that the plaintiff is an alienee from the original grantee does not take the suit out of the provisions of the clause. [p. 99, cols. 1 & 2.]

Appeal from the decision of the District Judge, Belgaum, in Appeal No. 264 of 1916, confirming the decree passed by the Assistant Judge at Belgaum, in Suit No. 4 of 1915.

Mr. A. G. Desai, for the Appellant.

Messrs. G. S. Rao and J. G. Rele, for Respondent No. 2.

JUDGMENT.

SHAH, J.—The plaintiff in this case sues for a declaration that the order of the Collector, dated 2nd June 1914, directing that he should pay certain rent on the lands in question or that the lands should be forfeited, is illegal and *ultra vires*.

The defendant No. 1 (the Secretary of State for India in Council) and defendants Nos. 2 and 3 in whose favour the said order was made contended in the Trial Court that the jurisdiction of the Civil Courts was ousted by section 4 (a) of the Bombay Revenue Jurisdiction Act (X of 1876) and that the order was justified by the rules framed by the Government in 1908 in exercise of the powers conferred by sections 8 and 10, Bombay Act XI of 1852, and Act VII of 1863, section 2, clause (3), regarding the resumption and continuance of service lands.

The Trial Court held that the jurisdiction of the Civil Court was not ousted, that the rules did not justify the order of the Collector, and that he was entitled only to levy the full assessment. It accordingly declared that the Collector was not entitled to recover from the plaintiff any sum exceeding the full assessment of the lands in suit and ordered a refund of the sum recovered in excess of the full assessment in pursuance of the Collector's order.

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The defendant No. 1 acquiesced in this view before the lower Appellate Court; and the contentions raised by defendant No. 3 as to the validity of the rules in relation to the service lands in question and as to jurisdiction under section 4 (a), paragraph 3, were disallowed by the lower Appellate Court. In the result the decree of the Trial Court was confirmed.

In the appeal before us defendant No. 1 has not raised any objection to the decree appealed from. On behalf of defendant No. 3, who is the appellant here, it is urged that the jurisdiction of the Civil Courts is ousted under section 4 (a), paragraph 1. The points raised in the lower Appellate Court have not been urged before us on his behalf; and it is not suggested now that the Collector's order is justified beyond the extent recognised by the lower Courts or that the jurisdiction of the Civil Courts is ousted under section 4 (a), paragraph 3. On behalf of the plaintiff, no objection is taken to the decree so far as it allows the levy of full assessment against him. Thus in this appeal we are not concerned with the merits of the decree passed by the lower Courts, but only with the question of jurisdiction raised by defendant No. 3.

It is urged that the claim relates to property appertaining to the hereditary office of a *kasi*, which is one of the offices expressly recognised under Act XI of 1852, Schedule B, rule 8, paragraph 1, or which is the office of a village officer within the meaning of section 4 (a), paragraph 1, and that no Civil Court can exercise jurisdiction in relation thereto. But the provision relied upon is subject to the exceptions appearing in the same section. As indicated by the proviso clause (k), if any person claim to hold property wholly or partially exempt from payment of land revenue under an adjudication duly passed by a competent officer under Act XI of 1852 which declares the particular property in dispute to be exempt, such claim shall be cognisable by Civil Courts. In the present case the plaintiff relies upon a decision of the Assistant Inam Commissioner, dated 31st December 1852, and claims in effect that the land in question is wholly exempt from assessment. The Sanad subsequently granted in 1867 is only a formal expression of that decision. Thus the plaintiff's claim is clearly within the scope of

the proviso and cognisable by Civil Courts.

It may be that on the merits he may not be able to substantiate his claim fully or at all: but that does not affect the jurisdiction to consider his claim to hold the land wholly free under the decision of the Inam Commissioner.

It is contended, however, that the plaintiff claims as an alienee and not under the person upon whom the *inam* was conferred under the decision of the Inam Commissioner and that the exception cannot apply to him. The proviso in terms applies to any person claiming exemption from land revenue under an adjudication duly passed by a competent officer under Act XI of 1852. I do not see how an alienee can be treated as being outside the scope of the provision. Further the decision of the Inam Commissioner expressly saves the rights of other persons, whose names may not appear in the decision, and it is made clear that the decision should be taken to mean how long the land is to be continued free from assessment.

In this view of the matter it is not necessary to consider the effect of section 5 (a), which has been relied upon by the plaintiff as saving the jurisdiction of the Civil Courts in a suit like the present. The plaintiff's contention is that his suit is against Government to contest the amount claimed and recovered as land revenue on the ground that such amount is in excess of the amount authorized in that behalf by Government. He further contends that the amount claimed and recovered under the Collector's order is land revenue within the meaning of the Bombay Revenue Jurisdiction Act, and that it is in excess of the amount authorised by Government under Act XI of 1852 or under the Sanad. On the other side it is contended that the amount must be deemed to have been authorised under the rules framed by the Government in 1908 and that section 5 (a) cannot save the jurisdiction of the Civil Courts. The plaintiff's contention is not without force. But as I have said, it is not necessary to decide this question. The only point raised on behalf of the appellant as to the jurisdiction of the Court fails.

The question relating to the meaning of 'resumption' of an *inam* under Act XI of 1852 in respect of service lands pertaining

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to any hereditary office useful to the village community as distinguished from the State has been incidentally argued. But it does not affect the point of jurisdiction in any way. It is really a point touching the merits of the Collector's order; and neither party has objected to the decree under appeal on merits. It is not, therefore, necessary to express any opinion about it.

The result is that this appeal is dismissed and the decree of the lower Appellate Court confirmed.

The appellant to pay the costs of respondent No. 2. Respondent No. 1 to bear his own costs.

HAYWARD, J.—I agree

Decree confirmed.

ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 39 OF 1917.

December 23, 1918.

Present :—Pandit Kanhaiya Lal, A. J. C.,
and Mr. Daniels, A. J. C.

SHEO DAYAL AND OTHERS—DEFENDANTS
—APPELLANTS

versus

Babu PIRTHIPAL SINGH—PLAINTIFF—
RESPONDENT.

Landlord and tenant—Under-proprietary rights,
acquisition of—Adverse possession, acquisition of title
by.

Defendants brought a suit to establish under-proprietary rights in 1868. Their claim was rejected but they were given a lease of the village for the term of the settlement. Through some mistake, however, the decree was not given effect to and when the Settlement Khewat came to be prepared a year later, an entry of under-proprietary right was made in their favour. The *khewat* was proclaimed for objections and none were made, and on all subsequent occasions the defendants claimed to be under-proprietors. In 1887 their claim was resisted by the person in possession of the estate, but it was upheld, and on other occasions it was either explicitly or tacitly admitted. The settlement came to an end in 1896, but the defendants continued to be treated as under-proprietors and on two occasions they asserted a transferable right by mortgaging portions of the land. In 1915 the plaintiff for the first time questioned the right of the defendants to be regarded as under-proprietors:

Held, that after the expiry of the settlement the defendants were in adverse possession of the village claiming title as under-proprietors, and that their

title had been perfected by prescription. [p. 102, col. 2; p. 104, col. 1.]

Appeal from the decree of the Additional Subordinate Judge, Bara Banki, dated the 18th December 1916.

Mr. A. P. Sen, for the Appellants.

Babus Ram Chandra and Surendro Nath Roy, for the Respondent.

JUDGMENT.

KANHAIYA L. L. A. J. C.—The dispute in this case relates to the village Kusehti which forms part of the Surajpur Estate, of which the plaintiff is the proprietor. The defendants claim under-proprietary rights in the said village. In a suit brought by the plaintiff for the recovery of arrears of rent against the defendants in respect of the village it was held by the Revenue Court that the former was not entitled to claim interest on the arrears, as the latter were under proprietors. The present suit was, therefore, filed by the plaintiff for a declaration that the defendants had no right of any kind, proprietary or under-proprietary, in the village. The defence was that the defendants and their ancestors had been in possession of the village as under-proprietors and had been effecting mortgages of their interest therein within the knowledge of the plaintiff and his predecessors-in-title, that the plaintiff and his predecessors-in-interest had been admitting the title of the defendants as under-proprietors in many proceedings and that the claim was barred by time.

The Court below decreed the claim, and the main questions for determination in this appeal are whether the defendants have acquired an under proprietary title by dint of adverse possession from more than 12 years and whether the claim is barred by limitation. It is conceded that the claim brought by Bhagwandin Singh, Dalip Singh and Durga Singh, the ancestors of the defendants, on the 25th February 1868 for a sub-settlement of the village was dismissed and that by virtue of a compromise to which the ancestors of the defendants and the then Taluqdar of the Surajpur Estate were parties, the only relief granted to the former was that they were entitled to hold a *theka* or lease of the village for the term of the regular settlement on a rental of Rs. 1,200 per year (Exhibit 10). The order then passed appears,

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however, to have been for some reason or another disregarded when the settlement record came to be prepared, for they were recorded in the *pukhtadari khewat* of Mauza Kusehti, which forms a part of the settlement record, the preparation of which was completed on the 16th November 1869, as *pukhtadars* liable to pay a *jama* or revenue of Rs. 1,200 per year (Exhibit D87).

On the 3rd April 1868 the then Taluqdar of Surajpur Estate brought to the notice of the Settlement Court that Bhagwandin Singh, Dalip Singh and Durga Singh were not entitled to *pukhtadari* rights in the village but had erroneously stated in their application for execution that they had got a decree for *pukhtadari* rights (Exhibit 12), and on the 7th April 1868 an order was passed by the Settlement Officer that they had been granted only *thekadari* rights and not *pukhtadari* rights (Exhibit 11). This order was communicated through the Sadar Munsarim to the decree-holders (Exhibit 16), and it is difficult to understand how in spite of the decree which was absolutely clear and the order above referred to, the names of the decree-holders came to be entered in the settlement records as *pukhtadars*.

The fact, however, remains that that entry remained unchallenged for the entire period of the settlement and, on the persons entered as *pukhtadars* dying, mutations of names were effected from time to time in favour of their heirs (Exhibit D2). That was not all. In 1869 the *wajib-ul-arz* of Mauza Kusehti described as an under-proprietary village was prepared, wherein it was mentioned that the holders thereof had obtained a decree for *thekadari* rights as under-proprietors (*digri thekadari matahti*) on the 25th February 1868 and a settlement of under-proprietary rights was stated to have been made with them for thirty years with effect from Kharif 1867 to Rabi 1897 and afterwards till the pleasure of the Government on a *jama* of Rs. 1,200 per annum, out of which the Taluqdar was to pay Rs. 650 to the Government and appropriate the remaining Rs. 550 himself (Exhibit D1). This *wajib-ul-arz* was probably dictated by the persons then living in the village who had claimed under-proprietary rights and may not be entitled to much weight

in face of the terms of the decree which are clear and specific, but it affords evidence of the fact that even then the ancestors of the defendants were claiming under-proprietary rights and had an impression that they had obtained a decree for *thekadari* rights as under-proprietors.

In 1887 the village was attached in execution of a decree obtained by Jagannath against Rani Chhabraj Kuar, the widow of Mahpal Singh and the mother of the present plaintiff. Sant Bakhsh Singh, Gajraj Singh and Darshan Singh, the present defendants Nos. 1, 2 and 5, and Durga Singh, the father of present defendants Nos. 3 and 4, filed an objection, claiming that they held the village in under-proprietary right. The Counsel who appeared for the judgment-debtor, Rani Chhabraj Kuar, admitted the title of the objectors and stated that they were under-proprietors paying Rs. 1,200 per year, out of which Rs. 650 were for revenue and Rs. 550 for Taluqdari right. On the 19th March 1887 that objection was allowed and it was held that the rights of the objectors could not be put to sale and that the decree-holder was entitled to the sale of the right of the Taluqdar to receive Rs. 550 per year only (Exhibit D5). It is not clear how the estate of Rani Talewand Kuar, who was the Taluqdar of the Surajpur Estate when the decree of the 25th February 1868 was granted, passed to Rani Chhabraj Kuar, the mother of the plaintiff. At the time when Act I of 1869 was passed Raja Udit Pratap Singh was shown as the owner of the Surajpur Estate in the lists appended to that Act. He was probably succeeded by Rani Talewand Kuar and later on by Mahpal Singh, the father of the plaintiff. During the minority of the plaintiff, the estate was, according to the Gazetteer of the Bara Banki District, page 90, under the management of the Court of Wards and Rani Chhabraj Kuar could only have been in possession of the village under some assignment from Mahpal Singh or as a guardian of the plaintiff before the Court of Wards took charge of the estate. The order above mentioned restricting the sale to the right of the Taluqdar to receive Rs. 550 per year is, in the absence of proof as to the nature of the interest held by the objectors of no value except as an assertion.

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under-proprietary rights by or on behalf of the present defendants within the knowledge of the person then in possession.

During the period the Court of Wards held possession of the estate on behalf of the plaintiff receipts were granted to the defendants for rent paid by them, wherein their status as *pukhtadars* was acknowledged (Exhibits D60 to D67). These receipts were executed in 1893, 1894 and 1895. At the last settlement the revenue payable in respect of the village was raised to Rs. 780 per year and the rent payable by the defendants was similarly raised from Rs. 1,200 to Rs. 1,330 per year (Exhibit D2). With the expiry of the preceding settlement the lease granted to the predecessors-in-title of the defendants by the decree of the 25th February 1868 terminated and a new Record of Rights was prepared in which the defendants were declared liable for a higher rental. The Court of Wards in charge of the estate of the plaintiff sued them for arrears of rent treating them as under-proprietors (Exhibit D6). In May 1903 and again in August 1912 Jagannath Singh, one of the defendants, mortgaged some land with Satrohan Singh (D. W. No. 3) with possession.

The right of the defendants to hold possession of the village as under-proprietors was questioned for the first time in the suits for arrears of rent brought by the plaintiff in 1915 (Exhibits 1 and 2). But by virtue of the possession held by the defendants under an assertion of under-proprietary title from the time of the expiry of the lease, granted by the decree of the 25th February 1868, they acquired an adverse right which it is no longer open to the plaintiff to question. Whatever might be said against the right of the Court of Wards to bind the ward by an admission of title not justified by the circumstances, the plaintiff cannot escape responsibility for not having challenged the right of the defendants to hold possession of the village as under proprietors after he assumed the direct management of the estate. The principle of holding over does not apply, because from the time of the first Regular Settlement when the ancestors of the defendants were entered as *pukhtadars*, the defendants and their ancestors did not

pay rent otherwise than as *pukhtadars* and the defendants have continued doing the same since the last settlement when the rent was enhanced. The defendants have enjoyed possession of the village under an open assertion of under-proprietary title from more than twelve years prior to the suit.

The appeal is, therefore, allowed and the claim of the plaintiff dismissed. The defendants appellants will get their costs here and hitherto from the plaintiff respondent.

DANIELS, A. J. C.—I agree with my learned colleague that the defendants appellants have established their claim to under-proprietary right by adverse possession. The facts of the case have been sufficiently stated by him and I need not re-state them. The plaintiff-respondent relies exclusively upon the proceedings of 1867-8 and I agree that the result of those proceedings was that the appellants got a decree as *thekadars* for the term of the settlement and that the under proprietary right which they claimed was not decreed. Through some mistake, however, the decree was not given effect to and when the Settlement Khewat came to be prepared a year later, an entry of under-proprietary right was made in their favour. There is an order on the *khewat* itself (Exhibit D 87) that it should be proclaimed for objections on the spot for one month, but it is clear that no objection was made. In this *khewat* the appellants were definitely recorded as under-proprietors. The word "*pukhtadar*" is used throughout the proceedings as the vernacular equivalent of "under-proprietor". In the very papers on which the respondent relies, e. g., Exhibit 19, the appellants' claim is described as "a claim for *pukhtadari* right."

There is, however, no direct evidence to show that the respondent was aware of the entry and it is possible for him to plead ignorance of it. We find, however, that on every subsequent occasion of which we have any evidence the defendants claimed to be under-proprietors and their claim was either upheld or admitted. The evidence falls into four groups:—

- (1) the proceedings of 1887,
- (2) evidence relating to the period when the estate was managed by the Court of Wards on behalf of the plaintiff,
- (3) settlement proceedings of 1896-7,

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(4) subsequent acts of the defendants dealing with the property as property in which they had a heritable and transferable right.

These last are of minor importance but the statement of evidence will be incomplete without them.

As regards the proceedings of 1887 we do not know precisely under what title *Musammât Ohhabraj Kuar* held the village. It is clear that she cannot have been acting merely as guardian of the plaintiff, or this fact must have appeared on the face of the proceedings.

In the absence of evidence as to the nature of *Musammât Ohhabraj Kuar's* title it cannot be contended that the order recognizing the defendants as under-proprietors is binding on the plaintiff, but it is relevant under section 13 of the Evidence Act and is of some importance as showing that as far back as 1887 the appellants not only asserted the under-proprietary right which they now claim but asserted it successfully against the person then in possession of the estate. Persons of the status of the appellants are no doubt at a disadvantage when litigating with a wealthy Taluqdar, but it would certainly have been better if they had produced evidence to show exactly under what title *Musammât Ohhabraj Kuar* was at that time in possession of the village.

During the period when the Court of Wards held possession of the estate on behalf of the plaintiff, receipts were granted to defendants for the rent paid by them (Exhibits D 60 to D 67). In these receipts the defendants' status as under-proprietors was acknowledged. The receipts produced were for the years 1893, 1894 and 1895. The learned Subordinate Judge considers this evidence as if it were a gratuitous admission of title made by the Court of Wards to the prejudice of their ward which can, therefore, be ignored. This is not a fair way of looking at the matter. The Court of Wards would be the last body to gratuitously abandon any right to which it was entitled. It frequently goes out of its way to assert rights which under the looser management of the previous holder had been allowed to slumber. On the other hand, just because the Court of Wards keeps more careful records and has always enforced a system of counterfoil receipts, it is easier

to get evidence of the condition of things under its regime than when an estate is managed by the owner. The value of these receipts lies in the evidence they afford as to the footing on which the defendants were treated when the Court of Wards took over the estate. It is clear that they were regarded as under-proprietors and not as mere tenants.

However much it might be open to the plaintiff to claim that in face of his decree he could not be prejudiced by the adverse entry in the first Regular Settlement, that settlement came to an end in the year 1893 or 1897 and in the new settlement a Sub-Settlement *Khewat* was prepared in which we find the names of the defendants recorded. Their father *Durga Bakhsh Singh* is also shown as *lambardar* from the year 1887. The annual sum payable by them to the Taluqdar was enhanced from Rs. 1,200 to Rs. 1,330 and is shown as made up of two items, Rs. 770 revenue and Rs. 550 *malikana*. This entry clearly shows that they were treated as under proprietors. It is hardly possible for the plaintiff to contend that he was unaware of these proceedings or that they did not constitute an assertion of adverse title against him.

To sum up the matter, the appellants, though described in the proceedings as ex-proprietors, certainly failed in 1868 to establish their claim for under-proprietary right. Through some mistake, however, the decree was not given effect to and when the Settlement *Khewat* came to be prepared a year later, an entry of under-proprietary right was made in their favour. The *khewat* was proclaimed for objections and none were made, but there is no direct evidence to show that the plaintiff was aware of the entry and it is possible for him to plead ignorance of it. We find, however, that on every subsequent occasion of which we have any evidence the defendants claimed to be under-proprietors. When their claim was resisted by the person in possession of the estate, as happened in 1887, the claim was upheld. On other occasions it was either explicitly or tacitly admitted. It was recognised when the Court of Wards was managing the estate on behalf of the plaintiff. In 1896 the settlement came to an end. If the rights which the defendants were holding were no more

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than those which were given by the decree of 1868, those rights came to an end with the expiry of the settlement. We should expect to find either that the Taluqdar gave them a fresh lease or that he ejected them or that he allowed them to hold over on the same rent. None of these things happened. We find the Settlement Officer treating them as under-proprietors and enhancing the revenue payable by them (it is explicitly so described in the sub-settlement register) from Rs. 650 to Rs. 780. It is in accordance with what has preceded that we find the defendant Jagannath Singh in 1903 and again in 1912 asserting a transferable right by mortgaging a portion of the land in suit. The evidence leaves no doubt that at any rate since the year 1893 the defendants have been claiming under-proprietary right to the knowledge of the plaintiff and that their title, however defective originally, has been perfected by adverse possession.

The appeal is, therefore, allowed and the claim of the plaintiff dismissed. The defendants-appellants will get their costs here and hitherto from the plaintiff-respondent.

Appeal allowed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 668 OF 1919.

October 24, 1919.

Present:—Mr. Justice LeRossignol.

JANG—PLAINTIFF—APPELLANT

versus

DOGAR AND OTHERS—DEFENDANTS—

RESPONDENTS.

Co-sharers in well, rights of—Right to irrigate lands through lands belonging to co-sharer, extent of—Presumption.

Where several persons are joint owners of a common well, it is implied in their covenant of partnership in the well that each co-sharer shall have a right to take water through the more adjacent fields. The line of irrigation, once determined, cannot be altered at the caprice of any co-sharer; and it is a fair presumption that the shortest line of lead would be that selected by the co-sharers.

Second appeal from the decree of the District Judge, Jullundur, dated the 16th

January 1919, reversing that of the Munsif, 1st Class, Phillaur, District Jullundur, dated the 23th June 1918, decreeing plaintiff's claim.

Lala Fakir Chand, for the Appellant.

Dr. Muhammad Iqbal, for the Respondents.

JUDGMENT.—In this case the question was whether the plaintiff had irrigated his fields through the water channel along the line A. B. which skirts defendant's field.

The trial Court held that there was no sign of a water-course at the line A. B., but concluded that plaintiff had irrigated his fields not through any defined channel but by flow over the whole of defendant's field (Kiarawar).

The District Judge found the evidence contradictory and came to no definite conclusion whether a water-course had existed at A. B., but he found that even if the plaintiff had used a channel along A. B. he had not used it for so long that an easement had been created in his favour.

Now the parties are joint owners of a common well and in such cases it is implied in their covenant of partnership in the well that each co-sharer shall have a right to take water through the more adjacent fields; if then the plaintiff can establish that he did take water through the channel A. B., it must be taken that he did so in consequence of the implied agreement between the co-sharers.

It does not follow that the line of irrigation, once determined, can be altered at the caprice of any co-sharer, but it is a fair presumption that the shortest line of lead would be that selected by the co-sharers.

What the learned District Judge then has to decide is whether the plaintiff had been regularly watering his fields from the channel A. B. If the finding is in the affirmative, plaintiff has a right to a continuance of that channel, even though he cannot prove an user of 20 years.

For these reasons I accept the appeal, set aside the lower Appellate Court's decree and remand for fresh decision after a clear finding on the point indicated has been arrived at.

Costs to follow final event.

Case remanded.

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OUDE JUDICIAL COMMISSIONER'S
COURT.

SECOND CIVIL APPEAL No. 347 OF 1918.

April 16, 1919.

Present:—Pandit Kanhaiya Lal, J. C.

RAM SARAN—PLAINTIFF—

APPELLANT

versus

BINDESHRI AND ANOTHER—DEFENDANTS

—RESPONDENTS.

*Principal and surety—Appeal, abatement of, as
against principal—Surety, whether discharged.*

The abatement of an appeal as against the principal debtor does not necessarily imply that the debt payable by him is extinguished or discharged, and in such a case the liability of the surety continues in spite of the abatement.

Appeal from the decree of the Subordinate Judge, Partabgarh, dated the 16th May 1918, reversing that of the Munsif, Kunda (Partabgarh), dated the 24th January 1918.

Syed Ali Muhammad, for the Appellant.

Babu Bisheshwar Nath Srivastava, for Respondent No. 1.

JUDGMENT.—This was a suit for the recovery of money due on a promissory note alleged to have been executed by Bindeshri and Dwarka, Ratai being their surety. Bindeshri denied having executed the said promissory note. The Court of first instance found against him, but the lower Appellate Court found that the execution of the said promissory note by Bindeshri was not satisfactorily established. So far as Bindeshri is concerned that finding is conclusive and the plaintiff is not entitled to any relief as against him.

Dwarka, on the other hand, admitted having executed it. He pleaded payment but was unable to establish that plea. Ratai similarly admitted having executed the promissory note as a surety. The claim was decreed by the Court of first instance against both of them. No appeal was filed by them, but the lower Appellate Court dismissed the claim as against them also. The plaintiff wants that the decree passed against Dwarka and Ratai, who had not appealed to the lower Appellate Court, be restored. Dwarka has since died and his legal representatives have not been brought on the record. A decree can, therefore, be passed only against Ratai. He was a surety, but the abatement of the appeal

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as against Dwarka does not necessarily imply that the debt payable by him is extinguished or discharged. The liability of the surety continues.

The appeal is, therefore, allowed and the claim decreed with costs and future interest at 6 per cent. per annum from the date of the suit till payment against Ratai. As against Bindeshri the appeal will stand dismissed with costs here and hitherto.

Appeal allowed

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 13 OF 1916.

August 1, 1919.

Present:—Mr. Justice Shah and

Mr. Justice Hayward.

FAKRODINSAB MAHOMED ARIFSAB—

PLAINTIFFS—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA—

RESPONDENT.

*Bombay Revenue Jurisdiction Act (X of 1876), s. 4
(k)—Bombay Titles to Rent-free Estate Act (XI of
1852)—Jurisdiction of Civil Courts—Khatibki inam
—Suit for declaration that inam is not liable to
assessment, whether cognisable by Civil Court.*

A suit against the Government for a declaration that the plaintiff is the full owner of a *khatibki inam* and of the *khatibgiri* rights appertaining to it and for an injunction restraining the Collector from recovering the full assessment from him, the claim being based on an adjudication made by the Inam Commissioner under the Bombay Titles to Rent-free Estates Act of 1852, is cognisable by the Civil Courts under section 4 (k) of the Bombay Revenue Jurisdiction Act, and the circumstance that the plaintiff claims as alienee from the original *khatib* does not take the suit out of the clause, [p. 103, col. 2; p. 107, col. 1.]

Appeal from the decision of the District Judge, Dharwar, in Suit No. 3 of 1914.

Messrs. G. S. Mulgaonkar, A. G. Desai and M. H. Vakil, for the Appellants.

Mr. Coyajee (with him Mr. S. S. Patkar, Government Pleader), for Respondent No. 1.

JUDGMENT.

SHAH, J.—The plaintiff sues for a declaration that he is the full owner of the land in suit and of the *khatibgiri* right appertaining to them, for an injunction prohibiting

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the defendants from recovering Rs. 450 annually from him and for a refund of Rs. 750 recovered by the defendants.

It is alleged that Fakrudin *valad* Mohamed Kasimsaheb was originally the *khatib* in Hangal and that as such he held certain lands in *inam*. These lands were allowed to remain with him in 1856 by the Inam Commissioner under Act XI of 1852. Under circumstances detailed in the plaint the lands and the *khatibgiri* came to be alienated to the plaintiff's father in 1864 by Fakrudin's daughter-in-law Pachhabi. Thereafter the plaintiff claims to have enjoyed the lands free from assessment and performed the services as *khatib* until the Commissioner (Southern Division) made an order on the 23rd September 1911, directing that the full economic rent be recovered from the present plaintiff and be paid to Mahomed Hanif (defendant No. 3) as long as he officiated as *khatib* on behalf of the *inamdar*. The Commissioner made this order under the rules framed by the Government in 1908 under Act XI of 1852 and Bombay Act VII of 1863, section 2, clause (3), and their general powers. The plaintiff now claims reliefs in this suit on the footing that the said order of the Commissioner is invalid and not binding upon him and that the alienation in favour of his father is good. The plaintiff also claims as an heir to Pachhabi.

It is not necessary to note all the defences, which may be gathered from the several issues framed by the lower Court. Three issues out of them were taken up as preliminary issues. Two out of these three issues were dropped as having been unnecessarily framed. The only preliminary issue considered and decided by the lower Court relates to the jurisdiction of the Court to entertain the suit. The lower Court held that the suit was barred by section 4 (a) of the Bombay Revenue Jurisdiction Act, and accordingly dismissed the suit. The plaintiff has appealed to this Court and has urged in support of the appeal that the jurisdiction of the Civil Courts is not ousted by section 4 (a) and that the suit is covered by the exception indicated in the proviso, clause (k) of section 4, and is also saved by section 5 (a) and (b). On behalf of the defendants it has been contended that the jurisdiction of the Courts is ousted under

the first, second and fourth paragraphs of section 4 (a) and that clause (k) does not apply as the plaintiff is only an alienee, and further that the claim relating to the *khatibgiri* service is not covered by the proviso. Further it is contended that section 5 (a) does not apply as the amount ordered by the Commissioner to be recovered as the economic rent is really the amount authorized by the Government and that, therefore, there is no excess such as is contemplated in the first part of section 5 (a). Section 5 (b), it is urged, cannot apply to the present suit, as it relates not merely to a claim between private parties but to a claim against Government.

In the present case there can be no doubt that in 1856 the lands in question were continued as the permanent official emolument of the hereditary office of a *khatib* in *inam* under the decision of the Inam Commissioner. The office of *khatib*, though not expressly mentioned in Act XI of 1852, Schedule B, rule 8, clause 1, is one of the type contemplated by that clause and not by the 5th provision of that rule. The plaintiff no doubt claims the right to officiate as a *khatib*; but his suit in substance is to establish his right to hold the land free from assessment. It is common ground that the Hereditary Offices Act (III of 1874) does not apply to this office. The fact that the Commissioner has acted under the rules framed by the Government under Act XI of 1852 also confirms the view that Act III of 1874 has no application. The claim may be treated as relating to property appertaining to the hereditary office of *khatib* recognized under Act XI of 1852 under the first paragraph or in part as a claim to perform the duties of the office under the second paragraph or as relating to lands declared by Government or any officer duly authorized in that behalf to be held for service under the last paragraph of section 4 (a) of Act X of 1876. These provisions are, however, subject to the exceptions mentioned in the section. The plaintiff's claim to hold the land wholly or partially free from payment of land revenue under an adjudication duly passed by a competent officer under Act XI of 1852 is cognizable in the Civil Courts under clause (k) of the proviso to the same section. I do not

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think that the circumstance that he claims as an alienee takes the case out of the proviso. It is not necessary to consider the further argument based on section 5 (a), though I am by no means satisfied that the present suit is not saved under that clause so far as it seeks to get rid of the order of the Commissioner as to the economic rent. The case is very similar to the second appeal which we have just decided, and the point of jurisdiction here must be decided in the same way.

The claim to perform the service as *khatib*, apart from the claim to hold the lands exempt from the payment of land revenue, stands on a somewhat different footing. That claim is covered in form by the first part of the second paragraph of section 4 (a) and may be in form not cognizable by the Civil Court; but in substance that part of the claim is a matter between private parties. The suit is no doubt against Government and properly so as regards the other reliefs. But this relief by itself could well be treated as falling under section 5 (b). Besides it is a prayer of secondary importance in the suit, the principal thing being the claim as to lands being exempt from the payment of land revenue. It may be that on the merits, as to which I express no opinion, the plaintiff may fail to establish that he is entitled to officiate as a *khatib*, but the claim is cognizable by Civil Courts.

Several other questions have been argued in this appeal as bearing on the question of jurisdiction. But they are all questions which may affect the merits of the plaintiff's claim and will have to be considered by the lower Court when it comes to deal with the case on the merits. For instance it has been argued that the rules of 1908 under which the Commissioner has acted are not justified by Act XI of 1852, Schedule B, rule 8, clause 5, so far as they are sought to be made applicable to an hereditary office, not falling under the said clause 5. It is further argued that the Sanad relating to the land shows that the land is inalienable and that what is granted is land and that what can be resumed is the land, and not merely the assessment, and further that the Government have the right to determine as to who shall perform the service of *khatib*. It is also

argued that whatever may be the powers of Government with regard to the office, they can only resume what they granted in *inam* under Act XI of 1852, that is, they may levy full assessment, but they cannot resume the possession of the lands nor can they levy the full economic rent. But these are all questions which touch the merits of the case and do not affect in any way the point with which we are concerned at present.

I would, therefore, reverse the decree of the lower Court and remand the suit to that Court for disposal according to law.

Costs up to date to be costs in the suit. Two sets of costs for respondents (one for respondent No. 1 and the other for respondents Nos 2 and 3).

HAYWARD, J.—I agree.

Decrees reversed.

ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 167 OF 1917.

June 6, 1919.

Present:—Mr. Ashworth, A. J. C.

Shaikh MUHAMMAD IBRAHIM—

DEFENDANT—APPELLANT

versus

Saiyad ALI NABI AND OTHERS—PLAINTIFFS

—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VIII, r. 3—Pleadings—Mortgage-deed, denial of, effect of—Attestation, whether must be proved.

By putting a plaintiff to proof of the mortgage-deed set up by him, the defendant must be taken to put the plaintiff to proof of its execution, which includes its signing and attestation. [p. 109, col. 2.]

Appeal from the decree of the Subordinate Judge, Rae Bareilly, dated the 25th August 1917.

Babu Basudeo Lal, for the Appellant.

Mr. Haidar Husain, for the Respondents.

JUDGMENT.—The questions arising in this appeal are whether the defendant-appellant can be said to have put the plaintiffs-respondents to proof of the proper attestation of the deed on which he is sued and if so, whether proper attestation

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was proved. The deed is a mortgage-deed, dated the 28th February 1905. It was, therefore, executed nearly 12 years before the date of the suit—a fact which has a bearing on the value of the evidence as to what happened at the time it was executed. The lower Court has found against the defendant-appellant on both the questions stated, that is to say, it has found that the defendant-appellant cannot be said to have put the plaintiffs to proof of proper attestation and that, even if he can be held to have done so, proper attestation was proved.

The first paragraph of the plaint of the plaintiffs-respondents states that the plaintiffs are mortgagees of the defendant's property and the second paragraph sets forth the particulars of the mortgage sued on. To each paragraph the appellant in his written statement has pleaded "not admitted." Three witnesses purport to have attested the deed. One is dead, but the remaining two were produced by the plaintiffs and deposed to the defendant-appellant having signed the deed in their presence and before they signed it. This fact was also sworn to by plaintiff No. 1 himself. The plaintiffs' evidence closed on the 6th of July 1917. On the 19th July 1917 the defendant-appellant applied for the summoning of the Sub-Registrar of Salon who registered the deed, of the scribe of the deed and of a person or scribe who had signed on behalf of one of the three attesting witnesses. On the 20th August 1917 the defendant was examined as a witness for himself for the purpose of rebutting the plaintiffs' evidence as to due attestation. He stated that the deed already bore the signatures of the three attesting witnesses before he affixed his signature as the person executing the deed. This evidence was objected to by the plaintiffs on the ground that the written statement did not contest due attestation, but it was recorded by the learned Subordinate Judge after noting the objection. After giving his own evidence the defendant did not put any of the three witnesses whom he had called into the witness box. To explain the evidence in this case it is necessary to point out that the mortgage-deed sued on bears two separate endorsements of the Sub-Registrar of Salon. One is dated the 20th January 1905 and shows that the deed was presented

for registration on that date but refused registration on the ground that Muhammad Fasih, who presented the deed and had produced a *mukhtarnama* registered at Bhongam, was not entitled by that *mukhtarnama* to present the document for registration. The other endorsement, dated the 1st March 1905, shows that the deed was presented by the appellant in person and duly registered. It is common ground that on the earlier date Muhammad Fasih brought the deed to the plaintiff No. 1 and requested him to come with him to the Sub-Registrar's office for the purpose of registering it. The plaintiff says that he told Muhammad Fasih after perusing his power-of-attorney that it did not appear to give him power to execute the bond on behalf of the defendant and he should further go and consult the Sub-Registrar whether he could get the document registered. As to this evidence, if the plaintiff doubted Muhammad Fasih's power to execute, it is curious that he should send him to the Sub-Registrar to ask the latter if the document could be registered. It is unfortunate that Muhammad Fasih's power-of-attorney was not put in evidence in this case, but according to the appellant he had given a special power-of-attorney in favour of Muhammad Fasih to execute the deed on his behalf as a general power-of-attorney already given to him did not give him power to execute. I have little doubt that what happened is this. There was no question of Muhammad Fasih's power to sign the deed on behalf of the defendant, that power being given him by the special power-of-attorney. On the other hand the general power-of-attorney registered at Bhongam probably did not contain any power to present for registration. This may be mere conjecture but it squares with the facts. At all events the defendant's evidence is credible, while the evidence of the plaintiffs is not only contradictory in itself but conflicts with the fact that the Sub-Registrar refused to accept the document because Muhammad Fasih had no power to present. To justify the Sub-Registrar's endorsement that Muhammad Fasih was not entitled to present the document, we must infer that Muhammad Fasih attempted to present it. We may

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further infer that he would not present it for registration unless the deed was already attested. I do not, however, place much reliance on the argument that the Sub-Registrar, before considering whether Muhammad Fasih had power to present for registration, must have noticed that the deed was not attested. This would be presuming something beyond what the evidence justifies in the absence of the Sub-Registrar as a witness. Again the signature of the defendant on the deed is obviously crowded in between the signature of Muhammad Fasih on the extreme left and the signatures of the three marginal witnesses. This obviously suggests that the appellant's signature, was added after the signatures of the attesting witnesses. It is suggested that when the appellant signed the deed to the left of Muhammad Fasih's signature, there may have been entered by the scribe of the deed the words "witness, witness" with a blank under them for the signature of the witnesses and that the appellant cramped his signature in order that it might not extend underneath the word "witness". This appears to me somewhat far-fetched. Even if we assume without proof that scribes do write in ink the words "witness, witness" in anticipation of the signatures of the witnesses, nothing would have been easier than for the first word "witness" to have been altered to the word executant. Both words consist of a letter and a long line. The learned Subordinate Judge has held that the evidence of the plaintiffs and their witnesses rebuts the contention of the defendant as to the attesting witnesses having signed before him, and on the strength of this evidence rejected the defendant's contention which seemed to him to be based on the mere assumption that the deed was complete when presented to the Sub-Registrar. I have, however, shown that the defendant's contention was not based on a mere assumption but was supported by two strong and distinct probabilities, namely, that a person will not present for registration a document which is obviously incomplete for want of attestation and that a person signing a deed as executant will not cramp in his signature unless the space has been restricted by something following the place he signs. I have also shown that the

plaintiff No. 1's evidence is self-contradictory, where he says that he doubted Muhammad Fasih's power to execute and so sent him to find out if he could present. The cumulative effect of these two probabilities mentioned in my mind entirely outweighs the plaintiffs' evidence. The defendant was not bound to produce the Sub-Registrar or the scribe. It was scarcely likely that they could strengthen his case and they might have weakened it, at least the Sub-Registrar, by prevarication.

The next point is whether the defendant put the plaintiffs to proof of attestation. Order VI, rule 8, has been invoked to support the contention that merely putting the plaintiffs to proof of the mortgage-deed was not sufficient to put them to proof of attestation. This order is not applicable. It produces Order XIX, rule 20, of the Rules of the Supreme Court in England, and the meaning of it is that the plea *non est factum* or "I do not admit the contract or deed" can only be taken to mean that there was no contract or deed made by the defendant. When this alone is pleaded, the defendant cannot afterwards say that there was a contract but it has no legal effect. By putting the plaintiffs to proof of the mortgage-deed the defendant must be taken to have put them to proof of execution, and execution includes signing and attestation. The plaintiffs produced evidence to prove proper attestation and the defendant was entitled to show that that evidence was false. He was not bound to indicate in his written statement how he proposed to prove that this evidence was false. I think that there is no room for doubt that to save trouble the parties to this mortgage-deed on the 1st March 1905 used the deed already executed and attested on the 28th February 1905. That they were in a hurry to get through the affair on the later date is obvious from the fact that they have even forgotten to cross out the name of Muhammad Fasih as executant, the retention of which was not only unnecessary but was improper after execution by the defendant himself.

It has been represented to me by the respondents' Counsel that if this claim of the plaintiffs is rejected on the formal ground of improper attestation, a grave injustice will be done. I agree that so far as the evidence shows the conduct of the defendant in putting the plaintiffs to proof of attestation is open to

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strong objection. The plaintiff No. 1 was an old school-fellow of the defendant Muhammad Ibrahim, and it is not pretended that the money secured by the mortgage was not advanced. At the same time it is not possible to hold that a deed which was not properly attested was properly attested merely in order to promote justice. There is one thing that I can do for the plaintiffs, and that is to order that a copy of this judgment be sent to the Collector of Badaun under paragraph 658 of the Oudh Civil Digest. It does not seem desirable that a Deputy Collector employed as Secretary of a District Board (Badaun) should resist his creditors' claim on a merely technical ground. That he has done so would suggest that he is seriously embarrassed.

For the reasons mentioned I allow this appeal and dismiss the suit but direct that the parties bear their own costs in both Courts.

The plaintiffs-respondents have filed cross-objections, but on an objection by the office to the sufficiency of the Court-fee they have withdrawn them. These cross-objections are, therefore, dismissed.

Appeal allowed.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 185 OF 1916.

August 18, 1919.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

MANCHARAM BHIKU PATIL
AND OTHERS—DEFENDANTS—APPELLANTS

versus

DATTU BHIKU—PLAINTIFF—RESPONDENT.

Hindu Law—Sudras—Mother, whether entitled to share on partition between legitimate and illegitimate sons—Leva Kunbis of Khandesh, whether Sudras

Among Sudras the mother is entitled to a share when the sons divide the property; and the fact that some of the sons dividing the property are the illegitimate sons of her deceased husband cannot make any difference in the application of the rule. [p. 110, col. 2; p. 111, col. 1.]

Leva kunbis of Khandesh District are Sudras. [p. 112, col. 2.]

Appeal from the decision of the first class Subordinate Judge at Dhulia, in Civil Suit No. 6 of 1914.

Mr. Jayakar (with him Messrs. Amin, Desai, G. N. Thakor and D. G. Dalvi), for the Appellants.

Mr. S. S. Patkar, Government Pleader, for the Respondent.

JUDGMENT.

SHAH, J.—The plaintiffs in this case claimed to be the illegitimate sons of one Bhiku and sued to recover by partition their 3/5th share in the movable and immovable properties left by Bhiku. The defendant No. 1 is the legitimate son of Bhiku, defendant No. 2 is his grandson, and defendant No. 3 Bhimabai, who died during the pendency of the appeal in this Court, was the widow of Bhiku. Bhiku died in July 1912.

The defence raised was that the parties belong to the Leva Patidar caste, and occupied the same status as the Leva Patidars in Gujarat and that as such they were either Kshatriyas or Vaishyas, but not Sudras, for the purposes of inheritance. The other defence raised was that the mother was entitled to a separate share at the partition.

The first class Subordinate Judge of Dhulia came to the conclusion that the parties were Sudras, and that according to the Hindu Law the illegitimate sons were entitled to half the share of the legitimate son. He also came to the conclusion that the mother was not entitled to a share; and on the footing of these findings he passed a decree in favour of the plaintiffs for the equitable partition of the property awarding them 3/5th share as claimed by them.

From this decree the defendants appealed to this Court. The defendant No. 3, as I have said, died during the pendency of this appeal. Two points have been urged in support of the appeal; one is a question of law, and the other is a question of fact.

It is urged that the lower Court is wrong in holding that the mother is not entitled to a share when the illegitimate sons divide the property with a legitimate son and grandson. It is clear, however, that the mother is entitled to a share, when the sons divide the property; and the fact that some of the sons dividing the property are the illegitimate sons of her deceased

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husband cannot make any difference in the application of the rule relating to the mother's share. The mother is entitled to a share when the sons divide the property, and it does not matter whether the sons are entitled to divide the property equally or unequally. In view of the fact that the mother is now dead, it is pointed out on behalf of the respondents that the points has no practical importance. There had been no actual division of the property at the time of her death: and the lower Court did not award any share to the mother. According to the decision in *Raoi Bhikaji v. Anant Laxman* (1) it is clear that the extent of the shares of the three illegitimate sons would be the same now. That point, therefore, does not help the appellants in any way.

The second question is whether the lower Court is right in its conclusion that the parties are Sudras. The evidence on this point has been fully discussed on behalf of the appellants, and in view of the fact found by the lower Court as to the customs obtaining in the community to which the parties belong, it is not necessary to examine the oral evidence in detail. It is found by the lower Court that the members of the community to which the parties belong "have no Vedic rites and Sanskaras prescribed for the twice-born classes among them; that they have not the chief Sanskara, Munj, which makes a man Dwija; that they wear the sacred thread only occasionally; that this occasional wearing also is probably of a recent growth; that they have all the customs which one should expect among the Sudras, viz., adoption of a daughter's son, and of a sister's son divorce, Pat marriage, widow re-marriage and non-tonsure of the widows, which are all badges of an inferior or unregenerate caste as observed by the High Court in *Gopal Narhar Safray v. Hanmant Ganesh Safray* (2).

The fact that the members of this caste do not ordinarily wear any sacred thread and that all the rites which Dwijas may observe are not observed by them is indecisive. It may be said that many members of the Kshatriya and the Vaishya communities, to one of which the

parties claim to belong, do not usually wear any sacred thread, and that even they do not observe all the Brahminical rites. The manner in which the ceremonies are performed is also not very helpful in determining whether the parties are Sudras or not. But the finding as to certain customs obtaining among the Leva Kunbis of the place or the district to which the parties belong is far more important. The correctness of the finding is not questioned before us. The fact that the adoption of a daughter's son or a sister's son is prevalent in this community shows that the parties are Sudras, for it is an established rule in this Presidency that the adoption of a sister's son or a daughter's son or a mother's sister's son is permissible only among Sudras without any proof of a special custom in favour of such adoptions. It is not suggested that the practice is based upon any special custom in this case. It is possible, however, to suggest that such a practice is attributable to a special custom. That could not be said of the practice of divorce, Pat marriage, and widow re-marriage, which supports the conclusion of the lower Court. It is clear that the caste, in which these customs are proved to obtain, can reasonably and properly be treated as Sudras, and the inference of the lower Court based on these facts appears to me to be right.

The oral evidence adduced by the plaintiffs goes to show that the parties are Sudras. In fact one witness, who is an elderly man and a Bhand of the deceased Bhiku, admits that he considers himself a Sudra. The evidence of the school-master (Exhibit 103), which appears to be reliable, helps the plaintiff's case.

The parties are Leva Kunbis residing at Changdev in the East Khandesh District. The evidence led on behalf of the defendants does not appear to me to establish any fact of any real value which could afford a reasonable answer to the inference suggested by the evidence adduced on behalf of the plaintiffs. The important witnesses examined on behalf of the defendants are Leva Kunbis of other districts; and their evidence is not of much use. It is urged, however, that apart from the oral evidence historically the Leva Kunbis in the Khandesh District belong to the same stock as the Leva Kunbis of Gujarat, that they migrated

(1) 46 Ind. Cas. 750; 20 Bom. L. R. 671; 42 B. 535.
(2) 13 B. 273.

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from Gujarat some centuries ago, that they must be accorded the same status which the Leva Patidars occupy in Gujarat, and that the Leva Patidars in Gujarat are Kshatriyas or Vaishyas. Several passages from the Bombay Gazetteers, Volume IX, Part I, (Gujarat Population) and Volume XII (Khandesh) have been cited to us to show the origin and history of the Leva Patidars in Gujarat and that the Leva Kunbis migrated to Khandesh some centuries ago. It is needless, in my opinion, to examine these passages in any detail, and to express any opinion as to the status of the Leva Patidars or Kunbis in Gujarat. Assuming for the sake of argument that the community to which the parties belong originally migrated from Gujarat several centuries ago and that the Leva Kunbis of Gujarat are not Sudras, it does not necessarily follow that they have retained in modern times the same customs and status as the Leva Kunbis in Gujarat may have retained. The recent history of the caste, as disclosed in the evidence, shows the adoption of customs, which are indicative of their present status as Sudras, and that in my opinion is sufficient for the purpose of this case. It is to be noted that the caste to which the parties belong, and which used to be described originally as Kunbi caste, has recently been described according to the evidence as Leva Kunbis; and it seems to me that an attempt has been made on behalf of the defendants to show, if possible, a higher status with a view to escape the liability in the present suit. The description of the caste "Pajne Kunbis," which was originally given to this caste, has apparently been changed to "Leva Kunbis" during the last twenty years. It seems to me on the evidence that the caste to which the parties belong are Sudras, whatever may have been the real status of the ancestors who migrated from Gujarat.

It is no doubt true that the test of occupation may be applied in determining the status of a particular caste. If that is applied in this case, it may be urged that the occupation of agriculture does not necessarily indicate that the parties are Sudras, as the occupation of agriculture is permissible to the Vaishya caste according to the ancient texts. But according to those texts agriculture as an occupation was permitted to the Sudras also. It is a matter of common

knowledge that among cultivating classes there are many Sudras: and the fact that the Leva Kunbis are generally agriculturists is by itself not sufficient to establish that they are not or cannot be Sudras. The conclusion that the parties are Sudras is supported by the remarks in Steele's Law and Custom of Hindu Castes at pages 101 and 101 relating to Kunbis. I am satisfied that the conclusion reached by the lower Court that the parties in this case are Sudras is correct, and that the special rule laid down in the Mitakshara allowing illegitimate sons certain share in the property of their father must be applied to this case. I would, therefore, confirm the decree of the lower Court and dismiss the appeal with costs.

MACLEOD, C. J.—I agree.

Decree confirmed.

ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 1 of 1919.

June 2, 1919.

Present:—Pandit Kanhaiya Lal, J. C.
Nawab Saiyad WILAYAT HUSAIN
AND OTHERS—DEFENDANTS—APPELLANTS

versus

Nawab Malka ZAMANI BEGAM—

PLAINTIFF—RESPONDENT.

Mortgage, usufructuary—Mortgagee, rights of—Repairs carried out by mortgagee—Rent, enhancement of, benefit of, mortgagee, whether entitled to—Decree based on mortgage—Auction-purchaser, dispossession of—Damages, basis of.

Where a usufructuary mortgagee of a house carries out repairs and improvements with the object of realizing enhanced rent, he ought to have the benefit of the enhancement which the money spent by him brings about. [p. 114, col. 2.]

Where an auction-purchaser in execution of a decree based on a usufructuary mortgage is dispossessed and claims damages for the period of his dispossession, the purchase-money paid by him is not to be taken into consideration in assessing the amount of damages. He can either get interest on the basis of the mortgage or damages to the extent of the rent of the property of which he has been deprived. [p. 114, col. 2.]

Appeal from the decree of the Additional Subordinate Judge, Lucknow, dated the 14th September 1918.

WILAYAT HUSAIN v. ZAMANI BEGAM.

Babu Bisheshwar Nath Srivastava holding brief of the Hon'ble Syed Wazir Hasan and Syed Ali Mohammad, for the Appellants.

Messrs. A. P. Sen, J. K. Bannerji and S. Mustafa, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff respondent for the recovery of money due on a deed of mortgage or in the alternative for the possession of the property mortgaged and damages.

The mortgage in question was made by Jafar Quli Khan in favour of Hamid Ali Khan on the 15th February 1890. The property mortgaged was a house situated in Lucknow, which was in the occupation of the tenants of the mortgagor. The mortgage-deed provided for the payment of interest at 1 per cent. per mensem and also contained an agreement that the mortgagor shall deliver possession over the mortgaged house. But in lieu of delivering possession, the mortgagor agreed to secure to the mortgagee a rental of Rs. 10 per mensem on account of the said house. The mortgagee thus got constructive possession over the mortgaged property. He was not, however, paid any rent.

On the 15th January 1893 Jafar Quli Khan and his wife mortgaged the same house along with other property with possession in favour of Musammât Askari Begam. Musammât Askari Begam could not, however, get possession of the house mortgaged until the prior mortgage was redeemed. On the 11th December 1900 the house in question was sold in execution of a simple money decree obtained by Moti Lal against Jafar Quli Khan. It is not clear whether Moti Lal succeeded in obtaining possession.)

On the 27th May 1905 Hamid Ali Khan obtained a decree for sale on foot of his mortgage, making Moti Lal, the auction purchaser aforesaid, a party to his suit. Musammât Askari Begam, the subsequent mortgagee, was not impleaded. In execution of the said decree the mortgaged house was put to auction on the 1st September 1909 and was purchased by the plaintiff-respondent for Rs. 4,100. The plaintiff got possession on the 13th April 1910.

On the 20th September 1909, the defendants Nos. 1 to 3, who are the legal representatives of Musammât Askari Begam, got a decree for sale on foot of the mortgage held by Musammât Askari Begam subject to the prior mortgage of Hamid Ali Khan. To that suit they impleaded the legal representatives of Jafar Quli Khan and the prior mortgagee, Hamid Ali Khan, and Moti Lal, the purchaser of the equity of redemption. A sale was held in execution thereon on the 8th March 1916 and the purchase was made by the decree holders themselves. They got possession. On the strength of that purchase they ousted the plaintiff respondent and obtained possession through Court on the 22nd October 1916.

In the present suit the plaintiff seeks the recovery of the purchase money paid by her with the money spent by her over repairs and the supply of the water connection exclusive of interest chargeable on the above sums. In the alternative she claims possession and mesne profits. Her object is to give the defendants Nos. 1 to 3 an opportunity to redeem the mortgaged property, of which she was deprived when Hamid Ali Khan brought the mortgaged property to sale in execution of his decree in satisfaction of the prior mortgage.

The Court below was of opinion that the plaintiff could not recover anything except the money due on her mortgage. It found that the expenditure said to have been incurred over repairs and over the fitting of the house with the water-connection was not proved nor necessary. On behalf of the defendants-appellants it is urged that in adjusting the accounts the Court below has not proceeded on the right basis, for it has not taken into account the entire rent derived from the house mortgaged. On behalf of the plaintiff-respondent it is argued by way of a cross-objection that the plaintiff was entitled to claim interest from the 1st November 1909 to the 13th April 1910, inasmuch as she did not get possession till the latter date, that she was entitled to claim the money spent over the repairs of the house mortgaged and in connecting it with the water-supply and that the interest awarded as damages from the date on which the plaintiff was dispossessed ought not to have been at a

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rate lower than that stipulated for in the mortgage-deed.

It is clear from evidence that though the mortgage-deed held by Hamid Ali Khan provided for the delivery of possession over the mortgaged house, the mortgagee did not actually get possession or the rent stipulated for except for a period of 10 or 11 months. The Court below rightly allowed the mortgagee interest due to him on the mortgage up to the 1st November 1909 crediting Rs. 110 on account of the rent realized by the mortgagee during the 11 months he was in possession. The learned Counsel, who appears for the defendants-appellants, does not contest this portion of the finding of the Court below.

It is equally clear that from the 1st November 1909 to the 13th April 1910 the plaintiff is entitled to claim interest at the stipulated rate, for she did not get possession till the latter date. The Court below has erred in disallowing the interest for that period. The amount to which the plaintiff is entitled on that account is Rs. 54-5-4.

The real points of contest between the parties relate to the period during which the plaintiff had been in possession since her purchase. It appears from the evidence of Muhammad Azim Khan and the other witnesses adduced in the case that when the plaintiff got possession, the house was badly out of repair. No tenant was willing to take it unless it was put in proper order. Mr. Fanthome wanted to take it on a rental of Rs. 20 per mensem, if all necessary repairs were carried out and the connection with the water works supplied to make the house comfortable to the tenant. The evidence of Sundar Lal shows that the repairs of the house cost Rs. 675. The fitting of the house with the necessary connection for the supply of water is shown by the evidence to have cost about Rs. 225. The effect of these outlays was that the house was able to fetch a rent of Rs. 20 per mensem. It would be inequitable to disallow to the mortgagee what he spent over the repairs and improvements aforesaid and charge him at the same time with the enhanced rent which he realized in consequence thereof. The learned Counsel, who appears for the plaintiff respondent, states that if the amount spent by his

client over the repairs and the improvements aforesaid be allowed to him with interest thereon at the stipulated rate, he would be willing to give credit for the rent which his client realised in excess of the stipulated interest.

Under section 76, clause (d), of the Transfer of Property Act (IV of 1882), a mortgagee in possession is not bound, in the absence of a contract to the contrary, to make any repairs which cannot be paid out of the rent and profits of the mortgaged property. The mortgagee did carry out the repairs and improvements in this case with the object of realizing enhanced rent, and it seems equitable that she ought to have the benefit of the enhancement which the money which she had spent had brought about. The approximate amount of the enhanced rent which the plaintiff realized during the period of her possession was Rs. 780. The repairs and water connection cost more. The advantage, if any, is, therefore, on the side of the defendants-appellants. The plaintiff is willing to forego the balance.

The only other point raised in the appeal relates to the amount of damages, which the Court below has awarded to the plaintiff on account of her dispossession. The damages ought not to have been awarded at a rate lower than the interest to which the plaintiff was entitled. In fact she could have claimed the entire rent as damages if no interest was to be allowed to her. The Court below has allowed interest at 6 per cent. per annum on the amount of the purchase-money paid by her, but as pointed out in *Gouri Shanker Singh v. Rai Bajrang Bahadur Singh* (1), the purchase-money paid by the plaintiff is not to be taken into consideration in assessing the amount of the mortgage money due to the plaintiff. The plaintiff can either get interest on the basis of the mortgage or damages to the extent of the rent of which she was deprived. It would not be equitable to award merely stipulated interest on the principal money, because the money which she has spent over the repairs and improvements would in that case be left out of account. She ought, therefore, to get Rs. 300 as damages for the period of her dispossession.

(1) 35 Ind. Cas. 434; 19 O. C. 39.

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sion from the 22nd October 1916 to the 21st January 1918.

A question has also been raised as to the form which the decree in this case should take. As the purchaser in execution of a decree on the foot of a prior usufructuary mortgage, the plaintiff has stepped into the shoes of both the mortgagor and the mortgagee. As the purchaser of the rights of the mortgagee, she is entitled to enforce the mortgage and to obtain possession of the mortgaged property either by getting a decree for sale or seeking the possession of the mortgaged property. As the purchaser of the rights of the mortgagor, she is not entitled to claim possession, because the mortgagor had already parted with his right to possession in the first instance to Hamid Ali Khan and in the next instance to the predecessor in interest of the defendants-appellants. The only right which was left with the mortgagor after these two mortgages was a right to redeem. The right to possession did not form any part of it so long as the two prior mortgages by which he had parted with that right remained unredeemed. As explained in *Sheo Indar Bahadur Singh v. Ghazi-ud-din* (2), the rights of a puisne mortgagee cannot be affected by the provisions of a decree to which he was not a party, and a person, who purchases in execution of that decree, can do exactly what the holder of the prior mortgage or the mortgagor could do, no less and no more. As a person who has stepped into the shoes of the mortgagee, the plaintiff-respondent is entitled to possession or to a decree for sale; as a person who has stepped into the shoes of the mortgagor, she is not entitled to possession because the mortgagor had himself parted with that right in favour of the defendants-appellants. A decree for sale would obviate a multiplicity of suits and meet the requirements of this case.

The appeal is, therefore, dismissed with costs and the cross objections allowed in so far that the plaintiff-respondent will be entitled to recover Rs. 3,218 5-4 with proportionate costs here and hitherto and future interest thereon at 6 per cent. per annum till payment. Six months' time will be allowed for payment. In case of non-payment the mortgaged property will be liable to sale. The decree

will be framed in terms of Order XXXIV, rule 4, of the Code of Civil Procedure, and there will be a further decree for Rs. 300 with proportionate costs here and hitherto by way of damages and future interest at 6 per cent. per annum from the date of the suit till payment against the defendants-appellants.

Appeal dismissed; Cross objections allowed.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 315 of 1916.

August 21, 1919.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.

RAMNATH CHHOTURAM AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

GOTURAM RADHAKISAN AND OTHERS—
DEFENDANTS—RESPONDENTS.

Hindu Law—Partition, suit for—Manager, whether bound to keep accounts—Expenses during pendency of suit, how to be met.

The manager of a joint family is not obliged to keep accounts while the family remains joint, and when a partition is asked for, partition takes place of the property as it exists in the hands of the manager [p. 116, col. 2.]

When a suit is filed for partition of joint family property, there is a severance of interest from the date of the filing of the suit, and for purposes of inheritance and succession the family members are no longer considered joint, but so far as the family property is concerned, the family is considered as one entity until the moment comes for division, and then each party gets his actual share. In the meantime if there are any expenses which should be properly incurred by the joint family purse, those expenses are taken out of the family property and they cannot be debited to any particular co-parcener. [p. 116, col. 2; p. 117, col. 1.]

First appeal from the decision of the joint first class Subordinate Judge at Dhulia, in Suit No 42 of 1909.

Mr. Jayakar (with him Mr. P. B. Shingne), for the Appellants.

Mr. G. S. Rao, for the Respondents.

JUDGMENT.

MACLEOD, C. J.—This was a partition suit filed in 1909. It is not disputed that the plaintiffs on the one hand are

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entitled to one-half of the plaint properties, while the defendants are entitled to the other half. A preliminary decree was passed, and it was referred to a Commissioner to take the accounts of the family property. On his report the defendants filed certain objections, and again it was referred to a second Commissioner to consider the accounts in the light of defendants' objections and he took the accounts and made up a final balance sheet. The result was as shown in the final decree of the learned Subordinate Judge at page 3 — "The defendants shall pay to the plaintiffs Rs. 4,623 10 0 as mesne profits of the Nipani lands for the years 1905 to 1909. They shall also pay Rs. 2,878-8-0 and Rs. 704 and Rs. 257."

The plaintiffs appealed, and though it does not appear in their objections which they filed what their real objections were to the decree, yet now their Counsel has objected on the ground that the learned Subordinate Judge has not dealt with certain items which were found by the first Commissioner, and objected to by the defendants. In the first place, if it is a fact that the learned Judge omitted to deal with certain items in the account when he was dealing with the Commissioner's report, that ought to have been pointed out to him by the defendants' Pleader. Now five years after the final decree was passed, and without any particulars having been alleged regarding these objections, we are asked to send back the case to the learned Judge so that he may deal with these items, which we are told he has omitted to consider. We are not satisfied by any means that the learned Subordinate Judge omitted to deal with these points, or that they were not dealt with by the second Commissioner. The second Commissioner's report is extremely full, containing every detail of the family property, and at this distance of time it is very difficult for us to say with any degree of certainty that the accounts have not been fully gone into, that all the objections have not been dealt with, and that the learned Judge in dealing with the Commissioners' reports has not fully gone into every item and decided the case after such consideration. We are not, therefore, disposed to accede to the appellants' sugges-

tions, and so far the appeal must be dismissed with costs.

Now we have to deal with respondents' cross-objections. They object to the plaintiffs being held entitled to claim mesne profits for the years 1905 to 1909. I do not understand on what principle these mesne profits were allowed by the learned Subordinate Judge. As I have always understood the Hindu Law on the point, the manager of a joint family is not obliged to keep accounts while the family remains joint, and when a partition is asked for, partition takes place of the property as it exists in the hands of the manager. It may be that the opponents may urge that the manager had in his possession family property and that he must account for its disappearance, and that was the case in a suit recently before me on the Original Side. But that was a different matter to asking the manager to account for the rents of the joint family lands, and I think Mr. Rao's contention is correct, and that the learned Judge was wrong in ordering that the plaintiffs should recover their shares of the mesne profits from the defendants.

Then Mr. Rao objected to the marriage expenses of the 1st plaintiff being deducted out of the joint family purse. No doubt from the date of suit there is a severance of interest, and for purposes of inheritance and succession the family members are no longer considered joint. But it does not follow that thereafter, until the joint family property is actually divided, it does remain joint. Otherwise this difficulty would arise that immediately after the suit was filed, the person in charge of the family property would have to open a separate ledger account for each co-parcener, and would have to debit to his account all expenses made on his behalf. It would be necessary to do that if Mr. Rao's contention were correct. I have never heard of any such procedure being followed during the course of partition proceedings. As far as the joint family is concerned, it is considered as one entity until the moment comes for division, and then each party gets his actual share. In the meantime if there are any expenses which should be properly incurred by the joint family purse, those expenses are taken out of the family property, and they cannot be debited to

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any particular co-parcener. Therefore, in my opinion, the learned Judge was correct as regards those expenses.

Then it has been proved that Rs. 9,429-5-6 were recovered by the Deputy Nazir as guardian of the appellants under a promissory note of the 16th October 1908. The defendants sued to recover their share by a separate suit which was resisted by the appellants successfully, but it was on account of that suit that this particular sum was left out of consideration when taking the account of the joint family property. It is perfectly clear that this is an asset of the joint family property, and that the defendants were entitled to half that amount.

The result of this judgment will be that the item of Rs. 4,626-10 0, which was directed by the order of the lower Court to be paid by the defendants to the plaintiffs, goes out, and defendants have to pay Rs. 3,839-8 0. Against that they will be entitled to recover half of Rs. 9,429-5-6, so that in the end there will be a balance due to them from the appellants. If anything has been paid by the defendants under the decree of the lower Court, the appellants must restore that amount. We make no order as to the costs of the cross-objections.

HEATON, J.—I concur.

Order accordingly.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1503 OF 1917.

October 31, 1919.

Present:—Mr. Justice Ryves.

Uhaubey BASDEO—DEFENDANT—APPELLANT
versus

BEHARI LAL—PLAINTIFF—RESPONDENT.

Registration Act (XVI of 1908), ss. 17, 49—Mortgage—Redemption, proof of—Receipt, unregistered, admissibility of—Possession given to mortgagor, effect of—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 31—Jurisdiction of Small Cause Court—Suit to recover profits of mortgaged land and value of trees cut down by mortgagee, whether cognizable by Civil Court.

No particular form of document is required to redeem a mortgage. [p. 118, col. 1.]

An unregistered receipt cannot in itself be used as evidence of redemption of a mortgage, but the Court is entitled to take it into consideration as evidence of the fact that on a particular date a particular sum was paid by the mortgagor to the mortgagee, and this, coupled with the fact that the mortgagor was put into possession of the property and has continued in possession of it, is good evidence upon which the Court might base its finding that the mortgage has been redeemed. [p. 117, col. 2.]

A suit by a mortgagor, after redemption, to recover from the mortgagee the profits of the mortgaged property and the value of certain trees alleged to have been cut down by the defendant, is exempted from the cognisance of a Small Cause Court by Article 31 of Schedule II to the Small Cause Courts Act and is, therefore, cognisable by a Civil Court [p. 118, col. 1.]

Second appeal against the decree of the First Additional Judge, Aligarh, dated the 7th September 1917.

Mr. P. L. Banerjee, for the Appellant.

Mr. Panna Lal, for the Respondent.

JUDGMENT.—The facts out of which this appeal arises are as follows. The plaintiff sued to recover one-third of the profits of a grove plus one-third of the value of certain trees which he alleged had been cut down by the defendants. The plaintiff's title was based on his assertion that he had redeemed one-third of the mortgage on the property. The Court of first instance dismissed the suit, holding that redemption had not been proved. On appeal the learned Additional Judge of Aligarh allowed the appeal and decreed the suit. On appeal before me the main argument is that the lower Appellate Court should not have admitted in evidence a certain receipt and that if that receipt were not admitted there would be no legal evidence on which the Court could base its findings. The objection to the receipt is to the effect that it had not been registered. Not having been registered, obviously it could not be used in itself as evidence of redemption of the mortgage. It in itself could not in any way affect the mortgage, but I think the lower Court was entitled to take it into consideration as evidence of the fact that on such a date so much money had been paid and that, coupled with the fact that one-third of the mortgaged property was then given into possession of the plaintiff and has been in his possession ever since, was good evidence on which he could find as a fact that the plaintiff had redeemed one-

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third of the mortgage. No particular form of document is required to redeem a mortgage. That being so, in my opinion the appeal fails. As my decision is open to appeal under the Letters Patent, I proceed to decide a preliminary objection which was raised as to the hearing of this appeal. It was argued by Mr. Panna Lal on behalf of the plaintiff that section 102 of the Code of Civil Procedure barred this appeal as the suit was of the nature of a Small Cause Court suit and its value was less than Rs. 500. On behalf of the appellant it was urged that under Article 31 of the Schedule to the Provincial Small Cause Courts Act (IX of 1887) such a suit was exempted from the cognizance of a Court of Small Causes. Mr. Panna Lal relied on a case reported as *Bindraban v. Sahodra* (1), which was a decision of a Divisional Bench. That case is, however, not very helpful, because neither in the arguments nor in the judgment itself is any reference made to Article 31 of the Schedule, nor are any reasons given in the judgment for the view which was taken. In *Sheo Bodh v. Surjan* (2) and in *Drig Pal Singh v. Kunjal* (3) the scope of Article 31 has been considered and it seems to me that according to the view taken in those two rulings this suit would come within the scope of the concluding part of Article 31. I, therefore, overrule the preliminary objection. The appeal is dismissed with costs.

Appeal dismissed.

(1) 21 Ind. Cas. 638; 11 A. L. J. 599.

(2) 19 Ind. Cas. 427; 11 A. L. J. 238.

(3) 44 Ind. Cas. 689; 16 A. L. J. 55; 40 A. 142.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1801 OF 1918.
CIVIL REVISION PETITION NO. 1052 OF 1918.
August 13, 1919.

Present:—Mr. Justice Spencer and
Mr. Justice Krishnan.

DONTU PEDDA CHENCHAYYA—
DEFENDANT NO. 2—APPELLANT IN S. A.
NO. 1801 OF 1918 AND PETITIONER
IN C. R. P. NO. 1052 OF 1918

versus

MALLAM BALAYYA AND ANOTHER—
EXECUTORS OF PLAINTIFF'S ESTATE—
RESPONDENTS IN BOTH.

Civil Procedure Code (Act V of 1908), s. 35, O.

XXII, r. 3 (2)—*Suit, abatement of—Non-survival of right to sue—Costs, award of, out of deceased plaintiff's estate—Discretion of Court.*

Courts have a discretion to award costs to a defendant in a case where a suit abates on the cause of action not surviving the death of the plaintiff, out of the deceased plaintiff's estate. The words 'costs of and incident to all suits' in section 35 of the Civil Procedure Code are wide enough to cover such a case. [p. 119, cols. 1 & 2; p. 120, col. 1.]

For the purpose of calculating Pleader's fees such a case should be treated as similar to one dismissed for default of prosecution after framing issues. [p. 120, col. 1.]

"Second appeal against the decree of the District Court, Cuddappah, in Appeal No. 261 of 1917, preferred against the decree of the Court of the District Munsif, Proddattur, in Original Suit No. 721 of 1916.

Civil revision petition under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise the decree of the District Court, Cuddappah, in Appeal Suit No. 261 of 1917, preferred against the decree of the Court of the District Munsif, Proddattur, in Original Suit No. 721 of 1916.

Mr. M. O. Parthasarathy Aiyangar (with him Mr. M. O. Tirumalachariar), for the Appellant.—The Court has a discretion to award costs where the suit abates by the cause of action not surviving on the death of the plaintiff. The language of section 35, Civil Procedure Code, is wide enough to cover the case. It will be a hardship to parties if the Court is not invested with such a power, as no separate suit lies for the recovery of costs as damages. The power to award costs should not be limited to particular classes of cases. See *Sakyahani Ingle Rao Sahib v. Bhavani Bozi Sahib* (1).

Mr. O. V. Subramanya Aiyar, for the Respondents.—The only statutory provision relating to costs is that found in Order XXII, rule 3, Civil Procedure Code. There is no reference in it to cases of non-survival of the right to sue on the death of a plaintiff. Section 35 should be read as applying to cases where both parties are on the record. Otherwise Order XXII, rule 3, would be superfluous. There is no good ground for awarding

(1) 27 M. 588.

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costs where the suit fails from no default of the plaintiff or his legal representative.

The Munsif did not exercise any discretion in awarding costs. He has calculated the Pleader's fee as if it was decided after contest. That is wrong.

JUDGMENT.

KRISHNAN, J.—In this second appeal and the civil revision petition two questions have been raised for our decision, namely, (1) whether when a suit abates on account of the death of a sole plaintiff the right to sue not surviving and it is dismissed in consequence, the Court has power to make an order granting defendant's costs out of the estate of the deceased and (2) when such an order is made by the District Munsif, an appeal lies against it to the District Judge at the instance of the deceased's legal representatives.

On the first question the learned District Judge held that the Court had no such power. No doubt, as pointed out by him, the case before us is not one to which Order XXII, rule 3, of the Code of Civil Procedure applies, for that Order does not seem to refer to a case where the right to sue does not survive on the death of the sole plaintiff. Sub rule (2) of rule 3, which in terms authorises the Court to grant costs to the defendant against the estate of the deceased plaintiff, applies only where no application is made within time under sub rule (1) for adding the legal representatives of the deceased as a party, and not to a case where no such application can be made at all. There is no reference in the whole of Order XXII to a case where, on the death of the sole plaintiff, the right to sue does not survive. Order XXII, therefore, cannot be relied on to support the order as to costs in the case before us. This was conceded by the learned Advocate for the appellant.

He relies, however, on section 35 of the Code itself. Under that section, "the costs of and incident to all suits" are in the discretion of the Court and the Court is given full power to decide by whom and out of what property and to what extent such costs are to be paid. This power exists even where the Court has no jurisdiction over a particular suit. The language

of the section is clearly wide enough to cover the present case. It is, however, argued that we should limit the scope of the section to cases where both parties are on the record, as otherwise the provision as to costs in Order XXII, rule 3, clause (2), will be rendered redundant. I do not think the redundancy pointed out is a proper ground for cutting down the scope of the section when there is nothing in its language to justify such limitation. As no separate suit lies between parties to a suit to recover the costs as damages, it stands to reason that a Court should have wide powers in awarding costs in all matters brought before it by parties and we should not, therefore, limit its powers unless it is clear that the Legislature meant to do so in any particular case. I am not, therefore, prepared to limit the scope of section 35 by any implication derivable from the existence of the provision as to costs in Order XXII, rule 3, clause (2). So far as I am aware, the power to grant costs against the estate in cases like the present has never been challenged and the practice has been to grant costs in suitable cases. One such example at any rate has been brought to our notice from the Law Reports. See *Sakyahani Ingle Rao Sahib v. Bhavani Bozi Sahib* (1). It is true the failure of the suit when plaintiff dies without the right to sue surviving cannot be attributed to any default on the part of the plaintiff or of his legal representative. But on the other hand there may be no reason whatever for mulcting defendants in costs by making them bear their own costs. The question has to be judged in each case as to what would be the proper order as to costs, and the Court must exercise a careful discretion in making its order. But to hold that the Court has no power to deal with costs in such a case in any circumstances will prevent the Court from granting the costs to the defendant, even in a case where it is clear to it that the plaintiff's suit is a vexatious and baseless one, the trial having advanced far enough before the plaintiff's death to draw such an inference.

Being of opinion that the Court has a discretion to award costs to a defendant even in a case where a suit abates on the

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cause of action not surviving the death of a plaintiff, I consider the decree of the learned District Judge, based entirely on his view that no such discretion exists, must be set aside.

It was argued by the respondents' Vakil that the District Munsif did not himself exercise any discretion in this case and that if he did, it was not a proper one. It is clear from his judgment that, though he thought he had power under Order XXII, rule 3, clause (2), to make the order as to costs, he did exercise a discretion in the matter; that rule also makes it discretionary for the Court to pass such an order. I do not think there is any valid ground for interfering with his discretion in this case. But it has been brought to our notice that in calculating the defendant's costs he has been awarded Pleader's fee in full as if the case had been tried and disposed of. It seems to me this case should be treated for the purpose of calculating Pleader's fee as similar to one dismissed for default of prosecution after framing of issues. Only one-half of the full fee should have been awarded under the rules. With this modification the order of the Munsif as to costs must be confirmed.

In the view I am taking it is unnecessary to express an opinion on the 2nd question raised by the learned Advocate for the appellant. I would allow the second appeal and set aside the decree of the District Judge and restore that of the Munsif with the modification above stated, and allow the appellant his costs in the lower Appellate Court and in the second appeal in this Court from the estate of the deceased Subbamma as the respondents acted as executors of her estate in appealing to the District Court and in supporting the District Judge's decree in this Court. The civil revision petition is dismissed with costs.

SPENCER, J.—I agree.

M. C. P.

*Appeal allowed;
Petition dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1555 OF 1917.

October 31, 1919.

*Present:—Mr. Justice Ryves.*CHHITTAR AND OTHERS—DEFENDANTS
—APPELLANTS

—versus

HARJU—PLAINTIFF—RESPONDENT.

*Civil Procedure Code (Act V of 1908), s. 20 (c)—
Restitution of conjugal rights, suit for—Cause of action,
accrual of—Place of suing.*

In a suit by a husband against his wife for restitution of conjugal rights, the cause of action arises in the wife absenting herself from the husband's residence, and, therefore, a Court within the local limits of whose jurisdiction such residence is situate is competent to try such suit.

Second appeal against the decree of the District Judge, Shahjahanpur, dated the 27th July 1917.

Mr. M. L. Sandal, for the Appellants.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff against his wife for restitution of conjugal rights and against three other defendants, praying that an injunction be issued against them not to interfere in any way with the plaintiff's wife coming to reside with him. The suit was brought in the Court of the Munsif of Shahjahanpur. The defendants all reside in the district of Hardoi in the province of Oudh. The Trial Court decreed the suit. The defendants other than defendant No. 1, the wife, appealed. In their grounds of appeal it was urged that the suit was not cognisable by the Court of Shahjahanpur. The same plea had been raised in the Trial Court and formed the subject of an issue. There the Court held, and rightly held, following the ruling of *Lalitagar Keshargar v. Bai Surai* (1), that the cause of action against the wife arose in absenting herself from the plaintiff's residence, which was in Shahjahanpur. It is not quite clear how the Court had jurisdiction against the other defendants. But I find that neither Court has come to any finding that the present appellants prevented or would in the future prevent the defendant No. 1, the wife, going back to her husband. This being so, I think the appeal must succeed. The result is that I allow the appeal and set aside the decree

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of the Court below so far as it affects the appellants. They are entitled to their costs in all Courts.

Appeal allowed.

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

May 30, 1919.

Present:—Viscount Haldane, Lord Buckmaster and Lord Danedin.

THE TEXAS COMPANY—APPELLANT

versus

THE BOMBAY BANKING COMPANY,
LIMITED (IN LIQUIDATION), AND

ANOTHER—RESPONDENTS.

Principal and agent—Notice—Principal, whether affected with knowledge of agent—Payment made by agent to principal—Principal acting in good faith—Money, whether can be followed in hands of principal where agent has committed fraud.

If a communication be made to an agent which it would be his duty to hand on to his principals, and if the agent has an interest which would lead him not to disclose to his principals the information which he has thus obtained, and in point of fact he does not communicate it, the knowledge cannot be imputed to the principals. [p. 125, col. 2; p. 126, col. 1.]

Where a company wanting payment of a debt from one of its agents asks that payment should be made and obtains a payment of its debt without any knowledge whatever of the sources from which the money has come, it would be straining the doctrine of notice beyond all reasonable limits to hold that in such circumstances moneys received in absolute good faith should be earmarked with some independent ownership, because the debtor, who was also a servant of the company, committed a fraud in order to discharge his obligations. [p. 126, col. 1.]

Appeal from the judgment and decree of the High Court, Bombay, in its Civil Appellate Jurisdiction, dated the 13th July 1916, dismissing an appeal from the judgment and decree of that Court (Beaman, J.) in its Original Civil Jurisdiction, dated the 2nd October 1915, which dismissed a suit brought by the appellants.

FACTS are sufficiently stated in their Lordships' judgment. With regard to the question of following the money and notice, the material portions of the original judgment are as follows: "Even assuming that the whole of this Rs. 65,000 had been the plaintiff's money and that Vaidya was holding it in trust for them, it would be necessary, before the Bank could be made

answerable to the plaintiff Co. in this suit, to show that the said money had been paid into the Bank definitely earmarked as trust money and as such capable of ascertainment now out of the remaining funds of the Bank with the knowledge of the Bank at the time the payment was accepted.

..... But the case is certainly much complicated when we find that Vaidya is himself Secretary, Treasurer and Managing Agent of the Bank. On the general principle of notice in such cases, there can be little doubt or difficulty. The cases relied on by the defendant Co., viz., *Marseilles Extension Railway Co., In re, Credit Foncier and Mobilier of England, Ex parte (1), Hampshire Land Co., In re, Portsea Island Building Society, Ex parte (2), David Payne & Co., Ltd., In re, Young v. David Payne & Co. Ltd. (3) and Coleman v. Bucks and Oxon Union Bank (4)*, are all very clear and positive upon the point that the knowledge of a Director as a Director, or a Solicitor acting in two capacities, is not necessarily the knowledge of the co-Directors, or of those parties who are respectively employing the Solicitor. But there is no authority, and as far as I can see no case such as I am dealing with has yet arisen, which would go the length of saying that the knowledge of the Secretary, Treasurer and Managing Agent of the Bank is to be imputed to the Bank as a whole. Here, we have to look at the Memorandum and Articles of Association which are Exhibit No. 1 in this case, and it is clear that all the practical business of the Bank is entrusted to the Secretaries, Treasurers and Managing Agents, subject to the general control doubtless of the Board of Directors. But the very use of the term "agent" certainly does suggest that private knowledge fraudulently withheld by such an agent might not necessarily be imputed to the controlling Board, that is to say, the Board of Directors."

"No money is paid into the Bank as a trust fund or specified or known by the

(1) (1871) 7 Ch. App. 161; 41 L. J. Ch. 345; 20 W. R. 254.

(2) (1896) 2 Ch. D. 743; 65 L. J. Ch. 860; 75 L. T. 181; 45 W. R. 136; 3 Manson 269.

(3) (1901) 2 Ch. D. 603; 73 L. J. Ch. 849; 20 T. L. R. 577; 91 L. T. 777; 11 Manson 437.

(4) (1897) 2 Ch. D. 243; 66 L. J. Ch. 554; 76 L. T. 684; 45 W. R. 616.

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Bank to be trust money, circumstances which are commonly found to exist in cases following upon the decision in *Hallett's Estate, In re, Knatchbull v. Hallett* (5). But there certainly are dicta of Jessel, M.R., in that case of the most general character which might be thought to support the plaintiffs' contention that if the Bank be affected with knowledge that the whole of Rs. 65,000 was misappropriated as trust money when put into the Bank by being put to private uses, then the Bank is liable to the defendants (plaintiffs) to make it good out of the larger sums at present in the hands of the defrauding trustees. In the absence of notice, however, it is clear that no such doctrine could possibly assist the plaintiffs in the facts here disclosed. For the payments in themselves do not suggest any misappropriation of trust moneys. They are quite ordinary payments by a man who has a running account in the Bank and is heavily indebted to the Bank at the time. The Bank, as I have said, is under no obligation to inquire whence the money has come. It is not as though Vaidya had a balance to his credit, but he had to pay his own debts. But for the fact that in Mr. Binning's language Vaidya was himself the Bank, the result would evidently be that the plaintiffs had no case whatever. But are they in any better position because of the double character of Vaidya? As Director it is hardly contended that his knowledge would affect the Bank as a whole. That point is too clearly covered by the authority of the cases I have cited. As Manager and Agent is the case any better? Here really comes a question of fact, and if we take the real management of the Bank to be in the hands of the Directors, then I think that that question of fact will have to be answered against the plaintiffs."

Mr. F. D. Mackinnon, K. C. (with him Mr. Hansell), for the Appellants.—The moneys paid into the Bank were the moneys of the appellants, because they were moneys which their agent held in trust for them. The appellants are, therefore, entitled to follow the moneys. The Bank knew that they were trust moneys: *Coleman v. Bucks and Oxon*

Union Bank (4), *David Payne & Co., Ltd. In re, Young v. David Payne & Co. Ltd.* (3), *Cave v. Cave* (6), *Kennedy v. Green* (7) referred to.

Mr. Upjohn, K. C. (with him Mr. E. B. Raikes), for the Respondents, was not called upon.

JUDGMENT.

LORD BUCKMASTER.—The appellants are a Corporation, incorporated under the laws of the State of Texas in the United States of America and either owing or having control over extensive oil fields. Their head office for India is in Bombay, and for the purpose of securing distribution of kerosene oil throughout the district of Bengal, they entered into an agreement in writing, on the 25th October 1911, with one Prabhakar Govind Vaidya, whereby he was appointed for five years their exclusive agent for the sale of such oil within the named areas on certain specified terms.

So far as they are material to the present dispute, these terms provided that, on receipt by the Company of an order from the agent for kerosene oil, they would give to him a delivery order for the quantity required in exchange for a deposit by him with the Company of such an amount of certain specified securities as should, at the market rate at the date of the deposit, represent 5 per cent. excess of the market rate of the oil, and that they should have power to realise the securities after seven days' notice of the failure by the agent to remit the sale-proceeds of the oil, in respect of which the deposit was made. The price at which the oil was to be sold by the agent was to be named by the Company from time to time, and the agent guaranteed that the full sale-proceeds should be paid to the Company, his commission being 4 annas per 8 gallons of oil. Sales were to be for cash, credits were to be at the risk of the agent, and the agent expressly agreed to remit to the Company all sale-proceeds directly they became due, without any deduction on any account. The only other material provision of this agreement was clause 23, which is in the following terms:—

"23. The Agent has deposited with the (6) (1880) 15 Ch. D. 639; 49 L. J. Ch. 505; 42 L. T. 730; 28 W. R. 793.

(7) (1834) 3 Myl. & K. 699; 40 E. R. 266; 41 E. R. 176.

(5) (1880) 13 Ch. D. 696; 49 L. J. Ch. 415; 42 L. T. 421; 28 W. R. 732.

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Company the sum of Rs. 5,000 in 5 per cent. Tansa Bonds as a guarantee of good faith, which amount is liable to confiscation by the Company for any breach of any clause of this Agreement and it is hereby expressly agreed and understood that the interest accruing on such Tansa Bonds. Deposit will be paid to the Agent by the Company so long as the Agent faithfully observes and performs the conditions of this Agreement."

The agent proceeded to make this agreement effectual by entering into a series of sub-agency agreements between himself and a variety of people operating in the district, constituting them as agents on terms which provided for a smaller rate of commission but in other respects following the provisions of his agreement with the Texas Oil Company. They are entitled sub-agency agreements; but, except so far as Vaidya is referred to as being the sole agent for the Texas Oil Company, no reference whatever is made to the Company in the agreement, and no privity whatever is established between the Company and the sub-agent. Clause 23 of the original agreement found its equivalent in clause 24, which ran as follows:—

"24. The Sub-Agent shall deposit with the Sole Agent the sum of money which the Sole Agent may fix from time to time as a guarantee of good faith which amount is liable to confiscation by the Sole Agent for any breach of any clause of this agreement and it is hereby expressly agreed and understood that interest at per cent. per annum accruing on such deposit will be paid to the Sub-Agent by the Sole-Agent as long as the Sub-Agent faithfully observes and performs the conditions of this Agreement."

Considerable business appears to have been done under these agreements, and large sums of money were received by Vaidya pursuant to their terms, both from the sale of the oil and from the deposits made under clause 24, the deposits alone amounting to at least Rs. 52,000 in September 1912. In addition to Vaidya's position as agent for the Texas Company, he was also a member—together with one Kothavle—in a firm, V. N. Apte & Co., and this firm were the secretary, treasury, and agent of the respondent's Bank.

In October of 1912 Vaidya, who had various accounts with the Bank, was overdrawn to the extent of about Rs. 300,000. At the beginning of this month the Bank finding themselves face to face with fast gathering financial difficulties, Kothavle was asked by two directors to obtain from Vaidya the money that he owed to them. Vaidya was then returning from England, and on his return an interview took place between him and Kothavle, with the result that Vaidya sent to the Bank the sum of Rs. 65,000—Rs. 60,000 in October and Rs. 5,000 in the following February. Of this sum, Rs. 60,000 was paid in cash by cheques drawn by or on behalf of Vaidya on the Indian Specie Bank, Bombay, and Rs. 5,000 by a cheque on the Eastern Bank, Bombay. The monies so received were credited by the Bombay Bank as to Rs. 52,000 to the personal account of Vaidya, as to Rs. 8,000 to the account of Kothavle, and Rs. 5,000 to an account headed Vaidya's Texas Account.

It appears to be accepted in these proceedings that the whole of these monies came from the monies provided by the sub-agents, either by way of guarantees or by monies paid for oil purchased; as to Rs. 45,000 from actual deposits and purchase monies of oil, and as to Rs. 20,000 by a loan granted to Vaidya on the security of certain bonds which had been purchased by him out of monies derived from the same source.

The Bombay Bank suspended payment in October 1913, and on the 13th February 1915 the appellant Company instituted the proceedings out of which this appeal has arisen, claiming re-payment of the sum of Rs. 65,000 in priority to other creditors of the Bank, on the ground that such sum represented their money in the hands of Vaidya, and had been received by the Bank with knowledge of this fact. In order that this claim should succeed, it is essential that the appellant Company should be in a position to establish two independent facts:—

First, that the money was theirs and held for them by Vaidya as trustee, and

Secondly, that the Bank knew this fact when they received it.

If they fail in establishing both these points, the question as to how the money was dealt with does not arise.

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With regard to the first matter, the Trial Judge, Mr. Justice Beaman, held that the aggregate amount of the deposits made by the sub-agents with Vaidya was some Rs. 68,000 in cash, and he decided that these monies were never in any real sense the plaintiffs' monies at all. Upon the character and quality of these monies, so far as they represented deposits, their Lordships, from the evidence before them on this appeal, have no hesitation whatever in accepting the conclusions of the learned Judge. There is no evidence to show that the Oil Company ever expressly or impliedly authorised Vaidya to enter into any sub-agency agreements at all, nor that they ever knew of the actual agreements or of their terms. It has already been pointed out that the agreements did not establish any privity of relationship between the Texas Company and the sub-agents; nor did the course of business between the Company and Vaidya necessarily imply that the parties must be assumed to contemplate the establishment of such sub-agencies. The appellants, however, say that such priority is established by section 194 of the Indian Contract Act, 1872, which is in these terms:—

"Where an agent, holding an express or implied authority to name another person to act for the principal in the business of the agency, has named another person accordingly, such person is not a sub-agent, but an agent of the principal for such part of the business of the agency as is entrusted to him."

The answer to this contention is to be found in the fact already mentioned that Vaidya never did have express or implied authority to name any person to act for the Texas Oil Company in the business; that he did not appoint them to act on behalf of the principal but on behalf of himself, and that the guarantees and deposited monies were to secure him as against them, and not for the security of the Oil Company. If, therefore, the Rs. 65,000 consisted entirely of these deposited monies, there would be no need for any further investigation into the matter; but in truth the appellants made a strong case for showing that only Rs. 52,000 were properly attributable to this source. In these circumstances it might have been necessary

to hear the respondents upon the question as to what was the true extent of these monies, and whether there was not, in the circumstances, some material difference between them and the sale monies, had it not been that their Lordships have come to the clear conclusion that, from whatever source the money was drawn, it was not paid into the Bank under circumstances that affected them with knowledge of any infirmities in Vaidya's title. The notice that it was alleged they received was, first, by reason of the form in which some of the cheques were drawn, and, secondly, by reason of Vaidya's association with the firm of Apte & Co. Upon the form of the cheque the notice is assumed to come from the signature, which in four cases is in these terms:

"B. R. Manerikar,

per pro P. G. Vaidya,

Sole agent for Bengal & U. P."

Manerikar was the head clerk and manager of Vaidya's agency for the appellants, and the signature was authorised and honoured; but there is nothing on the face of these documents that would lead the Bank to doubt that Vaidya was perfectly entitled to deal with the monies to which they related, in whatever manner he thought fit. To affect a Bank with knowledge of the ownership of monies paid into the accounts of their customers by the mere form of the signature on the negotiable documents by which such monies are transferred is to proceed far beyond the recognised limits of the doctrine of notice, and such a principle, if accepted, would create a serious embarrassment to the conduct of banking business. The case of *Coleman v. Bucks and Oxon Union Bank* (4) is an authority to show that even a direction to carry money to the credit of a customer's trust account, when no such account existed, is insufficient for such a purpose. Had Vaidya's account, to which the proceeds of the oil business were paid, been kept with the Bombay Bank under circumstances that could fairly impute to them knowledge that the monies were not Vaidya's, different considerations would apply [see *Gray v. Johnston* (8)], but in this case there is nothing beyond the fact that a cheque signed *per pro* with a

(8) (1868) 3 H. L. 1; 16 W. R. 842,

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statement that Vaidya is sole agent for Bengal and the United Provinces is handed in to the bank to be placed to the credit of Vaidya's account. Indeed, if the ledger account of the Indian Specie Bank be correctly stated in the record, there is nothing on the face of that account itself to suggest any infirmity in Vaidya's title, for it is simply headed: "Account of P. G. Vaidya, Esq.," and there is no explanation offered of the meaning of the signature, which indeed appears to have been quite unnecessary, for the cheque for Rs. 5,000 drawn on the 22nd February 1913 is signed without any such qualification, and is met out of the same account. Probably because of the infirmity of the proposition it does not appear from the documents and judgment that this point was ever raised in the whole course of the proceedings until the hearing of this appeal. As to verbal notice the only person with whom it appears that any interview took place was Kothavle, and both Vaidya and Kothavle's evidence are in agreement upon the fact that Kothavle was told that Vaidya had complete control over the monies, and to quote Kothavle's own evidence, Vaidya told him that the monies of all the cheques belonged to his rock oil business, as is shown by the following extract from this evidence :—

"A. . . . Vaidya told me that the monies of all the cheques belonged to his rock oil business.

"Q. And that he had full power and authority to give you those monies ?

"A. Yes.

"Q. He did not tell you that he was giving you some one else's money ?

"A. No.

"Q. As far as you knew, the monies belonged to Vaidya ?

"A. They did as far as I knew.

"Q. You told your directors so after the monies were paid, viz., that Vaidya had paid in monies belonging to himself ?

"A. Yes."

This evidence, which appears to have been accepted by the Trial Judge, and was certainly not impaired by cross-examination, is complete for the purpose of showing that neither by the knowledge of the Directors nor of Kothavle can notice be imputed.

There remains only the question of whe-

ther the knowledge of Vaidya himself is sufficient to form the necessary link. With regard to this it is important to observe that the Banking Company, though governed in the ordinary way by a Board of Directors, had, by Articles of Association, appointed the firm of V. N. Apte & Co. secretaries, treasurers and agents, and provided that they should have the general management of the business. But this is entirely insufficient to bring home to the Company notice of an irregularity on the part of Vaidya in his own private concerns which was only within his knowledge, and was solely due to his own improper conduct.

There is no principle and there is no authority to establish that, in such circumstances, the Bank could be affected with notice, and authorities indeed establish the exact opposite of such a proposition.

Without considering the earlier decisions it is sufficient to refer to the two cases of *Oave v. Oave* (6) and *David Payne & Co. Ltd., In re, Young v. David Payne & Co. Ltd.* (3). In the former, a Solicitor, who was the sole trustee of a settlement, paid the trust money in the joint name of his brother and himself and used the fund in the purchase of land, which was conveyed to his brother alone. The property was then mortgaged in favour of a mortgagee for whom the trustee acted as Solicitor; but it was decided that this fact could not affect the mortgagee with notice of the improper use of the trust money in the purchase of the estate.

In the latter case, the Director of a company induced the advance by them of £6,000 on the security of a second mortgage debenture in another Company, with the intention of using the money for the purpose of forwarding a scheme in which he was personally interested, a scheme outside the scope of their business. No other Director of the lending company knew anything of the circumstance. It was sought to affect the lending company by the knowledge which the Director possessed. Lord Wrenbury —then Buckley, J.—decided that no such notice could be imputed, and he stated the law in terms which their Lordships regard as accurate and appropriate. He said :—

"I understand the law to be this : that if a communication be made to an agent

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which it would be his duty to hand on to his principals, . . . and if the agent has an interest which would lead him not to disclose to his principals the information which he has thus obtained, and in point of fact he does not communicate it, you are not to impute to his principals knowledge by reason of the fact that their agent knew something which it was not his interest to disclose and which he did not disclose."

And this view was again supported in the Court of Appeal.

The facts in the present case do not, in their Lordships' opinion, go so far to constitute notice as those in the cases mentioned. In fact, they amount to nothing more than this, that a Company wanting payment of a debt from one of its agents asked that payment should be made, and obtained part of their debt without any knowledge whatever of the sources from which the money came. It would be straining the doctrine of notice beyond all reasonable limits to hold that in such circumstances moneys received in absolute good faith should be earmarked with some independent ownership, because the debtor, who was also a servant of the company, committed a fraud in order to discharge his obligations.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the Appellants.—Messrs. William A. Crump & Son.

Solicitors for the Respondents.—Messrs. T. L. Wilson & Co.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 6 OF 1919.

October 8, 1919.

Present :—Mr. Mittra, A. J. C., and
Mr. Prideaux, A. J. C.

MADHAO KASHINATH—

APPELLANT

versus

SAMBASHIVA—RESPONDENT.

Civil Procedure Code (Act V of 1908), Sch. II,
para. 17 (4)—Arbitration, reference to—Parties

inactive for six years—Reference, whether cancelled—Agreement to refer, whether can be filed.

On 24th December 1912 the parties, agreed to refer their differences to arbitration. On the 29th December 1912 they fell out and nothing was done under the agreement of reference for six years. After the lapse of that period one of the parties applied under paragraph 17 of Schedule II to the Civil Procedure Code to have the agreement filed;

Held, that the conduct of the parties, coupled with the long and unexplained delay, amounted to a cancellation of the agreement and that, therefore, the agreement could not be filed. [p. 127, col. 2.]

Appeal against the decree of the Additional District Judge, Chanda, in Civil Suit No. 31 of 1918, dated the 23rd December 1918.

Mr. M. B. Niyogi, for the Appellant.

Mr. Atmaram Bhagwant, for the Respondent.

JUDGMENT.—In Suit No. 74 of 1911, on the file of the Additional District Judge, Chanda, Madhao, the present appellant, sued the respondent Sambashiva for a partition of certain property. The application to sue as a pauper failed. On 24th December 1912, parties executed the agreement Exhibit P. 1 agreeing to submit their differences as regards partition to the arbitration of Rajam Sakharan Komti of Babupeth, Ramlu Jagappa Komti of Lohgaon, and Balwant Atmaram Brahmin Naik of Chanda.

On 27th December 1912 Madhao is said to have presented to the arbitrators a list of property to be partitioned, and on the next day Sambashiva also gave a list of the property in possession of both. According to the appellant he was abused on the 29th December 1912 before the Panchas by Sambashiva, who expressed his unwillingness to proceed with the arbitration. Having got so far in the settlement of their differences, nothing more seems to have been done until 29th July 1918, nearly six years later, when Madhao appellant gave Sambashiva a notice, Exhibit D 1. That document states, *inter alia*:—

"It was decided that you and myself should make an amicable settlement, and arbitrators were appointed, and you and myself together executed a deed of agreement in their favour on 24th December 1912. But the arbitrators have not made an award; and you do not give me the share. You are, therefore, being informed by notice that there is only a short time left for me during which I may bring a

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suit. It appears to be the intention of the arbitrators and yourself to let the period of limitation for my suit expire. I have now no confidence that the arbitrators will do the work; and I have informed the arbitrators by a notice that the deed of agreement is cancelled; and have cancelled the deed of agreement. You should, within 8 days from to-day, give my share of all the immoveable and moveable property and obtain a receipt from me."

Sambshiva's reply is Exhibit P-2. He stated:—

"The dispute between you and me is still before the arbitrators for settlement. I had never any objection to have a settlement made through arbitrators; nor have I any even now. Similarly, the arbitrators also never refused to make an award. It is you yourself who procrastinated. You cannot in this way cancel the agreement given to the arbitrators. If, while the matter is pending before the arbitrators, you take any other proceedings, or bring any claim against me, you will be responsible for the expenses, etc., I may incur therefor."

Madhao's answer was an application filed on 26th June 1918 under Schedule II, rule 17 of the Civil Procedure Code.

The respondent non-applicant pleaded *inter alia* that he has now a strong objection to one of the arbitrators, Balwantrao Naik, being allowed to arbitrate owing to the relations between them being strained. He asked that some other man be appointed with the consent of both parties in Balwantrao's place. The appellant applicant then denied that relations between non-applicant and Balwantrao were strained and the proceedings went to trial.

The Additional District Judge finds that under the law a new arbitrator could not be substituted for Balwant. He was satisfied that the non-applicant and Balwant Naik were not now on good terms and this fact made the non-applicant lose all confidence in Balwant, and that the fact that the two were on bad terms together with the lapse of time was sufficient cause under rule 17, Schedule II of the Civil Procedure Code, to justify a refusal to file the agreement, though he holds that if the relations between the parties were

unchanged, mere lapse of time would not enable any of them to withdraw from the arbitration. The application was dismissed.

We think that the conduct of the parties, dating from shortly after the date of the agreement, is sufficient to show that they had abandoned the idea of arbitration. The long and unreasonable delay of some years is not properly explained. We think that this conduct has broken the contract of the parties to refer the matter between them to arbitration. The appellant in his notice admits that he had cancelled the agreement.

It has been found, and we think rightly, that relations are strained between Balwantrao and the respondent and that the remaining arbitrators are partisans. There are thus reasons for the respondent's position that he is unwilling to submit the case now to the arbitration of a man who has quarrelled with him. We think the application has been rightly dealt with and, therefore, dismiss this appeal with costs. We fix Pleader's fees at Rs. 150.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1196 OF 1918.

May 23, 1919.

Present:—Justice Sir Asutosh Chaudhuri, Kt., and Mr. Justice Cuming.

MAHAMMED EMARTULLA SIRCAR—
DEFENDANT No. 2—APPELLANT

versus

MAHAMMED DIDAR BUX SIRCAR

AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 66—Benami purchase at execution sale, whether illegal—Statutory provision barring equitable jurisdiction of Court, construction of—Purchase at execution sale in benami of one of several heirs, whether deprives other heirs of their right—Tenant having attorned to beneficial owner, whether can refuse to pay rent to his heirs.

Although the object of section 65 of the Code of Civil Procedure is to discourage *benami* purchases at Court sales, it does not render such purchases illegal. Inasmuch as the section bars the equitable jurisdiction of the Court, it must be strictly

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construed and should not be extended beyond its express terms. [p. 128, col. 2.]

Where a Muhammadan father purchased a *jote* at an execution sale with his own money in the name of one of his sons and settled it with a tenant, who attorned to him and after his death paid rent to his heirs for some time:

Held, that having been brought upon the land by the father, it was not open to the tenant to say after the father's death that he was not the tenant of his heirs, and that a suit for rent brought by the heirs would not be barred under section 66 of the Code of Civil Procedure, simply because the father had purchased the *jote* at an auction sale in the name of one of his sons. [p. 129, col. 1.]

Appeal against the decree of the Subordinate Judge, Jalpaiguri, dated the 7th March 1918, affirming that of the Munsif, 2nd Court at Jalpaiguri, dated the 28th February 1917.

FACTS appear from the judgment.

Babu Santosh Kumar Bose, for the Appellant.—Defendant No. 2 had purchased the land in dispute at an execution sale held in August 1902. As the sale certificate was in his name, I submit that section 66, Civil Procedure Code, is a clear bar to the maintainability of the suit of the plaintiff.

Babu Hemendra Nath Bose, for the Respondents.—The object of section 66, Civil Procedure Code, is not to render *benami* purchases illegal, but only to discourage them. That section must be strictly construed. The father was the real purchaser of the *jote* within which the land held by the principal defendant stands. My suit cannot be barred by section 66. Refers to *Sasti Ohurn Nundi v. Aunopurna* (1).

The tenant paid rent to the father who brought him upon the land and after his death to his heirs, and so there cannot be any bar to the suit under section 66.

Babu Santosh Kumar Bose, in reply.—*Sasti Ohurn Nundi v. Aunopurna* (1) is distinguishable. In that case pleadings showed possession. Here plaintiff did not proceed on the footing of possession.

JUDGMENT.—This suit was instituted by the plaintiffs for recovery of rent for the period in suit, on the allegation that the rent claimed from the principal defendant, the tenant, was payable to the plaintiffs and the *pro forma* defendants as co-sharers who used jointly to realise same, but inasmuch as the *pro forma* defendants had not joined with the plaintiffs, they had been added as parties.

(1) 23 C. 699.

The prayer is for a decree against the principal defendant and in the alternative against the *pro forma* defendants, should it be found that they had realised the plaintiffs' share. The principal defendant denied relationship of landlord and tenant and defendant No. 2 Mahammad Emaratulla Sarkar supported him, on the ground that the land in suit had been purchased by him alone at an execution sale which took place in August 1902. He contended that inasmuch as the sale certificate was in his name, section 66, Civil Procedure Code, was a bar. We cannot take that view in this case. The object of that section no doubt is to discourage *benami* purchases at Court sales, but not to render such purchases illegal. Inasmuch as the provisions of that section bar the equitable jurisdiction of the Court, it has been repeatedly held that the section must be strictly construed and not extended beyond its express terms. It has been found by both the Courts that the defendant Emartulla's name was used by his father Haji Mehor Buksh, who was the real purchaser of the *jote* within which the land held by the principal defendant stands. It has also been found that the tenant defendant was brought on this land by the Haji and that after his death the tenant paid rent for one year to Dalal Buksh, one of the Haji's sons who according to the plaintiff was authorised to collect rent on behalf of all the heirs of the Haji. This allegation has been held proved. Defendant No. 2 relied upon certain decrees which he had obtained against some tenants of other lands in the *jote*, which are evidently of no value as the other heirs of the Haji were not parties therein. In the Settlement Khatian the names of all the heirs of the Haji are recorded as proprietors. The Courts have not accepted the allegation that the principal defendant paid rent to defendant No. 2 alone, as no rent receipts or collection papers were produced.

In the circumstances above mentioned, we think the suit is not barred by section 66. It was held in *Sasti Ohurn Nundi v. Aunopurna* (1) that when the plaintiff was in possession since the time of the sale for some years and when such possession was sought to be disturbed by the defendant by setting up a purchase in his own name, a suit was competent by the plaintiff for declaration of his title and for other reliefs incidental thereto. It was held in *Musammatt Buhuns Kowur v.*

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Buhocree Lall (2) that section 317 does not make all *benami* transactions invalid, nor read with section 316 does it confer upon the ostensible purchaser a title against the real purchaser. It merely declares that a suit shall not be maintained against the certified purchaser on the ground that he was only the ostensible purchaser. In *Bishan Dial v. Ghazi-ud-din* (3) *Sasti Ohurn v. Aunopurna* (1) was not fully accepted but the learned Judges said that the section would not apply where the suit was based not on the ground that the purchase was *benami* but upon some other independent ground. It seems to us upon the facts of the case, inasmuch as the tenant paid rent to the father who brought him upon the land and after his death to his heirs, it is not barred under section 66, Civil Procedure Code, simply because the father purchased the *jote* at an auction sale in the name of one of his sons. In *Bodh Singh Doodhoria v. Guneschunder Sen* (4) it was held that the provisions of Act VIII of 1859, section 260, were designed to check the practice of making *benami* purchases at execution sales, i.e., transactions in which one party secretly purchases on his own account in the name of another party. They cannot be taken to affect the rights of members of a joint Hindu family, who by the operation of law are entitled to treat as part of their common property an acquisition, howsoever made by a member in his sole name, if made by the use of the family funds. In this case a Muhammadan father bought the property with his money although in the name of one of his sons. He settled the land with a tenant who attorned to him and paid his heirs rent after his death. Having been brought upon the land by the father it is not open to the tenant to say after his death, although he had paid rent to the heirs, that he is not their tenant but the tenant of the son in whose name the sale certificate stood. To hold that the heirs are precluded from suing the tenant for rent under these circumstances would work

great injustice. We hold that the appeal fails and it is dismissed with costs.

Appeal dismissed.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 299 OF 1916.

August 4, 1919.

Present:—Sir Norman Macleod, Kt.,
Chief Justice, and Mr. Justice
Heaton.

RACHANGAUDA IRANGAUDA PATIL—
APPELLANT

versus

THE SECRETARY OF STATE FOR
INDIA—RESPONDENT.

Bombay Revenue Jurisdiction Act (X of 1873), s. 4 (a), whether ultra vires—Government of India Act 1853 (21 & 22, Vict. C. 106), s. 65—Vatandar patil, dismissal of—Suit for declaration that dismissal is illegal, maintainability of.

Plaintiff, who was a *vatandar patil*, was dismissed from his post and his life-interest in the *patilki vatan* was forfeited. He brought a suit against the Secretary of State for a declaration that the order of dismissal was illegal and for possession of the *vatan* lands;

Held, (1) that the suit was barred by the provisions of section 4 (a) of the Bombay Revenue Jurisdiction Act; [p. 130, cols. 1 & 2.]

(2) that section 4 (a) of the Bombay Revenue Jurisdiction Act was not *ultra vires* of the Government by virtue of the provisions of section 65 of the Government of India Act, 1853, inasmuch as the plaintiff could not have brought a suit claiming the same relief against the old East India Company. [p. 130, col. 2.]

Appeal from the decision of the District Judge, Bijapur, in Suit No. 2 of 1915.

Mr. Setlur (with him Messrs. Ratanlal Kanchhodas and Hiralal J. Kania), for the Appellant.

Mr. S. S. Patkar, Government Pleader, for the Respondent.

JUDGMENT.

MACLEOD, C. J.—The plaintiff in this suit was a sixteen-anna Vatandar Patil owing 23 Vatan lands in the village of Talikot in the District of Bijapur. By Government Resolution No. 7950 of 26th August 1914 it was resolved that Government concurred in the opinion expressed by the Commissioner in paragraph 3 of the memo-

(2) 14 M. I. A. 496 at p. 526; 18 W. R. 157; 10 B. L. R. 159 (P. C.); 3 Sar. P. C. J. 69; 20 E. R. 871.

(3) 23 A. 175; A. W. N. (1901) 44.

(4) 19 W. R. 356; 3 Sar. P. C. J. 253; 12 B. L. R. 317 (P. C.)

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randum. Sanction was accorded to the dismissal of Rachangauda Irangauda from the post of Revenue and Police Patil of the village of Talikot and to the forfeiture of his life-interest in the Patilki Vatan of the village. He then brought this suit against the Secretary of State for India in which the following relief was claimed: (a) a declaration that the order of Government is illegal and does not legally effect forfeiture within the meaning of section 61 of the Watan Act; (b) consequently the plaintiff is entitled to possession of the Vatan lands with mesne profits from date of suit.

The District Judge dismissed the suit on the ground that it was barred by section 4 (a), paragraph 1 of the Bombay Revenue Jurisdiction Act, and that as he had no doubt in the matter he was precluded from referring the matter to the High Court under section 13 of the Act. That section provides that subject to the exceptions thereafter appearing, no Civil Court shall exercise jurisdiction with respect to any of the following matters: (a) claims against Government relating to any property appertaining to the office of any hereditary officer appointed or recognized under Bombay Act No. III of 1874 or any other law for the time being in force, or of any other village officer or servant, or claims to perform the duties of any such officer or servant, or in respect of any injury caused by exclusion from such office or service.

There can be no doubt that the plaintiff's suit comes within the purview of those words, but it has been argued that that Act is *ultra vires* of Government in its powers of legislation on the authority of *Secretary of State for India v. Moment* (1). It was laid down in that case that the effect of section 65 of the Government of India Act, 1858, was to debar the Government of India from passing any Act which can prevent a subject from suing the Secretary of State for India in Council in a Civil Court in any case in which he could have similarly sued the old East India Company. The appellant, therefore, has to satisfy us that he could have sued the old

East India Company claiming the relief which he asked for in the present suit. Counsel for the appellant was not able to refer us to any authority which could convince us that such a suit as the present one could have lain against the old East India Company. We were referred to Regulations XVI and XVII of 1827. But there is nothing in those Regulations, which provide that a claim to Inam lands was cognizable by the Court of the East India Company. That is made clear by the preamble to Act XI of 1852, which states "Whereas in the Territories of the Deccan, Kandeish, and Southern Mahratta Country, and in other Districts more recently annexed to the Bombay Presidency, claims against Government on account of Inams and other Estates wholly or partially exempt from payment of land revenue are excepted from the cognizance of the ordinary Civil Courts...and whereas it is desirable that the said claims should be tried and determined without further delay", the enactment was passed. Then under section 2 the Governor of Bombay in Council was empowered to appoint an Inam Commissioner with so many Assistants, and such subordinate establishment as might be necessary for the purposes thereafter mentioned. By section 7 no decision or order of the Inam Commissioner, or of any of his Assistants, or of the Governor in Council under the provisions of this enactment, so long as the same shall be in force under such provisions, shall be questioned or avoided in any Court of law.

It is thus perfectly clear that before 1858 such a claim as the plaintiff's in the present suit was not cognizable by the ordinary Civil Courts. Therefore, section 4 (a) (1) of Act X of 1876 was not *ultra vires*. Therefore, in my opinion, the decision of the learned District Judge was correct and the appeal must be dismissed with costs.

HEATON, J.—I agree. There is no doubt whatever, it is not pretended that there is any doubt on this point, that the present suit is barred by section 4 of the Bombay Revenue Jurisdiction Act, if that section enunciates the law. But it is said that the section, at any rate in so far as it bars a suit of this kind, is *ultra vires*. It is for the appellant to show that this is so.

(1) 18 Ind. Cas. 22; 15 Bom. L. R. 27; 40 C. 391; 17 C. W. N. 169; 17 C. L. J. 194; 24 M. L. J. 459; 13 M. L. T. 53; (1913) M. W. N. 45; 11 A. L. J. 49; 6 Bur. L. T. 1; 7 L. B. R. 10; 40 I. A. 48 (P.C.).

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He relies on the case of *Secretary of State for India v. Moment* (1). That throws us back on to section 65 of the Statute 21 and 22 Vic, c. 106. That section and the case referred to open up a large variety of possible points, but so far as we have been able to inquire into the law as it existed when that Statute was enacted, i.e., in the year 1858, it is not shown that a suit would have lain against the East India Company for an act of this kind. In other words, it is not shown that the provisions of the Bombay Revenue Jurisdiction Act are *ultra vires* in so far as they affect the suit. Therefore, I think the appeal must be dismissed with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 59 B OF 1919.
September 27, 1919.

Present:—Sir Henry Drake Brookman, Kt.,
J. C.

EKOJI KUNBI—PLAINTIFF—
APPELLANT

versus

AKAJI KUNBI AND ANOTHER—DEFENDANTS—
RESPONDENTS.

Possession and dispossession, suit on basis of—Burden of proof—Limitation—"Confession and avoidance," defence of, nature of.

In a suit for possession upon a dispossession the plaintiff is bound to establish a subsisting title and possession within 12 years immediately preceding the commencement of the suit. [p. 133, col. 1.]

Dharani Kanta v. Gabar Ali Khan, 18 Ind. Cas. 17; 17 O. W. N. 389; 25 M. L. J. 95; 13 M. L. T. 185; (1913) 1 M. W. N. 157; 15 Bom. L. R. 445; 17 O. L. J. 277 (P. C.), followed.

A defence of confession and avoidance can be said to have been raised only when the defendant completely admits the basis of the plaintiff's claim but seeks to avoid the effect of that admission by pleading, for example in the case of a suit on a contract, performance, fraud, release, limitation or otherwise. [p. 133, col. 1.]

Appeal against the decree of the 2nd Additional District Judge, Akola, in Civil Appeal No. 242 of 1913, dated the 22nd January 1919, arising out of Civil Suit

No. 244 of 1916 in the Court of the Munsif, Basim, dated the 14th September 1918.

Mr. Bhowani Shankar, for the Appellant.

Mr. M. V. Joshi, for the Respondents.

JUDGMENT.—The judgment in this second appeal will govern the disposal of No. 60 B, except for one point which will be separately dealt with. It will also suffice for the determination of Second Appeal No. 61, B. There is a fourth appeal (No. 62-B), the hearing of which has had to be postponed because the respondent has not yet been served. These four appeals arise out of separate suits, namely, Nos. 244, 243, 240 and 235 of 1916 respectively.

In each of the four suits the plaintiff, who is the appellant in this Court, claimed exclusive title to and possession of certain sub-numbers of three or more out of the following survey Nos. in Mauza Krishna:—

Nos. 26, 32, 38, 60 and 61.

With regard to Nos. 26, 32 and 38 the plaintiff pleaded that his grandfather Suryaji acquired a one-third share at a time when the recorded *khatadar* was one Jhingraji who himself owned a similar share, the remaining one-third share belonging to Vikramji. He also stated that a latter *khatadar* was Vithoba, grandson of Jhingraji, and that about 40 years back a partition was effected under which the plaintiff obtained certain sub-Nos. in each of the five fields including the sub-Nos. now in dispute.

With regard to Nos. 60 and 61 his case was that a one third share in them also was acquired by his grandfather Suryaji, the remaining two shares belonging to Jhingraji and Vikramji respectively, and that the shares were separated at the partition 40 years back; of these two fields he alleged Suryaji to have been the recorded *khatadar*. His case generally was that he as his grandfather's successor was in sole possession of the entire one-third share up to the year 1913 when the respective defendants dispossessed him of certain portions, leaving him in possession of the rest.

It is common ground that one-third of each field belongs to the successors-in-title of Jhingraji and Vikramji respectively and the plaintiff himself alleged that Jhingraji's grandson Vithoba and Vikramji's son

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Ishnaji are his kinsmen "in the seventh or eighth degree." He also said that the defendants are related to him "in the eighth or ninth degree."

The case for the defence was that the defendants owned a one-third share in each of the five fields jointly with the plaintiff and that they were in joint possession till the year 1913, when a partition was effected in accordance with which certain sub-Nos. were allotted to the plaintiff, the rest (including all those sued for) being distributed among the defendants. This partition was established to the satisfaction of the officer in charge of the Record of Rights before whom in December 1913 the plaintiff claimed, as he does now, to be the exclusive owner of the entire one-third share in each field.

The Trial Judge, who first decided the suits in July 1917, placed upon the plaintiff the burden of proving that the fields were acquired by his grandfather Suryaji and that he had been in exclusive possession till 1913, and decided both the questions thus raised in the negative. He also found on other issues embodying the points raised for the defence that the five fields constituted ancestral property in the hands of the plaintiff, the defendants and other persons, and that the plaintiff and defendants were in joint possession till a partition was effected by a *panchayat* in 1912 or 1913. He was unable to decide the exact relationship between the plaintiff and the defendants. On these findings the suit was dismissed.

The plaintiff appealed in all four cases to the District Court and they were remanded by an Additional District Judge, who attaching undue importance to the matter of relationship considered that the burden should have been laid on the defendants to prove the exact relationship between them and the plaintiff. The trial was also said to have been unsatisfactory for want of complete pleadings and sufficient identification of the plots in dispute.

Before the new trial took place, maps were put in showing each of the five fields and its sub-Nos. and the name by which each field was locally known was also given. The following issues were then framed :—

"1. Whether defendants are related to the plaintiff as alleged by them ?

"2. Whether the defendants had joint possession over the plots in suit till 1912 as alleged by them?

"3. Whether there was a partition in 1912 as alleged by defendants and whether the plots in suit fell to the shares of the respective defendants at the said partition as alleged by them?

"4. Whether the plaintiffs were in exclusive possession of the plots till 1913 ?

"5. To what relief are the parties entitled ?"

The plaintiff examined one more and the defendants two more witnesses and the Trial Judge, the successor in office of the officer who had written the first judgment, decreed each of the four claims. He held that the defendants had failed to establish the correctness of the pedigree given by them; that the alleged joint possession and partition were also not established; and that the plaintiff must be taken to have been in exclusive possession of all the fields.

The case was again taken to the District Court in appeal and another Additional District Judge held that the burden of proof had been wrongly laid on the defendants; that the exclusive possession and title of the plaintiff had not been made out; and that the presumption afforded by section 6-I, Hyderabad Assigned Districts Land Revenue Code, 1896, was not rebutted, the decrees in favour of the plaintiff were, therefore, reversed and his claim was dismissed.

In this Court the main point urged on behalf of the plaintiff is that the burden of proof should have been placed upon the defendants to show the joint title and possession upon which they rely. Section 101, Indian Evidence Act, is relied upon in this connection. The terms of that section are as follows :—

"Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

"When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

It is said that the defence was really one of "confession and avoidance." In my opinion this is clearly not a case in

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which the defence can be accurately described by that technical term of old English pleading, which finds no place in the Current Rules and Orders of the Supreme Court. Where a suit is brought on a contract the defendant may admit that he made the contract, but avoid the effect of that confession by pleading performance, fraud, release, limitation or otherwise. In such a case there is a complete admission of the basis of the claim. In the present case the plaintiff claims exclusive title and possession and neither of these was admitted in whole. The plaintiff did not claim and does not desire to have joint possession of the plots sued for, nor could he be allowed to obtain such relief except on the theory that the defendants were his co sharers and on admitting them to joint possession of the plots, which he admittedly holds exclusively since 1913 by virtue of the alleged partition. There was in fact not a confession but a traverse. Moreover, the present suits are for possession as upon a dispossession, and the plaintiff is bound in accordance with a well-settled rule to establish a subsisting title and possession within 12 years immediately preceding the commencement of the suit: see *Dharani Kanta v. Gabar Ali Khan* (1). The section of the Evidence Act relied upon by itself suffices to show that it was for the plaintiff to prove what the defendants did not admit, namely, that his possession was to be accounted for by an exclusive title.

It is said that the defendants dispossessed the plaintiff in view of the approaching inquiry by the officer in charge of the Record of Rights and that no title could be conferred by that officer. The Record of Rights, however, shows that the defendants have long been in occupation and that they obtained the shares shown against their names as the outcome of an award given by a *panchayat* in September 1912. There is a presumption that the entries to this effect are true and there is also evidence to support them: for instance, Lakshman Kunbi (D. W. No. 3), who was a member of the *panchayat* and is related to both sides, spoke to the joint cultivation and the subsequent division. Altogether there is ample basis for the finding that the plaintiff was not in

exclusive possession as he alleges and he has undoubtedly failed to establish acquisition by his grandfather Suryaji of the entire one-third share.

The lower Appellate Court declared itself satisfied that the defendants and the plaintiff are descended from a common ancestor. It is objected here that sufficient reasons for this conclusion have not been given. It seems to me, however, that the existence of a common ancestor follows necessarily from the admission of the plaintiff himself in his written reply to the defence. In describing the defendants as his relatives "in the eighth or ninth degree" he necessarily implied that they had a common ancestor. There is, therefore, no force in this contention.

In the sixth ground of appeal the lower Appellate Court is said to have failed to have noticed that certain receipts executed at the *panchayat* were not produced in evidence and to have ignored the statements made by the defendants' own witnesses, to the effect that Suryaji was separate in mess and estate from the persons said to have been his brothers. With regard to the receipts I would observe that the witness Laxman Kunbi already mentioned deposed to execution of one receipt only, which was in favour of the *panchayat* and was subsequently filed in the Court of the Tahsildar and not returned to the *panchas* though they asked for it. With regard to the relations between Suryaji and his alleged brothers I am not referred by the appellant's Pleader to any specific statements. The plaintiff himself is 50 years old and none of the witnesses for the defence is over 60, while most are considerably younger. It is, therefore, quite unlikely that any of them knows much about Suryaji, who according to the plaintiff himself died 40 years ago.

Lastly it is contended that the evidence for the plaintiff was not considered by the lower Appellate Court in the manner required by law. It is complained that the statements of the plaintiff as P.W. No. 1 and Krishnaji (P. W. No. 2) regarding dispossession have been ignored and that the P. Ws. Nos. 3 to 6 have not even been mentioned. I am also referred to certain books marked Exhibits P.2 and P.3 and known as *proti* (revenue receipt) books, which are said to show that Suryaji acted as the sole owner of all the fields. I find, however, from the

(1) 18 Ind. Cas. 17; 17 C. W. N. 389; 25 M. L. J. 95; 13 M. L. T. 185; (1913) M. W. N. 157; 15 Bom. L. R. 445; 17 C. L. J. 277 (P. O.).

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third paragraph of the lower Appellate Court's judgment that the evidence of every single witness for the plaintiff has been considered. The *paoti* books have not been translated, and all I have been able to discover from a cursory inspection of them is that Suryaji paid revenue for Nos. 60 and 61, a fact which is accounted for if he was the recorded *khatadar* as pleaded by the plaintiff. It is well known that in Berar the recorded *khatadar* was frequently not the sole owner and as already mentioned, the plaintiff admitted in his reply to the defence that in respect of three fields, Jhingraji and after him Vithoba was recorded as sole *khatadar*. Much of the time of the Trial Judges who dealt with the case was wasted in dealing with the question of the exact relationship between the plaintiff on the one hand and each of the defendants on the other. This point was not really material in view of the plaintiff's own admission. He has failed to make out the facts on which he based his claim, namely, that his grandfather Suryaji acquired the one-third share in each of the five fields and his own exclusive possession for 12 years before 1913, and his claims in Suits Nos. 244, 243 and 240 were rightly dismissed.

This appeal and No. 61-B are accordingly dismissed. In the lower Courts costs will be paid as already ordered.

Appeal dismissed.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 869
OF 1918.

August 7, 1919.

*I resent:—*Mr. Justice Pratt.

THE SECRETARY OF STATE FOR
INDIA—PLAINTIFF

versus

SIR MAHOMED YUSUF ISMAIL, Kt.,

AND OTHERS—DEFENDANTS.

*Registration Act (XVI of 1908), ss. 2 (7), 17—
Agreement to grant lease, whether compulsorily
registrable—Construction of document—Intention of
parties.*

Agreements to lease which are compulsorily
registrable under the combined operation of section

2, sub-section (7), and section 17 of the Registration Act are those agreements which import a present demise or the creation of an immediate interest. [p. 136, col. 1.]

In order to determine whether an agreement is compulsorily registrable, the intention of the parties as declared by the words of the instrument must govern the construction. [p. 136, col. 1.]

An agreement between the parties that at a future time one of them shall become the tenant, provided certain things are intermediately done by the landlord or his agent so as to put the premises into a certain state which the agreement describes, is not an agreement of demise but an agreement to demise at a future date on the performance of certain conditions and is not, therefore, required to be registered. [p. 136, col. 2.]

Mr. Bahadurji, acting Advocate-General,
and Mr. Campbell, for the Plaintiff.

Messrs. Setalvad and Desai, for Defendant
No. 1.

JUDGMENT.—This is a suit for specific performance of an agreement to lease. The facts are not in dispute. In December 1914 the Presidency Post Master was looking for premises for a new Post Office and entered into negotiations with the 1st defendant, who was constructing a building called the Sutar Chawl. The Presidency Post Master gave the defendant particulars as to the nature and extent of the accommodation required and the defendant made the following offer in a letter, dated the 1st February 1915:—

"With reference to the Post Office Superintendent's interview with me, I have arranged with Messrs. Mistry and Bhedwar, Architects, to have an accommodation for a Post Office at Sutar Chawl measuring about 650 Sq. Yds. and shall let it to you on a lease for ten years on the following conditions:—

"1. The rent for the place would be Rs. 175 per mensem.

"2. The counters and a shelf would be supplied by me.

"3. The electric installation to be made by me, but will be maintained thereafter by you.

"The place would be ready for occupation by the 1st April 1915."

The Presidency Post Master then obtained the sanction of the Post Master General and replied as follows on the 13th of February 1915:—

"In continuation of my letter J. Musjid/2 dated the 6th February 1915, I have the honour to say that the Post Master,

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General, Bombay, has accepted the proposal. I shall, therefore, be much obliged if you will kindly do the needful now with a view to enable me to move the present J. Masjid Post Office into your new building in the Sutar Chawl with effect from the 1st April 1915. The Post Master General has further desired me to insert the optional clause in the lease, i. e., giving the Post Office the option to renew the lease for another five years. Kindly acknowledge receipt of this letter."

To this defendant replied on the 16th of February 1915 as follows:—

"With reference to your letter No. Juma Masjid/2, dated the 13th instant, I am making the necessary arrangements."

The defendant proceeded to make what he called the necessary arrangements, that is, to adapt the premises for use as a Post Office; but by the 1st of April these arrangements were not complete. The counters were not varnished, the shelves were not put up, and the electric lights were not installed. Nevertheless the Post Office went into occupation on the 1st of April and the improvements were completed in the following month.

Mr. Murtree, the Presidency Post Master, says that he did not tender a lease for execution on entry into possession as the improvements had not been completed. After they were completed he instructed a subordinate to do so. But the defendant made no reply and the matter was lost sight of. But the Post Office continued in possession and paid the stipulated monthly rental.

Subsequently the 1st defendant leased the same property to two rent farmers, the 2nd and 3rd defendants, and they served the Post Office with a notice to quit; and this led to the institution of the present suit.

On these facts the questions that arise are those embodied in the first two issues: Does the correspondence disclose a completed agreement? If so, is it inadmissible in evidence for want of registration?

Now, I think, it can hardly be disputed that there was a completed agreement. The defendant's letter of the 1st of February was an offer embodying all the terms of the proposed lease. It is true that the Presidency Post Master's reply was not

an unqualified acceptance but suggested a further condition of an option of renewal. It was in fact an acceptance with a counter-offer, which the defendant in turn accepted by his letter of the 16th of February. The acceptance was not express, but it is clearly implied in the statement that the defendant was making the necessary arrangements, specially in view of his subsequent conduct in giving possession to the Post Office.

The next question is the more difficult one: whether these letters embodying the agreement to lease are inadmissible in evidence in view of section 49 of the Indian Registration Act. That section enacts that no document which is required by section 17 to be registered shall, when unregistered, be received as evidence of any transaction affecting property comprised therein. There can be no doubt that an agreement may be a transaction affecting property, although it does not create an interest in the property. I think it is clear from the terms of section 91 of the Indian Trusts Act, where the same words "affecting property" are used.

The question then resolves itself to this: Whether the registration of this correspondence embodying the agreement to lease is compulsory under section 17. Now, the period is more than one year, and, if the agreement be equivalent to a lease, registration will be compulsory under section 17, sub-section (1), clause (d). The Advocate-General for the plaintiff refers to the case of *Panchanan Basu v. Ohandi Oharan Misra* (1), where Jenkins, C. J., described an agreement to lease as falling under clause (h) of section 17 of Act III of 1877, corresponding with section 17 (2) (v) of the present Act (XVI of 1908). But, I think, it is clear that this reference was an oversight, for that sub-section does not apply to leases and applies only to instruments described in section 17, sub-section (1), clauses (b) and (c). The substantial reason given in the judgment was that in the document there considered no immediate interest was created and there was no present demise. This accords with the rule deducible from *Purmananddas Jiwandas v. Dharsey Virji* (2) and the recent judgment

(1) 6 Ind. Cas. 443; 37 C. 808; 14 C. W. N. 874.

(2) 10 B. 101.

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of this Court in *Kessowji v. Bai Kesarbai* (Appeal No. 2 of 1909) that agreements to lease which are compulsorily registrable under the combined operation of section 2, sub section (7), and section 17 of the Registration Act are those agreements which import a present demise or the creation of an immediate interest.

Does this agreement import such a demise? Under the authorities "the intention of the parties as declared by the words of the instrument must govern the construction:" *Poole v. Bentley* (3) and "where there is any doubt as to the operation of the contract, the Court must endeavour to discover the intention of the parties from the contents of the instrument, and if we see a paramount intention that the instrument shall operate as a lease, we must hold it to be such, although it may contain conflicting expressions:" *Pinero v. Judson* (4).

Now, there are no words of present demise in the correspondence. "I let" or "I agree to let" have been held to be words of present demise but here the words are "shall let." Again, as to the intention of the parties, the terms of the agreement and the collateral circumstances negative a present demise. The defendant offers to provide accommodation for a Post Office and to make the necessary improvements, and the plaintiff accepts subject to a counter-offer which is itself accepted. The making of the improvements was a condition precedent to the acceptance of the tenure and there can be no doubt but that the plaintiff could have refused to enter into possession on the 1st of April if counters had not been constructed. The parties, therefore, could not have intended the agreement to operate as a present demise. And the fact that the plaintiff waived the previous construction of some of the improvements and did enter into possession on the faith of the defendant's promise to complete does not affect this conclusion.

For the defendant it is contended that the fact of plaintiff entering into possession and paying rent is conclusive that there was a demise. No doubt there has been a demise, but how? Not under the agreement which was executory, but by implication from the

fact that the defendant put the plaintiff into possession. When that was done on the 1st of April the agreement became executed and there was a demise. Nevertheless, on the 16th of February the agreement was still executory and imported no present demise. To quote the words of Baron Alderson in *Gore v. Lloyd* (5):

"Looking at the whole of this instrument, it appears to me that it was not intended to give an immediate right to the party to be from that moment, and before the execution of any lease, a tenant from a future day, but that the true construction of the instrument is, an agreement between the parties that at a future time one of them shall become the tenant, provided certain things are intermediately done by the landlord or his agent, so as to put the premises into a certain state, which the agreement describes. Then, it being shown that this agreement has been performed, and that the tenant is occupying the land, the terms of the agreement, coupled with his occupation, make him a tenant upon the conditions specified as the terms of the future lease."

That is exactly the case here. It is not an agreement of demise, but an agreement to demise at a future date on the performance of certain conditions.

In *Regnart v. Porter* (6) an agreement containing prospective stipulations by the landlord to lay out money on the premises was held not to operate as a demise *in presenti*. There were similar stipulations in *Staniforth v. Fox* (7), but they were held to be merely accessory in view of the express words "does this day agree to let" and the simultaneous payment of part of the rent. The recent case of *Inland Revenue Commissioners v. Earl of Derby* (8) illustrates the converse case of conditions to be performed by the tenant. There was an agreement to lease for a term commencing from Lady Day 1910. The agreement was concluded by correspondence of the 5th of April 1910,

(5) (1814) 12 M. & W. 463 at p. 478; 13 L. J. Ex. 366; 152 E. R. 1279; 67 R. R. 402.

(6) (1831) 7 Bing. 451; 5 M. & P. 370; 9 L. J. (o. s.) C. P. 168; 131 E. R. 174; 33 R. R. 537.

(7) (1831) 7 Bing. 590; 5 M. & P. 583; 9 L. J. (o. s.) C. P. 175; 13 E. R. 228; 33 R. R. 420.

(8) (1914) 3 K. B. 1186; 84 L. J. K. B. 245; 103 L. T. 827.

(3) (1810) 12 East 163 at p. 170; 2 Camp. 236; 101 R. 66.

(4) (1829) 6 Bing. 206 at p. 210; 3 M. & P. 497; 8 L. (o. s.) C. P. 19; 31 R. R. 388; 130 E. R. 1259.

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subject to certain conditions to be performed by the lessee, and the Court held that this was not the case of a tenancy actually created by agreement but an agreement which provides the conditions on which a lease can be demanded.

Sir Chimanlal for the defendant refers to *Barry v. Nugent* (9) and *Doe d. Walker v. Groves* (10) for the proposition that an agreement may operate as a present demise, although the execution in the future of a formal document was contemplated. No doubt, that will be so, if such can be collected to have been the intention of the parties. But that is not the case here and the extreme informality of the agreement concluded by the correspondence supports the contention that there was no intention to make a present demise.

The agreement is, therefore, not barred by section 49 of the Indian Registration Act.

It is further contended on behalf of the plaintiff that the Crown is not bound by the Registration Act. But, in view of my finding on the construction of the agreement, I need not enter into a detailed discussion of this question and shall content myself with referring to section 17, sub-section (2), clause (vi), and section 90 as containing an implication which takes away the prerogative of the Crown.

It is not contended that the delay in filing the suit disentitles the plaintiff to specific performance. The delay in this case leads to no inference of acquiescence, for the plaintiff was in possession. Nor has anything occurred in the interval which would make the grant of the relief claimed inequitable. On the other hand, the equities are in favour of the plaintiff for there has been part performance and the plaintiff has been put into possession.

The second and third defendants are subsequent lessees with notice, for plaintiff's possession was notice. They can, therefore, be made to join in the execution of the lease under section 27 (b) of the Specific Relief Act.

The agreement is not stamped, but is nevertheless admissible in evidence in view of the exemption of Government contained

in the proviso to section 3 of the Indian Stamp Act.

The following issues were framed:—

(1) Whether there was a concluded agreement in correspondence between plaintiff and defendant No. 1 as alleged in paragraph 2 of the plaint?

(2) Whether, if the first issue is found in the affirmative, the correspondence is admissible in evidence as the agreement to lease being not registered and not stamped?

(3) Whether the plaintiff is not merely a monthly tenant?

(4) Whether the plaintiff is entitled to specific performance of the alleged agreement?

(5) Whether the plaintiff is entitled to an option of renewal for a further period of five years?

My findings thereon are: (1) in the affirmative; (2) in the negative; (3) in the negative; (4) in the affirmative; (5) in the affirmative.

There will, therefore, be a decree in terms of prayer (a) to the plaint against the 1st defendant. The second and third defendants ordered to join in the execution of the said lease. The plaintiff to recover his costs from the 1st defendant.

Suit decreed.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER NO. 33 OF 1918.

October 1, 1918.

Present:—Justice Sir William Ayling, Kt., and Mr. Justice Krishnan.

SAMBASIVA AIYAR—PETITIONER—
APPELLANT

versus

THIRUMALAI RAMANUJATHATHACHARIAR AND OTHERS—RESPONDENTS
Nos. 3, 1, 2 AND 4—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 2—Mortgage decree—Payment made to mortgagee out of Court—Certification, absence of—Payment, whether can be pleaded as bar to execution of final decree.

Where in a mortgage suit the parties enter into an agreement before the preliminary decree is passed, and a payment under such agreement is made out of Court to the mortgagee, before the

(9) (1782) 3 Dougl. 179 at p. 180; 5 Term Rep. 165n; 99 E. R. 601.

(10) (1812) 15 East 244; 104 E. R. 837.

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final decree is passed, such payment falls within the scope of rule 2 of Order XXI of the Civil Procedure Code, and unless it is certified to the Court as required by that rule, it cannot be pleaded as a bar to the execution of the final decree. [p. 140 col. 2.]

The expression "the Court whose duty it is to execute the decree" in rule 2 of Order XXI of the Code merely indicates the Court to which certification is to be made, and in the case of a preliminary decree in a mortgage suit, the Court which is to receive the money payable under it is clearly the Court indicated. [p. 140, cols. 1 & 2.]

Appeal against the order of the District Court, Tanjore, in Appeal Suit No. 144 of 1918, preferred against the order of the Court of the District Munsif, Mannargudi, in Execution Petition No. 463 of 1917, in Original Suit 8 of 1913.

FACTS appear from the judgment.

The Hon'ble Mr. S. Srinivasa Aiyangar, Advocate-General (with him Mr. T. M. Krishnaswami Aiyar), for the Appellant.—The adjustment pleaded clearly falls under Order XXI, rule 2, Civil Procedure Code. The defendant alleges certain payments in pursuance of an agreement with the decree-holder. That is an adjustment of the decree within the meaning of the rule, and not having been certified, it could not be pleaded in bar of execution.

The Full Bench ruling in *Ohidambaram Chettiar v. Krishna Vathiyar* (1) relates to an agreement for temporary stay of execution, which is not the case here. One of the terms of the agreement in that case was that the decree was not to be temporarily executed and the agreement itself was an answer to the execution. Here the payments pleaded amount to an adjustment. The fact that the agreement was before the preliminary decree does not affect the question. The Full Bench ruling has to be re-considered. See *Piran Bibi v. Jitendra Mohan* (2).

Messrs. S. Varadachariar and S. Rangachariar, for the Respondents.—The agreement here was before the date of the preliminary decree. It does not fall under Order XXI, rule 2. It comes within the scope of the Full Bench ruling in *Ohidambaram Chettiar v. Krishna Vathiyar* (1). The rule is no bar to its being pleaded.

The payments are only performance of a reciprocal contract.

The only executable decree was the final decree and the adjustment was prior to it.

Rule 2 only refers to executable decrees, and the point for consideration is if the adjustment was prior to that decree.

JUDGMENT.—This appeal arises in execution of a mortgage decree for sale for Rs. 1,800 and odd obtained by the plaintiff-appellant against the defendants-respondents. The 3rd defendant, one of the respondents, pleaded that the decree had ceased to be executable by reason of an oral agreement between him and the plaintiff, the conditions of which on his part he had performed. The District Munsif disallowed his plea as not properly pleadable in execution, and took no evidence as to the existence of the agreement which was denied by the other side or of its terms or of its alleged performance by him. The District Judge reversed that decision and remanded the case for disposal on the merits. The appeal to us is against his decision.

The question to be considered is whether the defendant is barred from setting up his plea in execution: and it has to be decided on the allegations made by him, as no evidence has yet been taken. He alleges in his counter-petition that, at the request of the plaintiff, he agreed to settle the family disputes of one Murugathammal, a friend of the plaintiff's, and to induce her creditors, as she was in financial difficulties, to forego portions of their claims, that in consideration of his trouble he was to be allowed to treat the suit claim as fully satisfied on payment of Rs. 550 to her creditors and that in the meanwhile plaintiff was to get a decree as sued for as a guarantee for defendant's due performance of his part of the contract, but the decree was not to be executed if defendant did perform his part. He states that he did all that was necessary and paid Rs. 550 to four creditors of Murugathammal.

The agreement is said to have been entered into just before the preliminary decree was passed. The 3rd defendant tried to plead it in answer when the application for the final decree was made, but his objection was overruled on the ground that under Order XXXIV, rule 5 of the Code of Civil Procedure,

(1) 37 Ind. Cas. 836; 40 M. 233; 21 M. L. T. 24; 5 L. W. 132; (1917) M. W. N. 44; 32 M. L. J. 13.

(2) 40 Ind. Cas. 845; 25 O. L. J. 553; 21 O. W. N. 920.

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only payments made directly into Court could be considered. The High Court, however, then observed that his right, if any, would only be to plead the agreement in execution. That, of course, was not a decision that he could do so: that question we have now to decide.

The main objection raised by the learned Advocate-General for the appellant is based on Order XXI, rule 2 of the Code of Civil Procedure. He contends that if the payments alleged are true, there was an adjustment of the decree within the meaning of that rule when they were made; and as it was not certified to the Court it could not be pleaded in bar of execution. On the other side, it is contended that we have here a case of an agreement prior to decree falling within the scope of the Full Bench ruling in *Ohidambaram Chettiar v. Krishna Vathiyar* (1) and, therefore, it is pleadable in execution and Order XXI, rule 2, is no bar to it.

We may say that the Advocate-General urged that this Full Bench ruling itself required re-consideration and that we should in any case confine it to the facts of the case before the Full Bench, which he says was one of an agreement for a temporary stay of execution. As the majority of the Judges approved of and followed the previous decisions of our High Court which were not cases of temporary stay and also the decisions in *Laldas Narandas v. Kishordas Devadas* (3) and *Gauri Singh v. Gajadhar Das* (4) and refused to follow the Calcutta view, we will not be justified in cutting down the effect of the Full Bench in the manner suggested. We think the Full Bench decided that any pre-decree agreement between parties to a suit, by the terms of which the passing of the decree is not to be objected to but the execution is to be stayed in whole or in part either temporarily or for all time, can be pleaded and given effect to in execution proceedings and Order XXI, rule 2, is no bar to it. Though the arguments of the Advocate-General against the view of the Full Bench and in favour of the Calcutta view to the contrary as stated in *Benode Lal Pakrashi v. Brajendra Kumar Saha* (5) and *Hassan Ali v. Gauzi Ali Mir* (6) are not without force, we consider we are bound by that ruling. It is eminently

(3) 22 B. 463 (F. B.).

(4) 2 Ind. Cas. 608; 6 A. L. J. 403.

(5) 29 C. 810; 6 C.W. N. 838.

(6) 81 C. 179.

desirable that on a question of procedure there should be certainty and finality.

The question then is whether the present case is one falling within the scope of the Full Bench ruling as we understand it. It will be noticed from the terms of the agreement in that case, as set out in the judgment of Phillips, J., that it was one of the terms that the decree was not to be executed for a certain time, so that the agreement by itself was an answer to execution. In the present case, however, it is conceded that the agreement by itself was no answer to the execution of the decree; for it to become a proper answer it was absolutely necessary that defendant should perform his part of the contract and make the necessary payments. Whether we view the payments as performance by a party to a reciprocal contract under section 54 of the Contract Act as urged by the learned Vakil for the respondent, or as the performance of a condition precedent for the agreement not to execute to come into force, it is clear the payments were necessary to enable the defendant to object to execution. The adjustment of the suit claim was only complete on the day the last of these payments was made. On the allegations of the defendant there can be no doubt that his plea is that the suit claim was completely satisfied or "adjusted in whole" when he made the payments.

Though the agreement was entered into before the preliminary decree was passed, the payments alleged are stated to have been made after it but before the final decree was passed. In the Full Bench case the adjustment by agreement was wholly prior to the decree, but here we have a case of an adjustment subsequent to the preliminary decree but prior to the final decree. The two cases are, therefore, distinguishable. But it has been strenuously argued by the learned Vakil for the respondent that as the adjustment was prior to the final decree which was the only executable decree, we should hold that that rule did not apply to the present case, following the reasoning of the Full Bench on the point.

The answer to the above contention depends on the view we take of the scope of rule 2 as to whether it covers a payment under, or adjustment of a preliminary

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mortgage decree in a suit for sale. The learned Advocate-General has drawn our attention to the ruling in *Piran Bibi v. Jitendra Mohan* (2). It was decided there that a payment made out of Court to the mortgagee after the passing of the preliminary decree and before the final decree fell within the rule. The respondent's Vakil argues that we should not follow this ruling, because there is a difference of opinion between the Calcutta High Court and ours as to whether a pre-decree agreement can be pleaded in execution. That difference, however, has nothing to do with the applicability or otherwise of rule 2 and we cannot, therefore, uphold his contention.

This ruling was recently followed by a Bench of this Court in *Singa Raja v. Pethu Raja* (7), where the learned Judges say: "it may be that if between the passing of the preliminary decree and the passing of the decree for sale the defendant obtains a certificate under the provisions of Order XXI, rule 2, he can take advantage of that to reduce the amount for which the property is to be sold." No doubt this is not a decided expression of opinion that rule 2 applies, but it shows their inclination on the question. As we are also inclined to take the same view that such an adjustment or payment falls within the rule, we are prepared to follow the above rulings.

So far as the reason of rule 2 is concerned, we can see no difference between a payment after the preliminary decree and one after the final decree. The preliminary decree settles once for all the amount to be paid just as the decree in an ordinary money suit does. The payment or adjustment may, therefore, be rightly treated as made after the decree in the suit. The words of the rule are, we think, wide enough to cover such payments or adjustments. The learned Vakil for the respondent insisted strongly on these words of the rule, viz., "the Court whose duty it is to execute the decree," as showing that the rule referred only to executable decrees. But these words are used only to indicate the Court to which certification is to be made. In the case of a preliminary

decree such as the one we have here, the Court which has to receive the money payable under it is clearly the Court indicated. We do not think an inference adverse to our view as to the scope of the rule can properly be drawn from these words.

We must, therefore, hold that the adjustment pleaded in this case falls within Order XXI, rule 2, and that the Full Bench case is distinguishable and that as admittedly it had not been certified to the Court as required by that rule, it cannot be pleaded in bar to execution.

The order of the District Judge must, therefore, be reversed and that of the Munsif restored with costs here and in the lower Appellate Court.

M. C. P.

Appeal allowed.

CALCUTTA HIGH COURT.
APPEAL FROM APPELLATE DECREE No. 929
OF 1918.

August 19, 1919.

Present:—Mr. Justice Chatterjea and
Mr. Justice Duval.

PANCHAGOPAL MOOKERJEE AND
OTHERS—DEFENDANTS—APPELLANTS

versus

KALIDAS MUKHERJEE AND DEBI DAS
MUKHERJEE, MINORS, BY THEIR MOTHER AND
GUARDIAN, Srimati SARAT KUMARI
DEBI—PLAINTIFFS—RESPONDENTS.

Succession Act (X of 1865), s. 160, applicability of—Probate and Administration Act (V of 1881), ss. 130 to 134, applicability of—Hindu Law—Will, construction of—Gift of specific amount to be paid out of profits of immovable property, nature of—Gift, whether annuity or gift of corpus—Intention of testator—Interest, whether payable on annuity.

A testator by his Will devised his movable and immovable properties to his sons and gave certain legacies to his daughters and other persons with the following direction—"My eldest son Narindra shall, year after year, go on paying to my third son Nagendra the sum of Rs. 500 per annum out of the income from the *mahals* that he (Narindra) shall obtain as per schedule No. 1 and comprised within Lot Dawarbashini, etc.;"

(7) 48 Ind. Cas. 196; 5 M. L. J. 579; (1918, M. W. N. 809; 8 L. W. 497; 24 M. L. T. 501; 42 M. 61.

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Held, that in determining whether the devise of Rs. 500 per annum to Nagendra was in the nature of an annuity or was in fact a gift of the corpus, it was unnecessary to consider whether the provisions of section 160 of the Succession Act were more favourable to the annuitant than the provisions of English law, inasmuch as under both the question was one of intention. [p. 143, col. 2.]

Although the segregation of any particular property is the common mode of indicating an intention of the testator to make an annuity perpetual, yet that is not the only mode and the Will may indicate an intention in other ways that the sum payable is really not an annuity or at any rate is intended to be perpetual. [p. 143, col. 2.]

The intention of a testator must be gathered by reading the Will as a whole. [p. 145, col. 2.]

Where words of inheritance are not used by a testator with regard to any of the gifts which are admittedly absolute, the absence of such words with regard to a particular gift does not make it limited to the life of the donee, if the Will in other respects contains a clear intention of the testator that the gift is not so limited but is absolute and perpetual. [p. 145, col. 2.]

The provisions of sections 130 to 134 of the Probate and Administration Act relate to interest on annuities or legacies payable by the executor, and cannot apply to a sum to be paid out of the profits of immovable property which a legatee was entitled to as part of the properties obtained by him under a Will, and which was in his enjoyment for several years before his death, and which devolved upon his heirs. [p. 145, col. 2; p. 146, col. 1.]

Appeal against the decree of the Subordinate Judge, 3rd Court, Hooghly, dated the 18th February 1918, affirming that of the Munsif, 2nd Court at that place, dated the 20th August 1916.

Dr. D. N. Mitter and Babu Debendra Nath Mandal, for the Appellants.

Mr. N. Sircar and Babus Sib Ohandra Palit and Profulla Ohandra Chatterjee, for the Respondents.

JUDGMENT.—This appeal arises out of a suit to recover Rs. 1,563 on the basis of the Will of the late Babu Bijoy Kissen Mukherjee of Uttarpara.

Bijoy Kissen died on the 17th Magh 1300 leaving seven sons and several daughters. Of his sons, the eldest, was Narendra Nath, the second Surendra Nath and the third Nagendra Nath. It is unnecessary to mention the names of the other sons. Narendra died on the 16th Pous 1312, and Nagendra died on the 20th Magh 1318. The appellants are the sons and grandsons of Narendra Nath, and the respondents are the sons of Nagendra Nath.

Bijoy Kissen, by his Will dated the 16th Magh 1300, devised his movable and im-

movable properties to his sons and gave certain legacies to his daughters and other persons. By the first paragraph of his Will he gave to his eldest son Narendra Nath certain Mauzas within Lot Dwarbashini and certain other Mouzabs in the same lot were given to his second son Surendra Nath. Certain other properties were also given to each of them, which are set out in schedules 1 and 2 respectively to the Will. Similarly some specified properties were given to each of the other sons including Nagendra Nath in other paragraphs of the Will, and these are set forth in the schedules. In the second paragraph it is stated: "The profits from the said Lot Dwarbashini are much larger than those from the Mahals allotted to my other sons, and out of the Mahals allotted to my other sons certain portions of the Mahals within Lot Pantra allotted to my third son Nagendra Nath Mukherjee, fourth son Satyendra Nath Mukherjee and fifth son Jatindra Nath Mukherjee are under water. In regard to the profits of the aforesaid Lot, Dwarbashini, I make this provision that my eldest son Narendra Nath Mukherjee shall, year after year, go on paying to my third son Nagendra Nath Mukherjee the sum of Rs. 500 per annum out of the income from the Mahals that he (Narendra) shall obtain, as per schedule 1 and comprised within Lot Dwarbashini, and shall execute in terms of this Will an agreement in favour of the said Nagendra Nath Mukherjee promising to pay the same, that after my death, if the said Narendra Nath Mukherjee does not pay it and execute the agreement amicably, then my third son, the said Nagendra Nath Mukherjee, shall, under the provisions of this Will, be competent to take legal action and by instituting a suit recover the said amount from the Mahals appertaining to the share as per schedule 1 and obtaining a decree realise the same, year after year, from the said Narendra Nath Mukherjee, and all these Mahals and other properties shall be fully liable for the said amount; and further, that my second son Surendra Nath Mukherjee shall, after my death, pay from the profits of the Mahals as per schedule 2 within Lot Dwarbashini, that he shall obtain, the sum of Rs. 1,000 per annum to the aforesaid Satyendra Nath, Jatindra Nath

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Mukherjee, that is to say, Rs. 500 annually to my fourth son Satyendra Nath Mukherjee and Rs. 500 annually to my fifth son Jatindra Nath Mukherjee and execute separate agreements in favour of the said Satyendra Nath and Jatindra Nath Mukherjee each, promising to pay profits at the rate of Rs. 500 per annum, and that if such agreements be not executed, the said Satyendra Nath Mukherjee and Jatindra Nath Mukherjee shall take legal steps and institute separate suits to recover profits at the rate of Rs. 500 per annum, as provided by this Will, out of the profits of the Mahals representing the share as per schedule No 2 and obtaining a decree against the said Surendra Nath Mukherjee, realise the same, and all the properties specified in schedule No. 2 shall be fully liable for the said amounts."

The third paragraph which refers to the properties given to Nagendra and the fourth and fifth sons runs as follows:—A ten annas share of Lot Pautra bearing No. 44 of the Touzi of the District Hooghly Collectorate and carrying a Sadar Jama of Rs. 11,158-14-6 per annum constitutes my Zemindari and a six annas my Patni under the shares of the late Kali Kinkar Choudhury of Barnumera, District 24-Paragannahs. A sum of Rs. 750 per annum is payable to the heirs of the said Kali Kinkar Choudhury as profits of the said Patni Mahal. Certain Mouzas appertaining to the said Lot as also the sum of Rs 500 per annum out of the profits of Lot Dwarbashini and certain other properties specified in schedule No. 3 to this Will are allotted (by me) to my third son Nagendra Nath Mukherjee, and the said Nagendra Nath Mukherjee shall obtain the same after my death. I also allot to my fourth son Satyendra Nath Mukherjee certain Mouzas comprised within the said Lot and Rs. 500 per annum out of the profits of Lot Dwarbashini as well as certain other properties specified in schedule No. 4, and the said Satyendra Nath Mukherjee shall obtain the same after my death. I further allot to my fifth son Jatindra Nath Mukherjee certain Mouzas appertaining to the said Lot and Rs. 500 per annum out of the profits of Lot Dwarbashini as well as other properties specified in schedule No. 5, and the said Jatindra Nath shall obtain the same

after my death. My other sons shall have no concern with the said properties, nor shall the said Nagendra Nath, Satyendra Nath and Jatindra Nath Mukherjee be competent to dispute with one another regarding the properties allotted to them respectively." The other provisions of the Will which have a bearing upon the question before us will be referred to later.

The plaintiffs, who as stated above are the sons of the third son Nagendra, brought this suit on the allegation that the right to the sum of Rs. 500 payable annually out of the profits of Lot Dwarbashini to Nagendra was not restricted to the life of Nagendra but descended to his heirs and as the defendants (the heirs of Narendra) had stopped payment after the death of Nagendra, the present suit was brought for the recovery for the arrears from the latter part of 1313, and for the years 1319 and 1320, with interest thereon at 12 per cent per annum. The defence was that the provision for the payment of Rs. 500 annually was personal to Nagendra, and the right to get it ceased on his death.

The Courts below concurred in holding that the gift of Rs. 500 annually was in perpetuity and that the plaintiff's father was given an absolute and heritable interest in the same and accordingly gave a decree for the sum claimed in the suit to the plaintiffs. The defendants appeal to this Court.

It is contended on behalf of the appellants that the Rs. 500 provided by the Will to be paid annually by Narendra to Nagendra is an annuity that, under section 160 of the Indian Succession Act, the legatee is entitled to receive for his life only unless a contrary intention appears by the Will and that there is no such intention. Reference is also made to the English authorities on the point. On the other hand it is contended on behalf of the respondents that the devise is not in the nature of an annuity but is in fact a gift of the corpus, and that in any case the intention of the testator was to make it perpetual.

The English law on the point is thus stated by Fry, J., in *Blight v. Hartnoll* (1): "As a general rule there can be no doubt that the

(1) (1881) 19 Ch. D. 294; 51 L. J. Ch. 62; 45 L. T. 524; 30 W. R. 513.

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gift of an annuity to A is a gift of the annuity during the life of A and nothing more. It is equally free from doubt that where the testator indicates the existence of the annuity without limit after the death of the person named and, therefore, implies that it is to exist beyond the life of the annuitant, there the annuity is presumed to be a perpetual annuity. It is equally without doubt that there are cases in which the Court has come to the conclusion that the gift is not really that of annuity, but the gift to a person of the income arising from a particular fund without limit, and there the Court holds that the unlimited gift of the income is a gift of the *corpus* from which the income arises."

In *Lett v. Randall* (2) the rule is thus stated by Lord Campbell, L. C. :—"To make an annuity created by Will, perpetual, there must be express words in the Will so describing it, or the testator must, by some language in the Will, indicate an intention to that effect. The most common indication is a direction by the testator to segregate and appropriate a portion of his property from the interests or profits of which the annuity is to be paid. Where this is done, the annuity when mentioned in the Will represents the *corpus* so appropriated and the *corpus* passing by the bequest of the annuity, the annuity may be said to be perpetual." But if the gift is expressly one of annuity, the fact that it is secured by a fund or payable out of the income of a fund or the rentals of land does not make it perpetual, unless the testator shows an intention to dispose of the whole fund. See Jarman on Wills, 6th Edition, pages 1138-1139, and the cases cited therein.

Section 160 of the Indian Succession Act, which is applicable to Hindus, lays down: "Where an annuity is created by Will the legatee is entitled to receive it for his life only, unless a contrary intention appears by the Will. And this rule shall not be varied by the circumstance that the annuity is directed to be paid out of the property generally or that a sum of money is bequeathed to be invested in the purchase of it."

(2) (1860) 2 De G. F. & J. 398; 3 Sm. & G. 83; 30 L. J. Ch. 110; 6 Jur. (N. s.) 1859; 3 L. T. 455; 9 W. R. 130; 45 E. R. 671; 129 E. R. 123.

It is urged on behalf of the appellants that the fact that the annuity is payable out of the income or profits of any property is not an indication to make the annuity perpetual unless the whole of the property or fund is disposed of, in which case the unlimited gift of the income might be held to be a gift of the corpus from which the income arises, that in the present case the portion of Lot Dwarbashini out of which Rs. 500 is payable to Nagendra having been given absolutely to Narendra, there could not have been any such intention and that section 160 of the Succession Act goes farther and says that the annuity is not perpetual, not only where it is made payable out of property generally, but also where a sum is bequeathed to be invested in the purchase of it. On the other hand it is contended on behalf of the respondents that under the Indian Succession Act, it is only where the annuity is payable out of property generally or out of money bequeathed to be invested in the purchase of it, that the annuity is to be held to be limited to life in the absence of a contrary intention, and not where it is payable out of the profits or income of a particular property as in the present case and that in the present case, it is not an annuity at all, and even if it is an annuity, it is a gift of part of the corpus of Dwarbashini representing the sum of Rs. 500 annually.

We think it unnecessary to consider whether the provisions of section 160 of the Succession Act are more favourable and otherwise to the annuitant than under the English law, because under both the question is one of intention. No doubt the segregation of any particular property is the common mode of indicating an intention to make an annuity perpetual, but we do not think that that is the only mode and the Will may indicate an intention in other ways that the sum payable is really not an annuity, or at any rate is intended to be perpetual.

The main question for consideration, therefore, is whether the sum of Rs. 500 payable to Nagendra is an annuity and if so, whether there was an intention to make it perpetual.

The scheme of the Will appears to be to make an equal division of the properties

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as far as possible among the sons, and to allot specific properties to each of the sons, so that there might not be disputes which frequently arise where properties are held jointly. The properties, however, are not of equal value and the profits of Lot Dwarbashini are much larger than those from the Mahals allotted to the other sons. Instead of dividing Dwarbashini into small portions it was given to the first two sons, certain specified Mouzas in the Mahal being given to each of them, and they were to pay a portion of its profits to some of the other sons. In consideration of the fact that the profits of that Mahal were larger and also because certain portions of the Mahals allotted to the third son, Nagendra, and to the fourth and fifth sons were *haja*, it is provided that Nagendra is to get rupees five hundred annually out of the profits of the portion of Mahal Dwarbashini allotted to the share of Narendra, and the fourth and fifth sons are to get each a sum of Rs. 500 from the profits of the other portion of Dwarbashini, which was allotted to the share of the second son Surendra. The profits of the Mouzas allotted to the second son in Mahal Dwarbashini seem to be larger than those of Mouzas allotted to Narendra, as the former is to pay Rs. 1,000 (Rs. 500 each to the fourth and fifth sons), whereas Narendra is to pay Rs. 500 to Nagendra only. Now the share given to Nagendra consists of certain properties mentioned in the third schedule and the sum of Rs. 500, which he is to get out of the profits of Mahal Dwarbashini from Narendra. It is distinctly stated in the 3rd paragraph of the Will that certain Mouzas appertaining to the said lot (Lot Pautra) "as also the sum of Rs. 500 per annum out of the profits of Lot Dwarbshini and certain other properties specified in schedule No. 3 to this Will are allotted to my third son Nagendra Nath Mukherjee."

It appears, therefore, that the sum of Rs. 500 per annum out of the profits of Lot Dwarbashini formed part of the share allotted to Nagendra and stands on the same footing as the properties specifically allotted to him. The shares allotted to the fourth and the fifth sons also similarly consist of certain properties and the sum of Rs. 500 (each) out of the profits of

Lot Dwarbashini payable to them by the second son Surendra.

It is true that no words of inheritance have been used with reference to the sum of Rs. 500 payable out of the profits of Lot Dwarbashini, but the Will nowhere uses such words. The same expression used with reference to the gift of the immovable properties to each of the sons is used with reference to the sum of Rs. 500 payable out of the profits of Lot Dwarbashini, and admittedly the gift of the immovable properties allotted to each of the sons is absolute. The gift of Dwarbshini to Narendra and the second son was absolute subject, however, to the payment of Rs. 500 annually as directed in the Will, and made a charge upon the property, and subject to the gift over as provided in paragraph 22 of the Will.

There is some indication in the 22nd paragraph of the Will that the gift of Rs. 500 was not personal. That paragraph runs as follows:—"God forbid, if any of my sons dies leaving only a childless widow and no heirs such as sons and daughters, in that case the properties, etc., allotted to his share shall be divided and taken in equal shares by those of my sons surviving at the time, and my sons shall go on paying to such childless widow of my deceased son during her lifetime an allowance for maintenance and performance of pious acts at the rate of Rs. 35 per mensem." Now the words "properties, etc., allotted to his share" would include the sum of Rs. 500 to be paid out of the profits of Dwarbashini to Nagendra and the fourth and fifth sons, being part of the share allotted to each of them, and the clause provides that on the death of any of the sons without issue his share, which (in the case of Narendra and the fourth and fifth sons) would include the said sum of Rs. 500, would devolve on the surviving sons. This shows that the gift of Rs. 500 was not limited to the life of Nagendra or the fourth and fifth sons.

It is contended that the reason why Rs. 500 was given out of the profits of Mahal Dwarbashini to Nagendra and the fourth and fifth sons was that portions of the Mahals allotted to them were *haja*

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at the time, that it was not likely that the lands would continue in the same condition for ever and that, therefore, the payment of Rs. 500 was intended to enure only for the life of Nagendra, within which period the testator probably expected that the condition of the lands would be changed. But in the first place, the expression *haja thakai* does not necessarily mean that it was temporarily under water; it refers to the character of the land and implies the liability to be flooded or being under water. In the next place, the suggestion does not support the contention that the payment of the sum of Rs. 500 was limited to the life of Nagendra, because Nagendra might die the day after the death of the testator and in that case the payment would cease according to the appellants' contention, even if the Mahals allotted to Nagendra continued to be in the same condition (*haja*) after Nagendra's death.

The Will provides that Narendra would execute an agreement to pay the sum of five hundred rupees to Nagendra, but no argument can be founded on it in favour of the appellants, as the agreement was to be executed whether the payment is held to be limited to the life of Nagendra or not. Probably it was supposed that an execution of the agreement by Narendra would facilitate realization of the amount and would bind Narendra more effectually.

Reliance is placed upon the 8th paragraph of the Will, which runs as follows:—"I give to my eldest son Narendra Nath Mukherjee and second son Surendra Nath Mukherjee properties of larger values and yielding larger profits on condition that they shall train and educate my minor sons, protect their persons and maintain them. If they neglect to do anything on behalf of the minors they shall be fully liable to the minors for losses caused by infringement of the above terms, and the properties as per schedules Nos. 1 and 2 shall also remain liable for the said losses." It is contended that this paragraph militates against the view that the intention of the testator was to equalize the shares. The first two sons were, no doubt, to train and educate the minor sons, the 6th and 7th sons. But the expense to be incurred for the education of the minor sons was not

to be met by first and second sons from their own pockets. The 6th paragraph provides that the properties allotted to the minors were to be held in *Ijara* by the first five sons during their minority, the net profits payable to each of them being fixed at Rs. 2,750 out of which Rs. 500 was to be spent for the education of each, and the balance invested in Government promissory notes. The minors were not given anything out of the profits of Dwarbasini and it may be that in consideration of the first two sons training, educating and maintaining the minors, the latter were not to get anything from the former out of the Dwarbasini. However that may be, so far as Nagendra and the fourth and fifth sons are concerned, the second paragraph of the Will clearly shows that a sum of Rs. 500 out of the profits of Dwarbasini was given to each of them not only because the profits from Dwarbasini are much larger than those from the Mahals allotted to the other sons, but also because portions of the Mahals allotted to Nagendra and the 4th and 5th sons were *haja*. The Will must be read as a whole, and reading it as a whole we think that the clear intention of the testator was that the sum of Rs. 500, which is made payable out of the properties of Dwarbasini by Narendra to Nagendra, is not really an annuity, and in any case it was not limited to his life only, but forms part of the properties allotted to him and is absolute and perpetual, and this is the view which has been taken by both the Courts below. The whole difficulty has been raised by the absence of any words of inheritance, but as stated above, such words have not been used by the testator in any part of the Will, even with regard to gifts which admittedly are absolute.

The next question relates to interest. The Courts have decreed interest at 12 per cent. It is contended that having regard to the provisions of section 132 of the Probate Act, the plaintiffs are not entitled to more than 6 per cent. interest. But we think that the provisions of sections 130 to 134 relate to interest on annuities or legacies payable by the executor, and cannot apply to the sum of Rs. 500 to be paid out of the profits of Dwarbasini.

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which Nagendra was entitled to as part of the properties obtained by him under the Will, and was in enjoyment of for several years before his death, and which devolved upon the plaintiffs as his heirs.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL APPEALS NOS. 206 AND 207 OF 1918.

April 11, 1919.

Present:—Mr. Justice Abdur Rahim
and Mr. Justice Spencer.

INDOJI JITHAJI—PLAINTIFF—APPELLANT

versus

KOTHAPALLI RAMA CHARLU AND
OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Self-acquired property devised by father to sons, whether ancestral property in sons' hands—Release of co-parcener's share for consideration, whether transfer—Release, whether voidable by creditors—Death of releasor before action taken by creditors, effect of—Rights of creditors—Partition in status, when effected—Transfer of Property Act (IV of 1882), s. 53.

The self-acquired property of a Hindu devised by him to his sons will be regarded, in the absence of an express intention to the contrary by the deviser, as ancestral property in the hands of the sons and not as their separate and self-acquired property. [p. 148, cols. 1 & 2; p. 151, col. 2.]

Tara Chand v. Reeb Ram, 3 M. H. C. R. 50 at p. 55, *Nagalingam Pillai v. Ramachandra Tevar*, 24 M. 429; 11 M. L. J. 210, *Venkataramiah Pantulu v. Subramaniam Pillai*, 26 Ind. Cas. 393; 16 M. L. T. 489 and *Krishnaswami Naidu v. Seethalakshmi Ammal*, 31 Ind. Cas. 803; 18 M. L. T. 542; 3 L. W. 317; 39 M. 029, followed.

Hazarimal Babu v. Abani Nath, 18 Ind. Cas. 625; 17 C. L. J. 38 at p. 43; 17 C. W. N. 280, *Jugmohandas Mangaldas v. Mangaldas Nathubhoy*, 10 B. 58 at pp. 552, 574, 577 and *Parsotam Rao Tantia v. Janki Bai*, 29 A. 354 at p. 363; 7 A. L. J. 251; A. W. N. (1907) 77, not followed.

Whether in any given case property was intended to pass to the sons as ancestral or self-acquired property is a question of intention turning on the construction of the instrument of gift, the bias being in favour of ancestral property in the absence of words to the contrary. The fact that the grandsons' names are not mentioned in the instrument does not

tend to show that the property is not ancestral. [p. 152, col. 1; p. 148, col. 2.]

Per *Spencer, J.*—A partition of family property among Hindus cannot be treated as a transfer within the scope of section 53 of the Transfer of Property Act, as it only effects a change in the mode of enjoyment of the property and is not an act conveying property from one living person to another. [p. 151, col. 1]

A document whereby a co-parcener relinquishes his incorporeal right to have a partition effected of joint family property is not a transfer which can be avoided by his unsecured creditors under section 53 of the Transfer of Property Act, if they have taken no action to attach his rights prior to the relinquishment. [p. 151, col. 2.]

Section 53 of the Transfer of Property Act must be strictly construed, as it is a statutory provision and Courts have no power to extend statutory provisions by analogy to transactions which do not fall within the scope of the Statute. [p. 152, col. 2.]

Per *Abdur Rahim, J.*—The law requires some unequivocal and definite expression of an intention on the part of a member of a joint family, to the effect that in future he would regard himself as a separated member, before a severance can be held to have been effected, and the expression of such intention must be communicated to the other members or at least to the manager of the family. From the mere fact that a member of a joint family asks for a partition it is not to be necessarily inferred that he intended a separation of status before a partition was effected. [p. 150, col. 2.]

A relinquishment by a co-parcener of a large share in family properties in lieu of an inadequate and wholly disproportionate cash consideration received from the other members operates as a severance of the joint status and if it is effected to defeat creditors, the document may be avoided by the latter under section 53 of the Transfer of Property Act. [p. 149, col. 2.]

Appeals against the decrees of the District Court, North Arcot, dated the 30th March 1918, in Original Suits Nos. 13 and 14 of 1917.

FACTS.—The question in the case was the legal effect of a release deed executed by a Hindu son to his father prior to the son's death. There was also the further question whether the father and son were divided during the life. The contention was also that the creditor of the son had no remedy now that the son was dead and his share in the joint family had been taken by others by survivorship.

Mr. V. Ramadoss, for the Appellants.—The release is bad under section 53 of the Transfer of Property Act. It must be, if valid, for good consideration and *bona fide*; see *Ohidambaram Chettiar v. Sami Aiyar* (1), confirmed by the Privy Council in

(1) 30 M. 6; 16 M. L. J. 427; 1 M. L. T. 851.

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Ohidambaram Ohettiar v. Srinivasa Sastrial (2). See also *Hakim Lal v. Moosahar Sahu* (3), confirmed in *Musahar Sahu v. Hakim Lal* (4). The grantee under the release knew full well of the involved circumstances of the son. See *Alagappa Ohetty v. Dasappa Ohettiar* (5).

Mr. K. Srinivasa Aiyangar, for the Respondents.—The property in the hands of the grantee did not come to him through the release. It was the self-acquired property of his own father, which the latter devised to him. Hence it is his separate property over which the deceased had no manner of right. The decision to the contrary in *Nagalingam Pillai v. Ramachandra Tevar* (6) is wrong in principle. When property is devised, there is no difference if the devisee is a relation or a stranger. Farther, a joint family is not a corporation, *Shadogopa Naidu v. Thirumalaswami Naidu* (7). A son to whom his father leaves his self-acquired property by Will takes the property under the Will, and not by inheritance. See *Jugmohandas Mangaldas v. Mangaldas Nathubhoy* (8), followed in *Nanabhai Ganpatras Dhairyavan v. Achratbai* (9), *Bai Diwali v. Patel Becharadas* (10), *Timanacharya v. Balachory* (11). Even *Parsotam Rao Tantia v. Janki Bai* (12) lays down the same view. No doubt Calcutta takes a different and uniform view. I submit that the Bombay view is the correct one.

Section 53 does not apply. The arrangement is a pure family arrangement. The release deed is, therefore, valid.

Mr. Ramadoss, in reply.—The Madras view has been uniform from *Tara Chand v.*

Reeb Ram (13) onwards and Calcutta has also taken the same uniform view throughout from *Muddun Gopal Thakoor v. Ram Buksh Pandey* (14).

The evidence proves a clear division in status.

JUDGMENT.

ABDUR RAHIM, J.—The plaintiff, appellant, sued on several promissory notes executed by one Ranga Charlu, who died about six months before the institution of the suit, asking for a decree for Rs. 3,237.8.0 on account of principal and interest due on the notes and seeking to recover the amount out of his assets consisting of the share which, it is alleged, Rangacharlu had in the properties in the possession of the 1st defendant, his father, defendants Nos. 2 to 4, his brothers, and the 5th defendant, his widow. The main questions are, *firstly*, are the properties in dispute the ancestral properties of the family in the hands of the 1st defendant or his self-acquired and separate property, *secondly*, if ancestral, was there a division of status between Rangacharlu on the one hand and his father and brothers on the other, and, *thirdly*, is the instrument, Exhibit II, which is described as a release executed by Rangacharlu in favour of the 1st defendant, valid and operative as being made in *bona fide* settlement of a family dispute or is it liable to be avoided as being made to defeat Rangacharlu's creditors?

The 1st defendant obtained the property under a Will of his father, dated the 12th September 1910, wherein he describes the properties as his self-acquisition. He then bequeaths the properties in equal halves to the 1st defendant and to the minor son of the testator's deceased younger brother, his undivided co-parcener, and some small amounts to other persons. The main bequest was to the testator's son, the 1st defendant, and to the younger brother's son in equal moieties. There can be little doubt in my opinion that upon those facts the property would be ancestral property in the hands of the 1st defendant, according to the ruling of this Court in *Tara Chand v. Reeb Ram* (13) and *Nagalingam Pillai v. Ramachandra Tevar* (6). The

(2) 23 Ind. Cas. 714; 37 M. 227; 26 M. L. J. 473; 18 O. W. N. 841; 16 M. L. T. 286; (1914) M. W. N. 754; 16 Bom. L. R. 783; 20 C. L. J. 571; 1 L. W. 963 (P. O.).

(3) 34 C. 999; 11 C. W. N. 883; 6 C. L. J. 410.

(4) 32 Ind. Cas. 343; 30 M. L. J. 116; 3 L. W. 207; 20 C. W. N. 393; 14 A. L. J. 198; (1916) 1 M. W. N. 198; 19 M. L. T. 203; 23 C. L. J. 406; 18 Bom. L. R. 378; 43 C. 521; 43 I. A. 104 (P. C.).

(5) 18 Ind. Cas. 332; 24 M. L. J. 293; 13 M. L. T. 201; (1913) M. W. N. 141.

(6) 24 M. 429; 11 M. L. J. 210.

(7) 30 Ind. Cas. 272; 18 M. L. T. 129.

(8) 10 B. 528 at pp. 551, 574, 577.

(9) 12 B. 122.

(10) 26 B. 445; 4 Bom. L. R. 102.

(11) 4 Bom. L. R. 257.

(12) 29 A. 354 at p. 363; 7 A. L. J. 257; A. W. N. (1907) 77.

(13) 3 M. H. C. R. 50 at p. 55.

(14) 6 W. R. 71.

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question was fully discussed in the last-mentioned case, where it is laid down that "a father may leave his self-acquired property to descend to his sons as ancestral property or if he makes any disposition of it in favour of a son, he is at liberty to preserve for it the character of ancestral property. Whether in any given case, the property was intended to pass to the son as ancestral or as self-acquired property is a question of intention turning on the construction of the instrument of gift. If there are no words indicating a contrary intention, the natural inference should be that the father intended the sons to take the property as their ancestral estate." I may mention that the property in dispute there had also been devised under a Will, so that the ruling is a direct authority on the question before us. While laying down this proposition the learned Judges were careful to point out that any observation in the case reported as *Tara Chand v. Reeb Ram* (13), to the effect that a Hindu cannot make a free disposition of his self-acquired property by gift or by testamentary disposition, was no longer good law in the light of later decisions. The decision in *Nagalingam Pillai v. Ramachandra Tevar* (6) has been followed in a recent case reported as *Venkataramiah Pantulu v. Subramaniam Pillai* (15) and as I read the judgment of Sadasiva Aiyar and Napier, JJ., in *Krishnaswami Naidu v. Seethalakshmi Ammal* (16), I do not think that they meant to question the correctness of that ruling. I should hold, therefore, that the law on the point as enunciated in *Tara Chand v. Reeb Ram* (13) and *Nagalingam Pillai v. Ramachandra Tevar* (6) is settled so far as this Presidency is concerned.

In Calcutta the rule seems to be even more absolute in favour of such property being regarded as ancestral. See *Hazarimal Babu v. Abani Nath* (17). In Bombay, however, the law as expounded at least in the earlier cases was different. In *Jugmohandas Mangaldas v. Mangaldas Nathubhoy* (8) the matter was elaborately considered, and it was laid down that the self-acquired property of a Hindu devised by him to

(15) 26 Ind. Cas. 393; 16 M. L. T. 489.

(16) 31 Ind. Cas. 803; 18 M. L. T. 542; 3 L. W. 317 39 M. 1029.

(17) 18 Ind. Cas. 625 17 C. L. J. 38 at p. 43; 17 C. W. N. 280.

his son will be regarded as the self-acquired and separate property of the son and not as ancestral property. In a recent case, however, in that Court, *Ahmedbhoy Habibbhoy v. Sir Dinshaw M. Petit* (18), Beaman, J., seems to contend against the soundness of that ruling, and in any case, he understands it to lay down nothing more than that it is a question of the intention of the testator whether the property bequeathed by him is to be treated as ancestral or self-acquired in the hands of the donee. The Allahabad High Court's interpretation of the law was on the lines of the Bombay High Court. See *Parso-tam Rao Tantia v. Janki Bai* (12).

I do not think there is anything to show in this case that the 1st defendant's father intended that the property should be held by the 1st defendant as his self-acquired property. The fact that the testator did not mention in the Will the two sons of the 1st defendant who were living at the time does not in my opinion tend to rebut the presumption that the property is to be held by the 1st defendant as ancestral. The fact that such a presumption is raised by the law would in itself account for the non-mention of the 1st defendant's sons in the Will. On the other hand, the fact that the testator divided the property equally between his son and his younger brother's son supports the inference, that he meant the property to be enjoyed as ancestral property. I, therefore, agree in the finding of the District Judge on this point.

The next question we have to deal with is as to the validity of Exhibit II. The circumstances in which the document came into existence were briefly these. Ranga-charlu, who was the eldest son of the 1st defendant, was a reckless young man, addicted to women and drink. He borrowed money on promissory notes from Sowcars and consequently his father and the other relations were displeased with him. When the creditors clamoured for payment Ranga-charlu resorted to his father, the 1st defendant, who naturally did not like to be harassed in this way and he and his friends put their heads together to devise means of meeting the situation. They then

(18) 3 Ind. Cas. 124; 11 Bom. L. R. 545 and 366; 6 M. L. T. 200.

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hit upon the arrangement embodied in Exhibit II.

The learned Judge in the lower Court upholds the arrangement in Exhibit II as having been made in *bona fide* settlement of a family dispute. But I am unable to accept this conclusion. No doubt Exhibit II does mention that the 1st defendant, claiming the property as his self-acquired property, denied that Rangacharu had any share in it and that in order to settle all disputes the 1st defendant agreed to give Rs. 5,000 to Rangacharu and in consideration therefor he abandoned his claim to the property and released all his rights and interests therein, if any. Now, in the first place, the value of the property concerned is at least a Lakh and a half. According to law, Rangacharu had 1/5 share in it, which would be worth Rs. 30,000. There was no doubt as to the source of the property or how it devolved on the 1st defendant and on the date of Exhibit II the law in this Presidency, as I have tried to show, was settled. It is possible all the same that the 1st defendant believed *bona fide* that it was his self-acquired property in spite of the rulings of this Court. But I do not find upon the evidence, excepting the recital in Exhibit II, that there was really any dispute as to the character of the property and the share of Rangacharu therein. It was stated during the argument that Exhibit II was drafted by a lawyer. The lawyer has not been examined and there is no evidence that he advised the 1st defendant and Rangacharu or either of them that the property was ancestral in the hands of the 1st defendant. In fact beyond the recital in Exhibit II there is nothing to show that the 1st defendant claimed the property as his self-acquired property. On the other hand, Exhibit II came into existence because of the pressing demands of Rangacharu's creditors. All the circumstances show that the object of the arrangement was to protect the property from the claims of Rangacharu's creditors. It is probable that if not the entire Rs. 5,000, the consideration for Exhibit II, a substantial amount was paid to Rangacharu, but no portion of this amount reached the hands of his creditors; for Rangacharu seems to have made himself scarce with the money. There

can be little doubt that Rangacharu in executing Exhibit II must be imputed with the intention of defeating his creditors, as that was the inevitable result of his act, and the 1st defendant must be held to have known this and aided his son in evading his creditors, as by the transaction evidenced by Exhibit II he would benefit himself largely at the expense of Rangacharu's creditors. I hold, therefore, that Exhibit II is voidable at the instance of the plaintiff upon the principle enunciated in section 53 of the Transfer of Property Act.

The next question is whether Rangacharu had separated himself before his death. The law on the subject is fully enunciated by the Privy Council in *Girja Bai v. Sadashiv Dhundiraj* (19). They say (page 1047*) "... Separation from the joint family involving the severance of the joint status so far as the separating member is concerned, with all the legal consequences resulting therefrom, is quite distinct from the *de facto* division into specific shares of the property held until then jointly. One is a matter of individual decision, the desire on the part of any one member to sever himself from the joint family and to enjoy his hitherto undefined or unspecified share separately from the others without being subject to the obligations which arise from the joint status; whilst the other is the natural resultant from his decision, the division and separation of his share which may be arrived at either by private agreement among the parties, or on failure of that by the intervention of the Court. Once the decision has been unequivocally expressed and clearly intimated to his co-sharers, his right to obtain and possess the share to which he admittedly has a title is unimpeachable;" and at page 1050: "The intention to separate may be evinced in different ways, either by explicit declaration or by conduct. If it is an inference derivable from conduct it will be for the Court to determine whether it was unequivocal and explicit."

In this case the oral evidence relied on in support of separation is mainly that of

(19) 37 Ind. Cas. 321; 43 C. 1031; 20 C. W. N. 1085; 14 A. L. J. 822; 20 M. L. T. 78; 12 N. L. R. 113; (1916) 2 M. W. N. 65; 18 Bom. L. R. 621; 4 L. W. 101; 24 C. L. J. 207; 31 M. L. J. 455; 43 I. A. 151 (P. C.).

*Pages of 43 C.—Ed.

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the 1st defence witness, a relation by marriage of the 1st defendant, who says that "he (i.e., Rangacharlu) was fully determined on partition and made his father aware of it. He was not going to his father's house. During the one month it was a question of how much was to be given to him. The 1st defendant did not like to give him anything because he was a spendthrift and a rake." The 4th witness, whose sister is married to the 1st defendant and who took a very active part in bringing about an arrangement under Exhibit II, says in examination-in-chief: "Rangacharlu came to me and was demanding his share for a month previous to the release deed. He was demanding Rs. 10,000. I told his father and advised him to give him something. His father refused and said there was no reason why he should pay out of his property and Rangacharlu was in a bad state. We three mediators settled Rangacharlu should be paid Rs. 5,000. We told the 1st defendant and he said he could not pay so much. We prevailed upon him and he agreed. Rangacharlu also consented to Rs. 5,000. Exhibit II was brought into existence and Rangacharlu signed it. Money was paid to him before he signed. Sami Chetty said Rangacharlu complained he did not get food when he went to his house and was demanding his share. Then we settled, taking everything into consideration." The learned Vakil for the appellant stated in the opening that separation took place about 12 days before Exhibit II was executed. In any case he argued that Exhibit II created a division of status as found by the District Judge.

Some reference was also made to Exhibit J. The District Judge, however, finds that it was not proved that the original document of which Exhibit J is a copy was duly executed, and no serious attempt was made before us to show that that finding is wrong. Exhibit J undoubtedly would, in my opinion, show clearly that there had been a separation on or before 5th August 1914. The oral evidence I have cited may not, if it stood alone, be clear enough to show an unequivocal expression of Rangacharlu's intention to separate himself from the joint family and to enjoy henceforward his share in the joint family property in

severalty. It is quite probable that Rangacharlu, who was in need of money, might have on different occasions expressed a desire to have a partition and might have communicated that desire through common friends or relatives to his father. The law requires some unequivocal and definite expression of an intention on the part of a member of a joint family, to the effect that in future he would regard himself as a separated member, and that the expression of such an intention must be communicated to the other members or at least to the manager of the family. From the mere fact that a member of a joint family asks for a partition it is not to be necessarily inferred that he intended a separation of status before a partition was effected. Did Rangacharlu then separate himself by executing Exhibit I? I have held that that document was executed in order to defeat creditors and the plaintiff on that very ground contends that it does not bind him. The question, however, is did Rangacharlu by executing Exhibit II express an intention to relinquish his status as a member of the joint family? If he did so, it would make no difference so far as its effect on his joint status is concerned, even if his further object was to defeat his creditors. As I read that document, though its apparent design was to settle a family dispute, its real object was that Rangacharlu should by receiving Rs. 5,000 relinquish his share in the property; and he says in so many words: "I have.....no concern with the same hereafter and excepting the tie of relationship by blood the relation through property no longer subsists as between you and me." It is a formal registered instrument and I hold that it contains a clear and unambiguous expression of a desire on the part of Rangacharlu to sever the joint status.

As I have held that Exhibit II is not binding on the plaintiff, the result will be that the judgment of the District Judge will be reversed and there will be a decree in favour of the plaintiff for the sum of Rs. 3,287-80 with interest at 6 per cent, until payment. The appellant is entitled to his costs from the respondents both in this and in the lower Court.

My learned brother, however, would confirm the judgment of the lower Court.

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Under section 98 of the Code of Civil Procedure, therefore, the appeal will be dismissed with costs as against defendants Nos. 1 to 4 and the decree will be in accordance with his judgment.

SPENCER, J.—These suits were brought by a money-lender to recover money lent upon promissory notes, Exhibits A to F, to one Rangacharu, a spendthrift youth, who is now dead. The 1st respondent is Rangacharu's father, the 2nd, 3rd and 4th respondents are his brothers, and the 5th respondent is his widow. It is sought to make them liable for payment. A few months after the execution of these promissory notes, a release deed (Exhibit II) was drawn up and signed by Rangacharu, whereby he took a lump sum of Rs. 5,000 in full quittance of his right, if any, to be given a share in the entire property, moveable and immoveable, acquired by Rangacharu's father Ramacharu under the Will of his father Bhujungacharu.

The plaintiff impugns Exhibit II as being a fraudulent document got up to defeat Rangacharu's creditors, while the defendants maintain that it represents a *bona fide* family settlement for good consideration.

It has been held in several cases that where land is transferred with the intention of converting it into cash and thus putting it beyond the reach of the transferor's creditors, the transaction is obviously one calculated to defeat the creditors in a most effective manner *vide Palamalai Mudaliyar v. South Indian Export Co. Ltd.* (20).

But we have not been referred to any case in which a partition of family property among Hindus has been treated as a transfer within the scope of section 53 of the Transfer of Property Act. A partition is a division or an agreement among co-owners to make a division of their joint property in severalty. It effects a change in the mode of enjoyment of property, but it is not an act of conveying property from one living person to another. Exhibit II is not in terms a division of property, nor is it a transfer or a release of property, but it purports to be a relinquishment of the executant's inchoate

right to have a partition. The plaintiff would have had no ground for complaint if Rangacharu, his debtor, had been given more and had received it in a form more readily available for attachment by his creditors. The plaintiff's position may be regarded first from the standpoint of the property possessed by Ramacharu being his self-acquired property. If the estate bequeathed under Rangacharu's grandfather's Will was enjoyed as self-acquired property in the hands of Rangacharu's father, then Rangacharu could not claim as a matter of right to be given any definite portion of it. He had no more than an expectant right to succeed to a part of it on his father's death, which has not yet occurred. Now that Rangacharu is dead, his creditors can have no right whatever over the absolute estate of Rangacharu's father and the plaintiff's suit would necessarily fail against respondents Nos. 1 to 4.

If, on the other hand, this property was ancestral property in the father's hands at the time when the promissory notes which are the basis of the plaintiff's claim were executed, then Rangacharu had no exclusive ownership in any single item of that property. He had undoubtedly a right to demand a partition of the ancestral property in the management of his father, but the plaintiff did not obtain a transfer of that right from him, as another creditor (plaintiff's 3rd witness) did by his hypothecation deed of July 31st, 1914 (Exhibit L) before Rangacharu relinquished it under Exhibit II on August 12th, 1914. Thus the plaintiff was never in a position to insist upon an equal distribution of immoveable property being made among the members of his debtor's family. He was an unsecured creditor, and as such, he had to take his chances of getting his money whenever an opportunity occurred of attaching the debtor's property. A money-lender who lends money to a junior member of a joint family always runs the risk of losing his money if the debtor dies before he gets a decree and attaches the debtor's undivided share.

If the debtor died without becoming divided, all the remaining interest that the debtor possessed in the ancestral property

(20) 5 Ind. Cas. 33; 33 M. 334; 20 M. L. J. 211; 7 M. L. T. 167; (1910) M. W. N. 239.

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of his family passed to the surviving members of that family. But if Exhibit II created, as it appears to have done, a severance of status between Rangacharu and his father and brothers, then all that Rangacharu got by the partition before his death was the sum of Rs. 5,000 and that is all that became available for satisfying his unsecured creditors. Exhibit II contains these words:—"Whereas I and your other sons * * * were living as a joint family * * * you know that I, not finding our house a suitable habitation, have taken to separate living * * * I have received Rs. 5,000 in cash from you this day. So I have hereby relinquished the entire right and interest, if any, that I may possess in respect of the entire property, moveable and immoveable, that may be in your possession, that is to say, all the immoveable properties described below, other moveables and outstanding debts due from others as per documents, etc. I have, therefore, no concern with the same hereafter and excepting the tie of relationship by blood, the relation through property no longer subsists as between you and me." After such a clear and unequivocal statement it is impossible to conceive of Rangacharu's continuance in the undivided family to which his father and brothers belonged. The document cannot be treated as a nullity by one who lays claim to an interest in the property of those who were parties to it. So the plaintiff has no means, apart from section 53 of the Transfer of Property Act, of avoiding the effect of Exhibit II, and he cannot avail himself of the provisions of that section unless he shows.

(1) that the document was in substance a transfer of immoveable property;

(2) that it was intended thereby to defeat or delay the transferor's creditors, and he must fail if the defendants prove it to be an act done *bona fide* and for consideration.

I have already given reasons for thinking that partitions of co-parcenary property do not fall within the scope of section 53 which deals with transfers of immoveable property, seeing that every member of a co-parcenary has before a partition takes place a common interest in and a possession of every item of ancestral property,

and that the subjects of partition and settlements, though proposed to be included in the Bill of 1877, were found unsuitable and were designedly left out and a separate Act (Act IV of 1893) was enacted, in which no provision for the protection of creditors corresponding to section 53 of Act IV of 1882 is included. I think that this section must be strictly construed as it is a statutory provision, and I doubt whether Courts have the power to extend statutory provisions by analogy to transactions which do not fall within the scope of the Statute. (I refer to the definition of "Transfer of property" in section 5, Transfer of Property Act). Exhibit II cannot be impugned as fraudulent in a general sense, as it does not violate the legal rights of anybody.

On the second point the learned District Judge has come to the conclusion that Exhibit II represented a *bona fide* settlement and I agree with him on this point.

As he observes, it is not likely that Rangacharu would have voluntarily taken less than he could get, as he had somehow to maintain himself after separation from his family. If Exhibit J, produced for the plaintiff and spoken to by P. W. No. 2, which is an uncertified copy of an unregistered document, is of any value, it only goes to help the defendants' case by showing that Rangacharu tried to get Rs. 30,000 as his share on partition.

But he only got Rs. 5,000 through Exhibit II, which, as stated in the recital of that document and as spoken to by defendants' witnesses Nos. 1, 3 and 4, was the result of the intervention of mediators, the amount being fixed at that figure, partly because the 1st defendant's elder brother had once taken a similar amount from the family chest when he became separate some years previously and partly because some doubt was felt at the time whether Rangacharu was strictly entitled to any share in property received by his father under the Will of his grandfather, as it was regarded as the father's self-acquisition.

The learned District Judge has held on the authority of *Nagalingam Pillai v. Ramachandra Tevar* (6) that 1st defendant took this property as ancestral property, although it was self-acquired property in

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the hands of the testator. A number of decisions have been cited by respondents' Vakil, from which it appears that while the Bombay and Allahabad High Courts have treated property acquired through the Will of a grandfather as self-acquired, the Madras and Calcutta High Courts have inclined to the view that it is *prima facie* ancestral.

Tara Chand v. Reeb Ram (13) and *Nagalingam Pillai v. Ramachandra Tevar* (6) have been followed by judgments of a single Judge in *Venkataramiah Pantulu v. Subramaniam Pillai* (15) and *Shadagopu Naidu v. Thirumalaswami Naidu* (7), and not directly dissented from in *Yethirajulu Naidu v. Mukunthu Naidu* (21) which turned on the construction of a particular Will. The decision in Mangaldas's case, *Jugmohandas Mangaldas v. Mangaldas Nathubhoy* (3), though followed in *Nanabhai Ganpatrao Dhairyawan v. Achratbai* (9) in the judgment of a single Judge, has come in for much criticism from Beaman, J. in *Ahmedbhai Habibbhai v. Sir Dinshaw M. Petit* (18) and the case in *Muddun Gopal Thakoor v. Ram Buksh Pandey* (14), from which the view taken in *Nagalingam Pillai v. Ramachandra Tevar* (6) started, has been cited with approval by Mookerjee, J., in *Hazari-mal Babu v. Abani Noth* (17).

After all, what was laid down in *Nagalingam Pillai v. Ramachandra Tevar* (6) was that the question whether the property passed to the son as ancestral or self-acquired property was in every case a question of intention depending on the construction of the Will or gift deed, the bias being in favour of ancestral property in the absence of words to the contrary. Exhibit IV contains a bequest of Rs. 3,500 in favour of the children of the testator's divided eldest son, a provision of maintenance in favour of his daughter and a gift of the testator's half share in certain ancestral property for charitable purposes, but after a preliminary statement that the entire property enjoyed by the testator is his self acquisition, the Will proceeds to an equal division of the bulk of it between his own son (1st defendant) and his younger brother's son Sabbana Charyulu and closes with a protest against the equality of the

division being hereafter called in question. There are no words to indicate an intention on the part of the testator that his son should enjoy his portion as self-acquired property. The ammonite, which formed a kind of family idol, was left to be enjoyed by the son and the nephew in common. On the construction of the Will, the learned District Judge rightly held on the 3rd issue that the property became ancestral property in the hands of the 1st defendant.

But the idea in the minds of the parties to the settlement that in the eye of the law this property was the self-acquired property of the 1st defendant explains to some extent why no more than Rs. 5,000 was offered to and accepted by Rangacharu and thus throws light on the *bona fides* of the compromise.

As I think that Exhibit II should be upheld as a *bona fide* family settlement, the appeals in my opinion fail and should be dismissed with costs. I also observe that if for any reason Exhibit II were to be treated as a voidable document and vacated, then as it is not shown that Rangacharu became divided at any other time, he must be taken to have lived and died undivided, in which case the whole of his share passed by survivorship to the remaining members of the joint family, against whom the unsecured creditors have no legal claim for payment of his debts, before this suit was instituted. Thus in any case the 5th respondent alone is Rangacharu's heir after he became divided and the other respondents are not liable to be made to pay his debts by a decree of Court. In the result I would give the plaintiff a decree against 5th respondent with costs in both Courts and dismiss the appeals against the other respondents and direct him to pay their costs.

M. C. P.

Appeals dismissed.

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PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

July 11, 1919.

Present:—Viscount Haldane, Lord Buckmaster, Lord Dunedin and Lord Shaw.

SECRETARY OF STATE FOR INDIA IN COUNCIL—APPELLANT

versus

MAHARAJA OF BOBBILI—RESPONDENT.

Madras Irrigation Cess Act (VII of 1865), s. 1—“Engagement with Government,” easement, whether amounts to—Forfeiture of servient estate, effect of—Dominant estate, whether liable to pay cess.

When the Government in India forfeits an estate, the Crown takes that estate *tantum et tale* as it stood in the subject against whom the forfeiture is exercised: it takes it, therefore, subject to all existing easements. [p. 159, col. 1.]

Where a Zemindar had an easement to irrigate his estate free from an artificial channel passing through the estate of his neighbour, and Government forfeited the neighbour's estate for rebellion:

Held, that the Zemindar had an “engagement with the Government” within the meaning of the proviso to section 1 of the Madras Irrigation Cess Act of 1865 and that, therefore, he was not liable to pay the irrigation cess imposed under the Act. [p. 159, col. 1.]

Kandukuri Balasurya Prasadha Row v. Secretary of State, 41 Ind. Cas. 98; 44 I. A. 166; 33 M. L. J. 144; 22 M. L. T. 76; 15 A. L. J. 697; 21 C. W. N. 1039; (1917) M. W. N. 536; 19 Bom. L. R. 751; 6 L. W. 340; 2 P. L. W. 260; 26 C. L. J. 290; 40 M. 886, discussed.

Appeal from a decree of the Madras High Court, dated the 27th October 1915, affirming a decree of the District Judge of Vizagapatam, dated the 9th December 1909.

FACTS.—The respondent sued for refund of cess levied upon him in 1907 under Madras Irrigation Act VII of 1865 and paid under protest, and for a declaration that he was entitled to use the water for irrigating his village of Narayanapuram free of cess. He alleged, *inter alia*,

(a) that the irrigation channel in question was constructed more than a century ago by the Zemindar of Palkonda, an estate since forfeited by Government,

(b) that his lands had ever since been irrigated from it and that he and his predecessors-in-title had from time to time repaired the channel and constructed sluices to it at their own expense,

(c) that he was entitled to the irrigation of his lands from the channel free of charge as a riparian proprietor and by virtue of long user, custom, prescription, and easement, and according to an understanding and agreement between his predecessors-in-title

and the then Zemindars of Palkonda and (since the Palkonda estate was forfeited and became the property of Government) between his predecessors-in-title and himself on the one hand and the Government on the other.

By his written statement appellant pleaded that both the river and channel were the absolute property of Government and were a Government source of irrigation: he denied the understanding or agreement and the right by user, custom, prescription or easement alleged: and he claimed to be entitled to levy water rate upon all lands in the suit village, on which a second wet crop was now raised, in excess of the Permanent Settlement wet area.

The District Judge at first held it unnecessary to decide the issue whether the river in question (the Suvarnamukhi) belonged to Government, and that the only question was whether Government was entitled to levy cess for water taken from the channel: that the channel was constructed by the Palkonda Zemindar between 1690 and 1780, and now belonged to Government: that as the channel was an artificial one, the plaintiff could have no right based on riparian ownership: and that no such custom as alleged by plaintiff was proved. He found, however, the following facts in plaintiff's favour:—

(1) that in 1814 the Palkonda Zemindar admitted the right of plaintiff's predecessor to irrigate his land from the channel through five sluices:

(2) that in 1865, 1901 and 1903 Government had recognised respondent's right to irrigate his lands from the channel, and had allowed him to construct masonry sluices at his own expense, and that the Government had done nothing to improve the supply since the forfeiture in 1833:

(3) that no charge was levied by Government till 1907.

From these facts he inferred a grant or agreement by the Palkonda Zemindar, by which Government were bound, as they could only succeed to the Zemindar's title to the channel subject to existing rights. He, therefore, decreed the suit.

On appeal the Madras High Court (Sir Arnold White, C. J., and Oldfield, J.) remanded the case to the Trial Judge for findings upon the issue whether the Suvarnamukhi river belonged to Government and the following further questions:

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(1) whether the 160 acres in respect of which the Government claim the right to levy water-cess were at the time of the Permanent Settlement taken into account as wet land for the purposes of the settlement; (2) whether subsequently to the Permanent Settlement there has been an engagement with the Government under which the plaintiff has become entitled to irrigation free of separate charge as regards these 160 acres.

The District Judge found that the river belonged to Government: and (1) that the lands in question were not irrigated until after the Permanent Settlement: (2) that after the Permanent Settlement there was "an implied agreement by Government to supply the plaintiff with water from the channel as before the forfeiture of the Palkonda Zemindari," and he further held that the Government engaged that this should be free of any separate charge.

These last two findings were considered by the same Bench of the Madras High Court. As to (1) Oldfield, J., after examining the evidence at length, concurred with the Trial Judge: as to (2) he held that even assuming a grant or undertaking by the Palkonda Zemindar, no "engagement with the Government" could be inferred. Sir Arnold White, C. J., expressed some doubt as to (1) but was not prepared to differ from the finding thereon. As to (2) he held that even assuming that the obligation to supply water, originally incumbent on the Palkonda Zemindar, devolved upon Government, it did not follow that Government was not entitled to levy a tax for the use of the water; he, therefore, by a different process of reasoning, agreed with Oldfield, J., that there was no "engagement with the Government" excluding the cess. But the question whether the river from which the channel took off was a Government river still remained: the finding on that issue came before a different Bench of the High Court, consisting of Sir J. Wallis, C. J., and Seshagiri Aiyar, J., and these learned Judges agreed that as the banks and bed of the river did not belong to the Government until below the point at which the channel took off, the river itself was not a river belonging to the Government within the meaning of the Act. On this

ground they affirmed the decree in plaintiff's favour passed by the District Judge.

Sir Erle Richards, K. O., and Mr. Kenworthy Brown, for the Appellant.—The words "river, stream, channel, tank or work" in section 1 of the Madras Irrigation Cess Act are disjunctive: it is not necessary that the river from which the channel takes off should belong to Government: it is enough that the channel does. The ownership of the channel passed to Government on the forfeiture in 1833. Unless, therefore, there was an "engagement with the Government" within the meaning of the proviso, the cess was properly levied. The High Court, having held there was not, should have allowed the appeal.

The High Court have rightly held there was no "engagement" within the Act. Such an engagement cannot arise out of user subsequent to the Permanent Settlement. That question was left open when in *Kandukuri Balasurya Prasadha Row v. Secretary of State* (1) it was held that an engagement arises out of the permanent settlement of lands then irrigated. The imposition of a cess in this case is not in breach of any engagement with the Government made at the time of the Permanent Settlement, and since that time there has been nothing in the nature of a bilateral transaction between the owners of the land and Government from which an agreement can be implied. The question upon the proviso is not one of proprietary right or of easement, but of engagement—of contract: whether there is a contractual right to have the water free of cess. The proviso does not purport to preserve all existing rights.

Mr. Upjohn, K. O., Sir W. Garth, K. O., and Mr. Parikh, for the Respondent, were not called on.

JUDGMENT.

LORD SHAW.—This is an appeal against a decree of the High Court of Madras dated the 27th October 1915, which affirmed a decree of the District Judge of Vizagapatam, dated the 9th December 1909. The suit was brought by the Maharaja of Bobbili, viz., the present respondent, for the refund of a sum levied under the

(1) 41 Ind. Cas. 98; 44 I. A. 166; 33 M. L. J. 144; 22 M. L. T. 76; 15 A. L. J. 697; 21 C. W. N. 1089; (1917) M. W. N. 536; 19 Bom. L. R. 751; 8 L. W. 340; 2 P. L. W. 260; 26 C. L. J. 290; 40 M. 886 (P. C.),

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Madras Irrigation Cess Act (VII of 1865), and paid under protest, and for a declaration that he was entitled to use the water from a certain channel for irrigation of the village of Narayanapuram, free of the cess.

The respondent was the owner of a village called Narayanapuram in the district of Vizagapatam. For upwards of a century the lands of this village have been irrigated by the water of the Suvarnamukhi river flowing through an artificial channel known as the Sakarapalli channel. The river runs through the respondent's estate (amongst others), and its banks and bed in its course through that estate admittedly belong to him.

The history of the facts may be stated in one or two sentences. The Suvarnamukhi river rises in Zemindari land and flows through Zemindari land up to the suit village of Narayanapuram. From this river a channel was constructed by a Zemindar of Palkonda, no doubt for irrigation purposes. Apparently in order to obtain a suitable flow, the river had to be tapped at a point considerably above the Palkonda lands, and the river being so tapped, the channel proceeded therefrom through the lands of *inter alios* the predecessor of the present Maharaja, who is the respondent.

The Trial Judge is of opinion that the channel was probably constructed somewhere between 1690 and 1780. The evidence is not clear as to the exact date at which certain sluices, four of which still remain, were constructed from the channel for the purpose of irrigating the respondent's lands. The Courts below have come to the conclusion that the irrigation of the village is not proved to have taken place prior to the Permanent Settlement of the year 1801, notwithstanding the fact that, as already stated, the Trial Judge is of opinion that the channel itself was constructed many years earlier. It is unnecessary for the Board to enter upon the question whether a conclusion of this kind, which is more of the nature of a conjecture with regard to the probabilities of an obscure situation, could be classed as a concurrent finding of fact precluding a different finding here; but their Lordships must not be held as acceding to the view, founded upon the state of the Permanent Settlement

record, that the absence of express notice of the sources of water supply warrants the conclusion that such a supply—from the channel admittedly in existence then and for many years before—was not furnished to the respondent's lands.

As to the state of matters at the beginning of the 19th century, their Lordships agree with the view of the District Judge when he says:—

"The plaintiff relies upon Exhibit C as showing that in 1814 the then Zemindar admitted the right of plaintiff's predecessor to irrigate his lands from the channel through five *punathas* (sluices). There can be no doubt about this. This document was proved as Exhibit IV, in the connected suit, Original Suit No. 13 of 1906 on behalf of the defendant. Its existence was then probably not known to the plaintiff, as it was only produced for the first time at the hearing of Original Suit No. 13 of 1906. It shows conclusively that while the Palkonda Zemindars owned the channel, the plaintiff's right to irrigate his Narayanapuram lands through five *punathas* was admitted and recognised, and that no labour or contribution was provided by the village for repairing the channel. The oral evidence shows that the Zemindar (plaintiff) is in fact only enjoying four *punathas* now."

Two outstanding facts accordingly appear with regard to the irrigation of this property, namely, that for over at least one hundred years it has been enjoyed as matter of right; secondly, that no pecuniary return was made therefor. In short, the case appears to be the simple one, *viz.*—that for land given as part of the channel artificially constructed for irrigation purposes, a right to draw off water as it passed was conferred upon the respondent's predecessors and himself, and that that right has been enjoyed by them ever since. It is in these circumstances that the question arises whether the respondent is liable to pay an irrigation cess in virtue of the Madras Act No. VII of 1865, as amended by Madras Act V of 1900. No claim therefor in respect of these lands was made until the year 1907. Payment was made under protest, and the present suit to determine liability was instituted.

The case depends upon the proper construction to be put upon the Act

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referred to. Its preamble is not without importance:—

"Whereas, in several districts of the Madras Presidency, large expenditure out of Government funds has been, and is still being, incurred in the construction and improvement of works of irrigation and drainage, to the great advantage of the country and of proprietors and tenants of land: and whereas it is right and proper that a fit return should, in all cases alike, be made to Government on account of the increased profits derivable from lands irrigated by such works; it is enacted as follows:—"

So far as the preamble goes, the Act would not appear to be directed against lands such as those of the respondent; for it is admitted that no works or action of the Government have either created or increased the supply of water to his lands. It is nevertheless true, as was indicated by Lord Parker in his judgment in *Kandukuri Balasurya Prasadha Row v. Secretary of State* (1), that section 1 of the Amending Act makes operative provisions somewhat in excess of the apparent ambit of the preamble. If so, the section must govern.

It is in the following term:—

"Sections 1 and 4 of the Madras Act VII of 1865 . . . shall be read and construed as if at the time of the passing of the said Act there were and had been inserted in lieu of the said sections the following, viz:—

"(a) Whenever water is supplied or used for purposes of irrigation from any river, stream, channel, tank or work belonging to or constructed by Government, and also,

"(b) whenever water by direct or indirect flow or by percolation or drainage from any such river, stream, channel, tank or work from or through adjoining land irrigates any land under cultivation or flows into a reservoir and is thereafter used for irrigating any land under cultivation, and, in the opinion of the Collector, subject to the control of the Board of Revenue and the Government, such irrigation is beneficial to, and sufficient for the requirements of, the crop on such land,

"it shall be lawful for the Government to levy at pleasure on the land so irrigated a separate cess for such water, and the

Government may prescribe the rules under which, and the rates at which, such water-cess, as aforesaid shall be levied and alter or amend the same from time to time:

"Provided that where a Zemindar or Inamdar or any other description of landholder not holding under *ryotwari* settlement is by virtue of engagements with the Government entitled to irrigation free of separate charge, no cess under this Act shall be imposed for water supplied to the extent of this right and no more..."

The respondent's position is that of a Zemindar not holding under "*ryotwari* settlement;" he is, therefore, a person directly pointed to by the proviso just cited, and in view of the history of the lands as already sketched, the question is at once raised as to whether this Zemindar is "by virtue of engagements with the Government" entitled to irrigation free of separate charge. If he is, then no cess is leviable in respect thereof; nor would any cess have been leviable under the Act of 1865 as unamended: for by section 4 of the Act of 1865 there is a similar proviso of exemption. The reason of such a proviso is not far to seek. The Government was contemplating irrigation works, and along with these the financing of those operations; and the preamble indicates not obscurely that the financing was to be met by way of a fit return to Government on account of the increased profits which would be derivable from lands irrigated by such Government works. If, however, in consequence of other arrangements, or, as section 1 puts it, "engagements," the irrigation had been accomplished and financed apart from expenditure under the Statute, then those lands should stand free from the statutory cess.

The question accordingly in the present case is whether there are such "engagements with the Government." On this question there was a sharp division of opinion in the Courts below, and it is necessary to state how it is that the Government's claim to be owner of the channel arises. In the year 1832 the Palkonda Zemindar rebelled against the Government. His lands were in consequence forfeited to the Crown. As already stated, the artificial channel was at that time constructed and the irrigation as a system applicable to the lands of Bobbili

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was in full operation. No attempt was made by the Government of the day to change the footing upon which the irrigation rights were enjoyed or to assert any right in the Crown as owner of the servient tenement of Palkonda, which would lessen or interfere with the continued enjoyment of the easement by the respondent's predecessors as of right and without exaction or charge.

What was the nature of this right of easement? It was to receive and utilise for irrigation purposes from an artificial channel a supply of water. It is, of course, in accord with legal theory that such a right of easement is created by grant, but it is also sound law that a grant of such a right is presumed from long possession, although the actual transaction of making such a grant cannot be discovered or proved. The present case is accordingly in no way singular in this respect, that the acts of parties over a long course of years point to the enjoyment of an easement founded upon a grant by the owner of the servient to the owner of the dominant tenement.

Upon the facts of the present case it appears to be clearly established that for about fifty years, namely, from 1814 till 1865, when the Act was passed, the owners of Palkonda and the Zamindar of Bobbili stood in the position of having, the one a servient, and the other a dominant tenement, with the unchallenged enjoyment of the easement of water supply as stated. Had the question now in suit accordingly arisen in the year 1864 there seems little reason to doubt that the right of the respondent would have been settled upon that footing.

But the matter does not end there. The Act of 1865 was passed, and for forty two years the same state of matters was continued. Had this suit been raised in the year 1866 instead of 1907, a serious question would still even then have arisen, namely, whether the words in the section "engagements with the Government" did not require a construction inclusive of engagements with the Government or its predecessors-in-title, as only by such a construction could justice be done to the manifest intention to reserve as against water-cess those who had already been furnished with

their own water supply.

The position is strengthened by the further lapse of time and, in their Lordships' view, the Government must stand committed to the transactions which they have accepted as binding parties for a period of between eighty and ninety years, during which (including forty years since the Act was passed) the Zamindari of Bobbili has been enjoyed without any question that the Zamindar held under a tenure which gave him the benefit of the proviso in the Statute.

This view is in no way in conflict with the view of Lord Parker in the case referred to. On the contrary, it appears to be supported by certain passages in that judgment. His Lordship refers to the Permanent Settlement in the Madras Presidency under which the Government granted to the Zamindars "a permanent property in their land for all time to come, and would fix for ever a moderate assessment of public revenue on such lands the amount of which should never be liable to be increased under any circumstances;" and he adds: "Under these circumstances the Government could not impose a cess for the use of water the right to use which was appurtenant to the land in respect of which the *jama* was payable without in fact, if not in name, increasing the amount of such *jama*, and thus committing a breach of the obligation undertaken at the time of the Permanent Settlement." With regard to the actual question in the present case, judgment was expressly reserved. Referring to the difficulties which arise in the construction of the Act and the fact that the levy is made on the basis of the area irrigated, irrespective of profits, Lord Parker said: "If in order to avoid this result reliance were placed on the first proviso, the question would arise whether it were possible to imply some engagement with the Government arising out of the natural or prescriptive right of the riparian owner."

That question so reserved is the point now in issue. In their Lordships' opinion such an engagement should be implied in the circumstances already set out. The predecessors of the respondent were using the water as of right when the servient Zamindari was forfeited to the Crown in 1833; with the owners of that Zamindari

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they had, to use the general term employed in the Statute, a good "engagement:" in taking the servient estate, this engagement accompanied the transaction, and the engagement was thereafter with the Crown. In short, the forfeiture could not operate against a dominant and unforfeited Zemindari. With acquisition by forfeiture the Crown became bound to take the forfeited estate *tantum et tale* as it stood in the subject who had rebelled, that is to say, to respect the rights and in particular the easements enjoyed by others. Otherwise the scope of the forfeiture would be extended; *pro tanto* it would fall upon innocent and loyal subjects.

This is sufficient for disposal of the appeal. The case was unfortunately much delayed owing to various causes not sufficiently explained. Time also was occupied by a remit for enquiries in regard to the ownership of the river itself from which the water was drawn by the channel. While their Lordships do not differ from the conclusion upon that topic arrived at by the High Court, they are of opinion that the case should be determined on the simpler ground above stated. In their Lordships' opinion the Crown has failed to establish the liability of the respondent.

Their Lordships will humbly advise His Majesty that the appeal be dismissed with costs.

Appeal dismissed.

Solicitor for the Appellant.—*The Solicitor, India Office.*

Solicitor for the Respondent.—*Mr. Douglas Grant.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 604 OF 1894

September 7, 1895.

Present:—Mr Ismay, Offg. J. C.

BHAOSINGH—DEFENDANT—APPELLANT
versus

BIHARILALL AND ANOTHER—PLAINTIFFS—
RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 49—Loan of movable property—Property wrongfully converted by borrower—Suit for recovery of property—Limitation, commencement of.

In the case of property loaned to be returned when asked for, no action would lie until a return has been demanded and refused and the mere fact

that the borrower has, unknown to the lender, wrongfully converted the subject of the loan would not affect the question of limitation. [p. 160, col. 1.]

The period of limitation in such cases would run from the date of demand and refusal, and not from the date when the property was converted wrongfully. [p. 160, col. 2.]

Wilkinson v. Verity, (1871) 6 C. P. 206; 24 L. T. 32; 19 W. R. 604; 40 L. J. C. P. 141, followed

• Appeal against the decree of the Judicial Assistant, Narbada Division, dated the 5th August 1894, arising out of the decision of the Court of the Extra Assistant Commissioner, Hoshangabad, dated the 21st March 1894.

Mr. Balwant Rao, for the Appellant.

Messrs. Dillon and B. K. Bose, for the Respondents.

JUDGMENT.—In this case the plaintiffs sued to recover a female elephant valued at Rs. 3,000, which they had allegedly loaned to the defendant Bhaosingh in May 1891. The defendant Bhaosingh pleaded that his brother Dalpat Singh, the grandfather of the plaintiffs, had given him the elephant in 1882 and that he had pawned it to the defendant Khubchand (who is related to the litigants) in the beginning of 1890. It was also pleaded that the claim was barred by limitation and that the proper value of the elephant was Rs. 1,300 only. The defendant Khubchand admitted that he held the elephant in pawn and raised no fresh pleas. The first Court found that the elephant was the property of the plaintiffs and had been loaned by them to the defendant Bhaosingh not in 1891, but on some date more than six years prior to the institution of the suit. It considered that the claim was governed either by Article 49 or by Article 120 of the Limitation Schedule and dismissed the suit as time-barred. On an appeal by the plaintiffs the Judicial Assistant affirmed the finding as to ownership, but held that the possession of the defendant Bhaosingh was not adverse and that limitation did not commence to run until the return of the elephant was refused. For some reason which is not very intelligible the defendant Khubchand was discharged from the suit and a decree was passed against the defendant Bhaosingh, to the effect that he should put the plaintiffs in possession of the elephant or pay the value of the animal, *viz.*, Rs. 3,000.

Against this decree both parties have made a second appeal to this Court. In regard to the plea that the Courts below have come to

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no distinct finding as to the value of the elephant, it is agreed on both sides that for the purposes of calculating costs and awarding damages the value of the elephant shall be taken to be Rs. 2,000.

The only plea then raised by the defendant Bhaosingh is in regard to limitation, and this plea clearly carries no weight. The Statute of Limitation does not necessarily begin to run from the time of the making of a contract or promise, but it runs from the time when the plaintiff might have brought his action. Now in the case of property loaned to be returned when asked for, no action would lie until a return had been demanded and refused and the mere fact that the borrower had, unknown to the lender, wrongfully converted the subject of the loan would not, I think, affect the question of limitation. The present case is in principle on all fours with the English case of *Wilkinson v. Verity* (1), and the defence raised was precisely the same. In 1859 the defendant had taken possession of certain church plate for the use of the parish and to be forthcoming when required. In the course of the same year he sold it as old silver to a silversmith and eleven years afterwards the plaintiffs brought an action of detinue, proving a demand made shortly before the action and a refusal to comply. On behalf of the defendant it was pleaded that as a conversion of the property had been made more than six years previously the action was time barred. In giving judgment Mr. Justice Willes noted that the point was a new one and concluded thus:—"If the action for detinue is resorted to for the purpose of asserting against a person entrusted for safe custody a breach of his duty as bailee by detention after demand, independent of any other act of conversion, such as would make him liable in an action of trover, it would seem that the owner is entitled to sue at election either for a wrongful parting with the property (if he discovers and can prove it) or to wait until there is a breach of the bailee's duty in the ordinary course by refusal to deliver up on request; and that in the latter case it is no answer for the bailee to say that he has by his own misconduct incapacitated himself from complying with the lawful demand of the bailor. A man

entrusted with property for safe custody cannot better his position by wrongfully parting with possession of it but must be answerable as if he retained the possession. And this is agreeable to the maxim *qui dolo desit possidere proposti deute damnavit*."

This view appears to be in complete accord with the law of this country. Article 49 of the Limitation Schedule (which I think governs the present case) enacts that a suit for specific movable property not covered by the preceding Article shall be brought within three years from the time when the detainer's possession becomes unlawful, that is in the present case from the time when a return of the movable was demanded and refused. I am not aware that the point under discussion has ever come before the Courts in this country, but the *ratio decidendi* in *Issur Ohunder Doss v. Juggut Ohunder Shaha* (2) is to some extent applicable. The appeal by the defendant Bhaosingh fails and is dismissed with costs in this Court on the appellant up to Rs. 2,000.

Turning now to the plaintiffs' appeal, it may be said at once that the dismissal of the claim as against the defendant Khubchand, who is in wrongful possession of the elephant, cannot be sustained. Although the question was never raised in the first Court, I may note that the principle laid down in the first exception to section 108 of the Contract Act would not apply so as to render the plaintiffs liable for any charge upon the property [cf. *Shankar Murlidhar v. Mohanlal Jaduram* (3) and the cases therein cited]. It is further clear that the form of the decree is wrong, inasmuch as it allows the defendants the option either of returning the elephant or paying its value.

The appeal by the plaintiffs succeeds and on such appeal it is directed that the decree of the lower Appellate Court be set aside and that in lieu thereof a decree be passed for the plaintiffs against both defendants for return of the elephant claimed; if delivery could not be had then the defendants shall pay as an alternative the sum of Rs. 2,000.

As regards costs the defendants must pay their own costs throughout, and the defendant Bhaosingh must also pay the plaintiffs' costs in all Courts up to Rs. 2,000.

Appeal dismissed.

(1) (1871) 6 C.P. 206; 40 L. J. C. P. 141; 24 L. T. 32; 19 W. R. 604.

(2) 9 C. 79.

(3) 11 B. 704.

EMPEROR V. SAKHARAM MANAJI.

BOMBAY HIGH COURT.

CRIMINAL APPEAL No. 86 OF 1919.

June 7, 1919.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Pratt.

EMPEROR—PROSECUTOR—APPELLANT

versus

SAKHARAM MANAJI VANJARI—

ACCUSED.

*Criminal Procedure Code (Act V of 1898), s. 417—
Appeal against acquittal—Power of Government to
prefer appeals, exercise of—High Court, duty of—
Procedure.*

The power of appeal under section 417 of the Criminal Procedure Code should be exercised sparingly by the Government. The discretion to exercise that power, however, is not subject to the control of the High Court, and, where, in such an appeal, the Court is of opinion that the lower court has acted on an erroneous view of the evidence, and that it should have convicted the accused, it has no jurisdiction to refuse to convict. [p. 163, col. 1.]

As between an appeal against an acquittal and an appeal against a conviction, the Criminal Procedure Code makes no distinction. [p. 163, col. 1.]

Criminal appeal by the Government of Bombay, from an order of acquittal passed by the Sessions Judge at Nasik.

Mr. S. S. Patkar, Government Pleader, for the Crown.

Mr. D. R. Patwardhan, for the Accused.

JUDGMENT.—The accused Sakharan Manaji Vanjari was tried for the murder of Vithi, wife of Bhika Gangaram, and was acquitted by the Sessions Judge of Nasik. This is an appeal by the Government of Bombay under section 417 against the acquittal.

Vithi was a young woman aged 12, who lived with her husband Bhika Gangaram at the village of Wadgaon, a few miles from Deolali. Her husband worked as a cartman at Deolali. On the 8th of September, the husband says, Vithi came in the morning to Deolali and left him his food and fodder for his bullocks and a message that she would return in the evening with his dinner. After his work he returned to Deolali Station at 3 p. m. expecting her to arrive. She did not come. He went home and found that she had not returned home after her visit to Deolali that morning. He searched for her that night and next morning without success, and at 4 p. m. on the 9th learnt that her corpse had been found in the bed of a Nalla between Wadgaon and Nanegaon on the way

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from Deolali. He went there with the Wadgaon Patil, who sent for the Nanegaon Patil as the place was within the boundary of the village of Nanegaon. He then went back to Wadgaon in the evening and learnt from the womenfolk that Yama had a clue to the murder. He found Yama at his house at 4 p. m. and after much persuasion Yama told him that Bhika Raoji had said that accused and Pandu had committed the murder. He looked for Bhika Raoji, but could not find him and returned to the scene of the murder at 11 p. m. By that time the Nanegaon Patil had arrived and later about 2 a. m. the Sub-Inspector came there. The Sub-Inspector made an inquest in the morning of the 10th. He did not take the statement of the husband till the afternoon after he had gone on to Wadgaon. He did not find Yama, Bhika, Pandu and the accused till the 11th. On that evening he arrested the accused.

Now there is no doubt that Vithi was murdered in the Nalla bed. Her throat was cut. There was much blood on the ground near the corpse and there were other marks of violence. Broken pieces of bangles and of a necklace were lying 9 or 11 paces from the corpse and the body had been dragged from there to the place where it was found. The motive for the murder was not robbery, for the woman's ornaments had not been touched. The *kasota*, however, had been loosened and there can be no doubt that the unfortunate woman had been ravished and murdered.

Bhika Raoji is the most important witness in the case. His field is 500 paces from the Nalla bed where the corpse was lying. He says that on the morning of the 8th while ploughing his field he saw four men from Wadgaon, the accused, Pandu, Narayan and Ramji, carrying head loads of grass pass by the path alongside his field, cross the Nalla and sit down to rest on a hillock which is 100 paces from the further bank of the Nalla. He saw a woman coming from towards Nanegaon. He says that she passed the four men, halted, looked back and proceeded on her way towards the stream. He says that Narayan and Ramji got up and went on their way towards Nanegaon. The accused, he says, ran towards the Nalla and like the woman went out of sight in the Nalla bed. Pandu

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then followed and stood on the far bank of the Nalla. He says that Pandu then returned, picked up his load and went on towards Nanegaon; and after him the accused came out of the Nalla bed and did the same. But as the woman did not appear, he felt suspicious, went to the Nalla bed and saw that she had been murdered there. He was terrified and went and told Yama and Ramchandra, who were in their field beyond his, that a murder had been committed in the Nalla bed by Pandu and the accused Sakharam. All these three went away without going to the scene of the crime or giving the alarm. That is not surprising, for the average villager has little sense of civic duty and is much afraid of being mixed up in a Police case.

There can be no doubt, however, that the main facts of Bhika Raoji's story are true. Narayan was called as a witness and he says that he, Ramji, Pandu and the accused rested with their head loads on a hillock, that Vithi passed them, that he spoke to her and that as she went on to cross the river bed, he and Ramji left. The Sessions Judge has believed this witness. His evidence establishes that the accused and Pandu were left near Vithi at the place where she was murdered and at the time of her murder.

Now Pandu admits that he was at the hillock with Narayan, Ramji and the accused, that Vithi passed them, that Narayan and Ramji went on and, he says:—"Then Sakharam the accused followed her and obstructed her near the bank of the dry stream. She shouted and I went towards her. When I reached the bank of the river, I saw that Vithi was lying on her side in the dry bed of the stream. Sakharam was standing and was holding her. He put one hand on her neck and the other on her thigh. Accused was stopping at the time. I remonstrated saying she had done him no harm. Thereupon he took out a knife from his pocket. I saw the blade. He told me if I shouted or made noise he would kill me. When this was going on, I saw Vithi's face. She was struggling to get up. I then went away after Narayan and Ramji as the accused's threat frightened me."

But though he says he went away because he was frightened, Pandu admits that he

went on with the accused and joined Narayan and Ramji at the Darna river on their way, where they bathed. He also went on with the accused to Deolali Station and he was seen with the accused in a hut near Deolali Station at 3 p. m. that day by Vithi's husband, who was there waiting for his wife. There can be no doubt that Pandu was an accomplice in the murder. He is a distant relation of Bhika Raoji and the Sessions Judge thinks that Bhika Raoji is trying to shield Pandu when he says that Pandu did nothing but look on from the bank. We agree. We also agree with the Sessions Judge that if the Sub-Inspector had taken the trouble to question the husband as soon as he arrived at the scene of offence, and to secure the evidence of Bhika Raoji earlier, he would probably have told the whole truth. But if Bhika Raoji is trying to screen Pandu, does it follow that his evidence against the accused was false? We think not. Bhika Raoji first said to Yama and Ramchandra that Pandu and Sakharam committed the murder. That was before he had time to think of screening his relation and that was probably the truth. The Sessions Judge has acquitted the accused, because he thinks that Pandu may have committed the murder without the assistance of Sakharam, and that Bhika Raoji may have interchanged the parts played by Pandu and Sakharam. But Pandu is only a boy of 18 and we think it incredible that he committed the murder single handed. Again, the theory that there was one man on the bank who was an innocent onlooker is one that we cannot accept. It was only invented by Bhika Raoji in order to screen Pandu. Both Pandu and the accused were left with Vithi. Both were together for the rest of the day, at any rate up to 3 p. m. We feel no doubt that the outrage was committed by both of them. In spite of the delay in securing their evidence we feel sure that Yama and Bhika Raoji are not tutored witnesses. Yama says he told no one until questioned by the husband. But the husband says he had been told that Yama had a clue. This discrepancy would not be present if the evidence was tutored. Yama probably did say something to his women-folk and that is how news generally spreads in villages. Yama admits that he first told the husband he knew nothing, so anxious was

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he to keep out of the case. Yama and Ramchandra, if they were false witnesses, would certainly have said that they had seen accused, Pandu, Narayan and Raoji pass by their field. They did not see them, because their field is further away than Bhika Raoji's and because they were at that time sitting down and having their breakfast. There were no bloodstains on the accused; but he bathed in the Darna river soon after the murder and if there were probably two murderers, the woman would have been so overpowered that it would have been possible for the murderers to avoid bloodstains. The accused has called two witnesses, who say that he was in Deolali on that morning. This sort of evidence is easily fabricated and we do not believe it.

There is clear evidence that the accused was present at the time of the murder coupled with the evidence of Pandu and Bhika Raoji. We have no doubt that the accused and Pandu were the murderers.

Mr Patwardhan has suggested that we should not interfere even if we disagree with the Sessions Judge, for his conclusions are not unreasonable and perverse. But the cases of *Queen-Empress v. Bibhuti Bhusan Bit* (1) and *Queen-Empress v. Karigowda* (2) are a sufficient answer to this argument. The Code makes no distinction between an appeal against conviction and an appeal against acquittal. In an appeal against acquittal if this Court thinks the lower Court has taken an erroneous view of the evidence and should have convicted, it has no jurisdiction to refuse to convict. The power of appeal under section 417 is one that should be exercised sparingly by Government, but the discretion to exercise that power appertains to Government and is not subject to control by this Court.

We are satisfied with the guilt of the accused. We reverse the order of acquittal and convict the accused Sakharam Manaji of the offence of murder under section 302 of the Indian Penal Code. But as he had been acquitted by the lower Court, we refrain from inflicting the capital sentence. We sentence the accused Sakharam Manaji to transportation for life.

Appeal accepted.

(1) 17 C. 485.

(2) 19 B. 51.

MADRAS HIGH COURT.

REFERRED CASE No. 8 of 1919.

October 7, 1919.

Present:—Sir Abdur Rahim, Kt., Offg. Chief Justice, Mr. Justice Sadasiva Aiyar and Mr. Justice Burn.

In the matter of K. VENKATA ROW,
1ST GRADE PLEADER, BELLARY.

Legal Practitioners Act (XVIII of 1879), s. 13 (f)
—Guardian and ward—Agreement to pay surety portion of income of minor's estate—Pleader advising guardian to enter into agreement—Bona fide belief of Pleader—Misconduct.

A Pleader who advises his client, who has been appointed guardian for a minor, to enter into an agreement with the persons standing sureties for him to pay them a portion of the income from the minor's property in consideration of their executing the surety bond, *bona fide* believing that it is for the minor's benefit, is not guilty of misconduct within the meaning of section 13 (f) of the Legal Practitioners Act [p. 166, col. 1.]

Case stated under section 14, Act XVIII of 1879, by the District Judge, Bellary.

FACTS.—A Pleader acted for the natural father of a minor in a Court, which ordered that the father be appointed guardian on condition of his furnishing security to the extent of Rs. 32,000. The guardian, being indigent, was recommended to the present sureties by the Pleader and entered into an agreement with them to give them half the proceeds arising from certain investments of the minor's property and to hand over the bonds, etc., to these sureties, etc., etc. The Pleader was cognisant of all these, but he neither advised the guardian that he was committing any breach of trust nor was the agreement brought to the notice of the Court. Hence the charge under clause (b) of section 13 of Act XVIII of 1879.

The Advocate-General, for the Crown.—There is nothing illegal in a guardian paying remuneration for getting solvent sureties where reliable security cannot otherwise be had. It was so held in *Lucas, In re, Parr v. Blair* (1) where, however, the administrator was entitled to the letters as of right. There is no such right in a guardian, since the paramount consideration is the benefit of the minor; but a guardian cannot be asked to provide sureties at his own cost. The sanction of

(1) (1900) 1 Ir. R. 292; 5 Ir. L. R. 136.

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the Court is not material, as the property dealt with is not immovable. But yet the agreement is a breach of trust, inasmuch as it is the surety's interest alone that is secured by it and the minor's interest is prejudiced. *Cf. Foteh Singh v. Sanwal Singh* (2).

Hence the Pleader must have advised the guardian for whom he acted that he was committing a breach of trust.

[ABDUR RAHIM, OFFG. C. J.—The agreement being after the conditional order, was it not the duty of the Pleader to mention it to the Court in the interests of the minor?]

The Pleader acts only for the guardian and so is not bound. But it is not covered by the exceptions to section 126 of the Indian Evidence Act. There is no crime or fraud. But the agreement provides for part administration of the estate by the sureties, which is a breach of trust. In this respect clause (b) of section 13 is to be read with clause (f), as was done in *In the matter of two Second Grade Pleaders* (3). It may be that mere carelessness will not come under the Act.

[SADASIVA AIYAR, J.—Even continued negligent conduct?]

Possibly. The handing over of the bonds may not be illegal, inasmuch as the guardian's liability is only to account. See sections 27, 29 of the Guardians and Wards Act. But the Court may restrict his powers. Section 32.

The test laid down in England is whether the legal practitioner is party to a fraudulent breach of trust. *Goodwin v. Gosnell* (4), *Chandler, In re* (5), *Barnes v. Addy* (6) *Lubeck, In re* (7), is the only Indian case in point and it lays down the same rule.

Mr. E. L. Thornton and Mr. C. Sambasiva Rao, for the Pleader.—The charge is only under clause (b). Clause (f) cannot be allowed to be brought in.

[ABDUR RAHIM, OFFG. C. J.—The High

(2) 1 A. 751.

(3) 6 Ind. Cas. 313; 34 M. 29 at p. 39; (1910) M. W. N. 163; 3 M. L. T. 22; 20 M. L. J. 500; 11 Cr. L. J. 810.

(4) (1846) 2 Coll. 457; 63 Eng. Rep. 83; 10 Jur. 422.

(5) (1856) 22 Beav. 253; 52 E. R. 1105; 25 L. J. Ch. 396; 3 Jur. (N. S.) 366; 27 L. T. O. S. 16; 111 R. R. 249.

(6) (1874) 9 Ch. App. 244; 43 L. J. Ch. 513; 30 L. T. 422 W. R. 105.

(7) 33 C. 151; 7 Bom. L. R. 894; 2 A. L. J. 800; 2 C. L. J. 421; 10 C. W. N. 57; 15 M. L. J. 432; 2 Cr. L. J. 775; 1 M. L. T. 17; 32 I. A. 217; 8 Sar. P. C. J. 861.

Court is not restricted in that respect.]

But the test is, is there any fraud on the client? I submit that there is none. See *Incorporated Law Society & Four Solicitors, In the matter of* (8).

In the matter of two Second Grade Pleaders (3) is not conclusive with respect to clauses (b) and (f). Further in the present case, the minor came to the Court and expressed her wish that her father ought to be appointed guardian, and he was so appointed. But the father was poor and he could get sureties only on such agreement as was entered into. The Pleader acted *bona fide* and he was acting only for the guardian and he has not acted in fraud of the client's interest.

ORDER.—Mr. Venkata Row, 1st Grade Pleader in the District Court of Bellary, has been called upon to show cause why he should not be dealt with under section 13 (b) and (f) of the Legal Practitioners Act for having advised one Hulkigal Hanumappa, who had applied to be appointed guardian of his minor daughter called Nilavoa alias Thimmavva, to enter into an agreement with two persons, namely, Hannumantha Reddi and Sunkamma, to the effect that in return for their services in standing as sureties they should receive a certain portion of minor's income, namely, one-half of the interest accruing on all Government bonds and Rangoon Debenture loans for Rs. 16,000, the property of the minor during her minority, knowing that such arrangement was highly detrimental to the interest of the said minor, and that he further presented the security bond drawn up in accordance with the above mentioned agreement to the District Court of Bellary and obtained therefor the said Court's sanction.

The facts shortly are these: The minor, a Hindu widow, inherited considerable property consisting of movables and immovables, the movable property mainly consisting of $3\frac{1}{2}$ per cent. Government securities and Rangoon Debentures of the nominal value of Rs. 16,000. Hannumappa, the father and natural guardian, applied to be appointed guardian by the Court. He apparently was a poor man and was unable to find the required sureties to the extent of Rs. 32, 00 as demanded by the District Judge. He consulted Mr. Venkata Row who

(8) (1890) 7 T. L. R. 672,

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was well-known to him, and he advised him to apply to the two persons, namely, Hanumantha Reddy and Sunkamma, through a common friend of both. They agreed to become sureties on the guardian entering into the agreement mentioned in the charge. The result of the arrangement was that half the income derived from the property of the minor would go to the sureties for four years, amounting to about Rs. 1,200.

The question is, in the first place, whether such an agreement is illegal or detrimental to the interests of the minor and in the second place, whether Mr. Venkata Row acted properly in the matter in not advising Hulkigal Hanumappa not to enter into such an agreement, or whether he believed, as he himself asserts, that the arrangement was to the advantage of the minor. He says that the father of the minor would not have been able to find proper sureties unless he agreed to the terms in question, and the only alternative open to the Court would then have been to appoint a guardian on a salary; that, he says, would have caused greater loss to the minor's estate than the arrangement in question. On the question whether a guardian is justified in entering into an arrangement by which the sureties are paid a certain portion of the income from the minor's property in consideration of their executing a bond, we have been referred to a ruling of the Irish Court on the subject *Lucas, In re, Parr v. Blair* (1) to the following effect: "Where a person who is entitled as of right to a grant of administration, but is otherwise unable to give justifying security, procures a surety bond from an insurance company and pays a premium thereon, it is within the discretion of the Court to allow the amount of such premium out of the general estate, where the circumstances of the case show that a reliable security could not otherwise be obtained and that the course adopted was reasonable and proper and for the interest of all parties entitled to the assets." The learned Vice Chancellor says in the course of the judgment: "Private individuals hate suretyships as a rule; but insurance companies of undoubted solvency can generally be found to guarantee against such losses for a sum not by any means exorbitant. In cases, where reliable security cannot otherwise be

procured, I consider it to be for the interest of all parties entitled to the assets, whether as creditors or beneficiaries, that the security of an insurance company, or some equally solvent surety should be procured at the expense of the estate." He says: "Of course, when the Administrator comes to be allowed this credit he must satisfy the Court that it was a proper and reasonable thing for him to have done and if it should appear to have been done unnecessarily or improperly, it should be disallowed."

There is no Indian ruling on this point excepting a case, *Fateh Singh v. Sanwal Singh* (2). But there the man who stood surety for a person charged with a crime did so on receiving from the accused the amount for which he became surety, and the Court held that that was illegal inasmuch as an arrangement like this would defeat the purposes for which the law requires bonds in such cases. But that is very different from the case here and the principle laid down in the Irish case seems to have a closer bearing on the facts of the present case. Besides we are informed that it is not by any means unusual for a person required to give security to obtain the services of sureties under an agreement to give them some compensation for the risk. It may be that in certain circumstances, such as in the case of *Fateh Singh v. Sanwal Singh* (2), an agreement of this character would be invalid and illegal. But it does not follow that it would not be valid in any case. Whether the particular agreement in this case was injurious to the interests of the minor or not is not very clear upon the facts, as we have them on the record. At any rate these facts would not justify us in saying that the agreement under which the guardian consented to part with a portion of the income of the minor's property in consideration of those two sureties consenting to act in the matter must have been detrimental to the interests of the minor. Further, we are not in a position to hold that it is made out that Mr. K. Venkata Row might not have honestly believed that the agreement which the guardian entered into was not a proper one. We have the fact that, although the agreement was not brought to the notice of the Court, it was attested by a number of persons of res-

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pectable position in life; and there is nothing to show that any attempt was made to keep it a secret arrangement. We think it would have been better if Mr. Venkata Row had advised his client to bring the matter to the notice of the Court but, in the absence of any evidence to show that he must have thought that the agreement was detrimental to the interests of the minor, we are unable to say that, in not advising the guardian to bring the matter to the notice of the Court, he was guilty of professional misconduct or was guilty of conduct which would bring him within the purview of clause (f) of section 13 of the Legal Practitioners Act.

The learned Advocate-General who placed the whole matter very fairly before us drew our attention to that portion of the agreement, Karar, Exhibit B, by which the sureties are given the power to sell and dispose of the securities and to invest the sale proceeds in other securities and to appropriate any additional income they might have derived from such an investment, and suggested that that might amount to a technical breach of trust on the part of the guardian and, therefore, it was also the duty of Mr. K. Venkata Row to have advised him accordingly. But this matter is not specified in the charge and we do not, therefore, propose to deal with it.

In the above view of the facts it is unnecessary for us to consider the scope of clause (f) of section 13 of the Legal Practitioners Act, or the ruling in cases cited before us on the subject.

M. C. P.

ODDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 78 OF 1919.
July 23, 1919.

Present :—Mr. Ashworth, A. J. C.

MOHAMMAD JAFAR AND OTHERS—

ACCUSED—APPLICANTS

versus

EMPEROR—COMPLAINANT.

Evidence Act (I of 1872), s. 35—Chaukidar's Regis-

ter, entry in, admissibility of—Expert evidence as to age, value of.

The question whether any particular entry in a Chaukidar's Register of Births and Deaths is admissible in evidence depends primarily on section 35 of the Evidence Act. Under that section it is not enough to prove that the Chaukidar's Register is an official book, but it is also necessary to prove that any entry relied on in it was either made by a public servant in the discharge of his official duty or made by some other person in performance of a duty specially enjoined by the law of the country. [p. 167, col. 2.]

A Civil Surgeon's evidence as to the age of a girl is on a higher level than that of an ordinary person, as he is able to examine the girl with a particularity and with a knowledge which an ordinary person does not possess. Such evidence, however, is not conclusive and has to be carefully considered. [p. 167, col. 1.]

Criminal application against the order of the Sessions Judge, Lucknow, dated the 14th June 1919, confirming that of the Magistrate, 1st Class, Barabanki, dated the 6th June 1919.

Messrs. H. C. Dutt and N. C. Dutt, for the Applicants.

The Government Pleader and Messrs. R. F. Bahadurji and Hyder Husain, for the Crown.

JUDGMENT.—The applicants have been convicted of kidnapping a girl, named *Muasm-mat Shahzadi*, from the lawful guardianship of her father. The Magistrate who tried the case found that, although the accused had had sexual intercourse with the girl before and took her away from her father's house without resort to force, still he took her away without the father's consent. This finding of fact was concurred in by the Sessions Judge in appeal, who also held that whether or no the girl resisted being taken away from the house of her father, force was used to prevent the girl being re-captured while she was being taken away by the accused. There was certainly evidence on which these findings could be sustained and in revision I am not prepared to upset them. The case was originally started under section 452, and it is urged that this meant that the prosecution witnesses knew there had been no kidnapping. It does not follow. The witnesses may well have taken the wrong view of law, that, because the girl was willing to go initially, there could be no kidnapping. The ruling in 39 Indian Cases, page 401 [*Mahomed Yedol Triffin v. Yeoh Ooi Gark* (1)] is not relevant. In that case the

(1) 39 Ind. Cas. 401; 21 O. W. N. 257; (1914) M. W. N. 162; 19 Bom. L. R. 157 (P. C.).

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girl was found by a Chankidar on a road after having fully thrown off her father's tutelage.

The chief point on which I am asked to interfere is that it is not proved that the girl was under sixteen years of age. The Court of first hearing relied on the evidence of the Civil Surgeon. But it is urged that such evidence is inconclusive and that a Civil Surgeon has no better means of judging than an ordinary person. This latter proposition I am not prepared to admit. A Civil Surgeon's evidence as to age is on a higher level than that of an ordinary person, as he is able to examine the girl with a particularity and with a knowledge which an ordinary person does not possess. It may be admitted, however, that his evidence is not conclusive and has to be carefully considered. In this case the doctor was of no doubt that the girl was under sixteen. He was not over positive as to the exact age. He found it to be fourteen or fifteen. The Court of first hearing rejected the evidence afforded by the Chankidari Register of Births on the ground that the writer of the register had not been summoned. The Government Pleader in supporting the conviction appeals to this register.

The admissibility of such a register has been the subject of decision by this Court. It was held in *Sampat v. Gauri Shankar* (2) that, assuming that a Chankidar's register of births and deaths is a public or other official book within the meaning of section 35 of the Evidence Act, the entry produced as evidence in such a register must be shown to have been made by a public servant in the discharge of his official duty and that failing this, it cannot be accepted as evidence. In *Habib Ullah v. Emperor* (3) it was held to be necessary, as a condition precedent to using as evidence an entry in a Chankidar's birth register, to prove that the making of the entry was an act required of a Chankidar in discharge of his official duty. In *Bisheshwar Dayal v. Hira Lal* (4) it was held that such entries are only proof at the best of the approximate date of birth. In a case in the U.

P. Law Reporter, Vol. 1, page 1, [*Zaibunnessa v. Hasaratunnissa* (5)] (which will probably be reported in the Oudh Cases* and which is Second Civil Appeal No. 146 of 1918, decided on 24th March 1919 by Mr. Daniels) it was held, following *Tamiz-ud-din Sarkar v. Taj* (6), that the Chankidari register of births and deaths was an official register made by a public servant in the discharge of his official duty and as such was admissible as evidence under section 35 of the Evidence Act. As regards the rulings of other High Courts, *Tamiz-ud-din Sarkar v. Taj* (6) has already been mentioned. In this ruling reliance is placed on *Devarapalli Ramalinga Reddi v. Srigiriraju Kotayya* (7), where the question of the admissibility of such a register is discussed very thoroughly. In the case of *Baldevi v. Abhey Ram* (8) Justice Piggott expressed doubt as to the correctness of the case referred to above as *Sampat v. Gauri Shankar* (2).

In all these rulings it is admitted that the question whether any particular entry in a Chankidar's register of births and deaths is admissible in evidence depends primarily on section 35 of the Evidence Act. Under that section it is not enough to prove that the Chankidar's register is an official book but it is also necessary to prove that any entry relied on in it was either made by a public servant in the discharge of his official duty or made by some other person in performance of a duty specially enjoined by the law of the country. It has not been contended that the Chankidar's register is a private register, and such contention appears impossible in the face of the fact that paragraphs 367 and 368 of the Police Manual published by Government in 1900, which was in force at the time of the entry in question in this register, make it the duty of the head constable writer at the Thana to make the entries in the Chankidar's register to the dictation of the Chankidar. What we have to decide is whether this particular entry answers the other conditions of section 35. The cases referred to in *Sampat v. Gauri* (5) 52 Ind. Cas. 162; 1 U. P. L. R. (J. C.) 1; 22 O. C. 124.

(6) 46 Ind. Cas. 237; 46 C. 152; 22 C. W. N. 822.

(7) 41 Ind. Cas. 286; 41 M. 26; 22 M. L. T. 17; 23 M. L. J. 60; (1917) M. W. N. 558; 6 L. W. 246.

(8) 24 Ind. Cas. 540; 12 A. L. J. 945

*Since reported in 22 O. C. 124—Ed.

(2) 10 Ind. Cas. 713; 14 O. C. 68.

(3) 18 Ind. Cas. 653; 15 O. C. 351 at p. 36; 14 Cr. L. J. 93.

(4) 36 Ind. Cas. 941; 19 O. C. 221; 4 O. L. J. 49.

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Shankar (2) and *Habib Ullah v. Emperor* (3) indeed only call attention to the necessity of this and do not dispute that if these conditions are fulfilled, an entry in a Chaukidar's register would be relevant. The case reported as *Baldeo v. Abhey Ram* (8) does not correctly state the attitude taken by Mr. Champier in *Sampat v. Gauri Shankar* (2). As pointed out in *Devarapalli Ramalinga Reddi v. Srigiriraju Kotayya* (7), if it can be proved that the entry was made by a public servant in the discharge of his official duty, it will not be necessary to show that there was any enactment specially enjoining the performance of the duty. This necessity only exists where the person who makes the entry is not acting officially. What we have, therefore, to ascertain in this case is whether the station writer made this entry and whether, if he did so, he did it in the discharge of an official duty. To take the last question first, I find that under section 50 of U. P. Act XX of 1856, called the Bengal Chaukidari Act, which was in force at the time of this entry, a Chaukidar was liable to perform all the duties of Police Officers prescribed in the Acts of the Government of India for the time being in force. Under section 12 of Act V of 1851 (the Police Act) the Inspector General of Police is given power to frame rules as to particular services to be performed by the Police force. It was in exercise of this power that the orders contained in paragraphs 367 and 368 of the Police Manual must have been issued. It, therefore, follows that Chaukidars were lawfully assigned the duty of verbally reporting births and deaths and the station writers were lawfully required to make the entry to the Chaukidar's dictation. If then the entry can be proved to have been made by the station writer, the entry is relevant under section 35 of the Evidence Act. Now the entry does not appear to have any signature after it, much less to have a signature after it with the official designation attached to it of the person signing it. The entry does not, therefore, purport to be duly certified by any duly authorised officer, and section 79 cannot be invoked for the purpose of presuming its genuineness. Under section 81, however, of the Evidence Act every document purporting

to be a document directed by any law to be kept by any person may be presumed genuine if such document is kept substantially in the form required by law and is produced from proper custody. It is not disputed that this register is produced from proper custody, namely, from the Thana. We have to ascertain, however, whether the Chaukidar's register of births and deaths can be called a document directed by any law to be kept by any person. It will not be sufficient to show that the Inspector-General of Police had power to require a Chaukidar to carry about this register and to require the Police writer at every Thana to make entries in it. We must have a specific enactment directing the keeping up of this register and in a particular form. I have not been able to discover any such enactment in these provinces. The Births, Deaths and Marriages Registration Act, 1883, only applies to persons to whom the Indian Succession Act applies, see section 11 (1) of that Act, no extension order having been passed under section 11 (2). This case, therefore, may be distinguished from the case reported as *Devarapalli Ramalinga Reddi v. Srigiriraju Kotayya* (7), because in Madras there is an Act III of 1899 making provision for the registration of births and deaths in rural tracts. The statement in that ruling that even if this Act had not existed an entry by a village official in the register would have been admissible, was only correct on the assumption that the entry in question purported to be made by such an official. In this case the entry does not purport to be made by the station writer. In *Tamiz ud din Sarkar v. Taju* (6) it is stated that the presumption that the entry was properly made may be made under section 114 of the Evidence Act. With all respect I cannot concur in this suggestion. The meaning of Illustration (e) of section 114 of the Evidence Act is that, where there is a proof of an official act having been done, it may be presumed to have been regularly done. Here the entry is not shown to be by the proper official. My conclusion then is that the entry in the Chaukidari register is not admissible in evidence under section 35 of the Evidence Act, because there is no evidence that it was made by a public servant in the discharge of his official duty.

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or by any other person in performance of a duty enjoined by the law of the country. This conclusion appears to me not only to be necessitated by law but also to be consistent with common sense and public policy. Very important issues hang on the genuineness of such entries and there must be something to show that the entry is by the person authorised to make it. The register is kept by the Chaukidar who is an illiterate man under merely departmental orders, and it appears to me that it will be very dangerous to presume every entry in his register genuine merely because it is in his register and that register is produced from proper custody. The law requires more than this, and most advisedly so.

At the same time even though we declare this register to be inadmissible in evidence there is evidence, apart from the evidence of the Civil Surgeon, that the girl was not more than fourteen years old. The mother deposes to this effect. I am not disposed in revision to go behind a finding of fact to support which there was evidence. The Magistrate rejected the birth register as evidence. His reason, namely, that the person who produced it was not the person who wrote it, was not a good one but as he rejected the register he cannot have been influenced by it. The Sessions Judge held that the medical evidence proved conclusively that the girl was not sixteen years old. There is concurrent finding, therefore, of fact that the girl was not sixteen years of age and there was evidence to support that finding.

For the above reasons I dismiss this application in revision.

Application dismissed.

CALCUTTA HIGH COURT.

CRIMINAL RULE No. 595 OF 1919.

August 13 & 20, 1919.

Present:—Mr. Justice Newbould and
Justice Sir Syed Shamsul Huda, Kt.

MOIRAM BEWAH—PETITIONER
versus

MURIJAN SARDAR AND ANOTHER—
1ST PARTY, FZAL SHEIKH AND OTHERS
—2ND PARTY—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1894), ss. 145,
429, 435, 439—Government of India Act, 1915 (3 & 6

Geo. V, c. 81), s. 107—*Letters Patent (Cal)*, cl. 36—*Proceedings under s. 145, Cr. P. C.—Failure to join party, whether error of jurisdiction Irregularity Revision—High Court, power of interference of—Difference of opinion between Judges—Procedure—Opinion of senior Judge, whether to prevail.*

When on an application to the High Court under section 97 of the Government of India Act, there is a difference of opinion between the Judges the decision of the senior Judge prevails. [p. 172, col. 1.]

Sections 435 and 439 of the Criminal Procedure Code must be read together, and if a case is outside section 435, section 439 cannot apply to it. [p. 172, col. 1.]

The Criminal Procedure Code has not overruled the provisions of section 36 of the Letters Patent. [p. 172, col. 1.]

Even if the provisions of section 36 of the Letters Patent do not apply to a case not coming before the High Court in its original or appellate jurisdiction, in the absence of any provisions to the contrary, in the case of a difference of opinion between the Judges, the decision of the senior Judge should prevail in accordance with the principle laid down in section 36 of the Letters Patent. [p. 172, col. 1.]

Per Newbould, J.—The omission to join a party in proceedings under section 145 of the Criminal Procedure Code is not an error of jurisdiction [p. 171, col. 1.]

Per Shamsul Huda, J.—There is no authority for the proposition that the High Court's power of superintendence over inferior Courts is confined to questions of jurisdiction alone. This power can be exercised, not only where inferior Courts act without jurisdiction or refuse jurisdiction, but also when these Courts commit an illegality or a material irregularity. [p. 170, col. 2.]

Rule against an order of the Sub-Divisional Magistrate, Kushtia, dated the 7th May 1919.

Rabu Nitish Chandra Lahiri, for the Petitioner.

Babus Dinesh Chandra Roy, Phanindra Lal Moitra and Manindra Nath Roy, for the Opposite Party.

JUDGMENT.

SHAMSUL HUDA, J.—(August 13th, 1919)—In a proceeding under section 145, Criminal Procedure Code, there were three persons in the 1st party and twenty in the second. Of the twenty persons forming the second party, all except No. 10 stated in their written statements that they had no concern with the land which belonged to Moiram Bewa. Second party No. 10 alleged that he had been cultivating about a *bigha* of land as *bargidar* under Moiram Bewa. Apparently they took no further interest in the case, adduced no evidence and even did not cross-examine the witnesses of

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the first party. On the day the written statements were filed, Moiram Bewa appeared and asked to be made a party, alleging that the land in respect of which there was the dispute had not been correctly described and that the boundaries given in the proceeding included land on which stood her dwelling house and part of which she cultivated. She said that the other side had been trying fraudulently to deprive her of her homestead, of which she with her sons was in possession. The petition was filed before any evidence was recorded. The Magistrate rejected the application of Moiram Bewa on the ground that it was filed too late. Ultimately the Magistrate passed an order in favour of the first party in terms of section 145 of the Criminal Procedure Code.

It appears that the first date of hearing was fixed on the 14th of April 1919 and on that day the second party applied for time, alleging that the notice had been served only the day before. A similar petition was filed by the first party. The next date fixed was the 25th of April, and on that day the first party again asked for an adjournment and adjournment was given. Moiram Bewa states in her petition to this Court, which is supported by an affidavit, that she came to Court on that day with a petition praying to be made a party but found that the learned Sub Divisional Magistrate had left Kustia for Khoksa by the morning train. The petition which was actually filed on the 7th of May, however, shows that it was not ready before that date, as the Court-fee stamp was purchased on that day and the petition is itself dated the 7th of May, but it is possible that finding the Magistrate absent on the 25th of April the Court-fee stamp was not purchased on that day. There is intrinsic evidence that the application was ready before it was dated. The Magistrate in his explanation does not deny that he had left Kustia by the morning train that day. If the facts stated are correct—they are not denied by the Magistrate nor is there a counter-affidavit from the other side, it is difficult to understand how it can be said that the petition was filed too late. In the Moffusil, so far as I am aware, petitions in connection with a case are only filed on the dates fixed for hearing. If the facts stated in her petition to this Court by Moiram Bewa are

correct, a grave injustice has been done to her. The land had been previously attached and a postponement of the proceedings could not have led to any serious inconvenience and ought under the circumstances to have been granted. Moiram Bewa alleges, and the fact is not denied that the order has led to her eviction from her dwelling house, which has been demolished.

The only material for the Magistrate's finding that the application is not *bona fide* is that the same Mukhtear who filed the written statements of the second party also presented her petition for being added as a party. I need hardly say that this is a very slender material upon which to base such a conclusion. I think Moiram Bewa should have been given an opportunity to show that she was actually in possession. It is only then that the Court could form an opinion regarding the *bona fides* of her claim.

It is argued that the question of adding parties does not involve a question of jurisdiction, and reliance has been placed on the Full Bench decision in *Krishna Kamini v. Abdul Jabbar* (1). In that case it was laid down by Mr. Justice Hill and the majority of the Judges concurred with him, that ordinarily these questions do not go to jurisdiction. Assuming that they do not, there is no authority for the proposition that our power of superintendence is confined to questions of jurisdiction alone. In the subsequent Full Bench case of *Sukh Lal Sheikh v. Tara Ohand* (2) it was argued that this Court has the power of interference in all cases of injustice. It was conceded by the Advocate General that the power could be exercised, not only where inferior Courts had acted without jurisdiction or refused jurisdiction, but also when these Courts have committed illegality or material irregularity. But in every case it must be shown that justice has been denied and Maclean, C. J., in delivering the judgment of the Court observed as follows:—"In our opinion the power, which is discretionary, ought in relation to cases under section 145 to be exercised with every caution. Assuming that in any particular case the Court has proceeded with irregularity, we do not think that this Court should interfere, un-

(1) 30 O. 155; 6 O. W. N. 737.

(2) 33 C. 68; 2 C. L. J. 241; 9 O. W. N. 1046; 2 Cr. L. J. 618.

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less it can be shown that some one has been materially prejudiced by such irregularity. If, however, the subordinate Court has acted without jurisdiction, this Court will interfere."

In this case I think there are reasonable grounds for the apprehension that the action taken by the Magistrate has resulted in a serious failure of justice and I would make the Rule absolute.

I regret to have to differ from my learned brother and although his opinion prevails, I have thought it necessary to express my opinion at some length regarding the merits of the case.

NEWBOULD, J.—(August 13th, 1919)—I would discharge this Rule. The decision of the Full Bench in the case of *Krishna Kamini v. Abdul Jubbar* (1) is that the omission to join a party in proceedings under section 145 is not an error of jurisdiction. Nor can I agree with my learned brother that there has been an irregularity resulting in such material prejudice as would justify our interference. There was considerable delay on the part of the petitioner. Though she says the Magistrate left Kushtia by the morning train on the 25th April 1919, it is not stated in the affidavit that she was unable to file her petition on that account. I also think that the Magistrate had good reason for holding that the application was not made in good faith. If the petitioner really wished to prove her claim to possession, she could have done so through her alleged bargadar Torap Ali Sheikh.

As this application is made under section 107 of the Government of India Act, the decision of the Senior Judge will prevail and the Rule will be discharged.

JUDGMENT.—August 20th, 1919.—In this case after we delivered our respective judgments the learned Vakil for the petitioner contended that the case should be referred to a third Judge. He argues that section 439 of the Criminal Procedure Code is comprehensive enough to include all cases of revision, whether the power is exercised under the Code or under any other enactment, and that so far as criminal cases are concerned, section 36 of the Letters Patent has been superseded by the Criminal Procedure Code. In support of his contention the learned Vakil relied on the

decision of the Bombay High Court in *Queen-Empress v. Dada Ana* (3). He also relies on two decisions of this Court in *Laldhari Singh v. Sukhdeo Narain Singh* (4) and in *Sajuddi Mandal v. F. L. Cork* (5), in which a difference of opinion regarding the propriety of an order passed under section 145 of the Criminal Procedure Code was referred to a third Judge instead of being dealt with in accordance with the provisions of section 36 of the Letters Patent. No great value, however, attaches to the last two cases, because the point was not argued and it was apparently assumed that section 429 applied by the operation of section 439. There are, however, other cases of this Court in which a different procedure was adopted. In the case of *Mathura Sahu v. Damri Ram* (6) a difference of opinion regarding the propriety of a sanction under section 195 of the Criminal Procedure Code was dealt with under section 36 of the Letters Patent and the judgment of the senior Judge prevailed. This was apparently on the ground that the power exercised by the High Court under section 195 (6) of the Criminal Procedure Code was not in the exercise of an appellate or revisional jurisdiction and that the jurisdiction was original, to which neither section 429 nor section 439 applied. A similar view was taken by a Full Bench of the Madras High Court in *Bapu v. Bapu* (7). In an unreported case a difference of opinion between two learned Judges of this Court regarding the propriety of granting bail to an undertrial prisoner was dealt with under section 36 of the Letters Patent. These cases are against the view of the Bombay High Court that the Criminal Procedure Code has overruled the provisions of section 36 of the Letters Patent.

In support of the contrary view the learned Vakil for the opposite party has relied on the decision of the Full Bench of this Court in *Har Prasad Das v. Emperor* (8). In that case the point argued was that an

(3) 15 B. 452.

(4) 27 C. 892; 4 C. W. N. 61.

(5) 46 Ind. Cas. 41; 22 C. W. N. 499; 27 C. L. J. 465; 19 Cr. L. J. 681.

(6) 14 Ind. Cas. 755; 15 C. L. J. 337.

(7) 14 Ind. Cas. 305; 39 M. 750 (F. B.); 11 M. L. J. 367; (1912) M. W. N. 499; 22 M. L. J. 419; 13 Cr. L. J. 209.

(8) 19 Ind. Cas. 197; 40 C. 477; 17 C. W. N. 327 (F. B.); 17 C. L. J. 245; 14 Cr. L. J. 197.

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order passed by a Civil Court under section 476 of the Criminal Procedure Code being outside the scope of section 435, the matter could not be dealt with under section 439. This contention prevailed and after stating that section 435 did not apply to the case, the learned Judges observed: "Nor does section 439 touch the matter. It is clear that sections 435, 439 must be read together, as pointed out by Wilson, J., in *Hari Dass Sanyal v. Saritulla* (9). Section 439 must, therefore, be read along with and subject to the provisions of section 435." This decision concludes the present question and is a clear authority for the proposition that if a case is outside section 435 as the present case is, section 439 cannot apply to it. That being so either section 36 of the Letters Patent applies or there is no law regulating the procedure. If it be held that section 36 does not apply because it only refers to original or appellate jurisdiction, we think in the absence of any provision to the contrary we should act in accordance with the principle underlying that section. We accordingly hold that in this case the opinion of the senior Judge prevails.

Rule discharged.

(9) 15 C 608 at p. 617; 13 Ind. Jur. 56.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 624 OF 1919.
November 13, 1919.

Present:—Mr. Justice Ryves.

UDIT NARAIN AND ANOTHER—APPLICANTS
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 356
—Failure to record evidence in vernacular, effect of
—Irregularity—Trial, whether vitiated.

Where a Magistrate omits to prepare a vernacular record of the evidence as required by section 56 of the Criminal Procedure Code, he commits an irregularity which vitiates the trial.

Criminal revision from an order of the Sessions Judge, Allahabad, dated the 21st of August 1919.

Mr. G. Banerji for the Applicants.

Mr. Lalit Mohan Banerji. (Assistant Government Advocate), for the Crown.

JUDGMENT.—Two persons, Udit Narain and Mahadeo, were convicted by a Magistrate of the First Class under section 380 and

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sentenced to 8 months' rigorous imprisonment. They appealed; their appeal was dismissed. Among the grounds taken in the lower Court it was urged that the trial was irregular because no vernacular record of the evidence was prepared as is required by section 356. The learned Sessions Judge says: "the objection does not seem to have any force. Section 355 of the Code of Criminal Procedure empowered the Magistrate to make a memorandum of the substance of the evidence of each witness, as the offence was one of those mentioned in clause (d), sub section (1) of section 260. The procedure adopted by him was in full conformity with the provisions of law." In my opinion the learned Sessions Judge was mistaken. Section 355 applies to summons cases. This was not a summons case, as shown by the fact that the sentence of 8 months' rigorous imprisonment was passed. Secondly, clause (d) of section 260 does not apply, because the property said to be stolen was a sack of rice which probably was worth more than Rs. 50; in any case, as required by section 263 (f), the value of the sack of rice has not been given. It seems to me that I have no alternative but to set aside the conviction and order a fresh trial according to law. I order accordingly.

Conviction set aside.

MADRAS HIGH COURT.
ORIGINAL SIDE APPEAL No. 31 OF 1919.
October 23, 1919.

Present:—Sir Abdur Rahim, Kt., Offg. Chief Justice, and Mr. Justice Burn.
M. VENKATAGIRI AIYAR—
APPELLANT
versus

N. M. FIRM—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 215, 478. Letters Patent (Mad), cl. 15—Trial of civil suit on Original Side of High Court—Commitment under s. 478, Cr. P. C., to Sessions—Appeal against order of commitment, maintainability of.

No appeal lies against an order of commitment made under section 478, Criminal Procedure Code, by a Judge presiding on the Original Side of the High Court in the course of the trial of a suit, except under the provisions of section 215 of the Code. [p. 73, col. 1]

Clause 15 of the Letters Patent is controlled by the specific provisions of section 15, Criminal Procedure Code. [p. 173, col. 1]

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Appeal from the order and judgment of Mr. Justice Coutts Trotter, dated the 1st May 1919, passed in the exercise of the Ordinary Original Civil Jurisdiction of this Court in Civil Suit No. 583 of 1912.

JUDGMENT.—Mr. Justice Coutts Trotter sitting on the original side of this Court in the course of the trial of a civil case proceeded under section 478, Criminal Procedure Code, and committed a certain witness who gave evidence in that case to the High Court Sessions for trial on charges of perjury. This appeal is filed on the civil side of this Court, against the order of commitment as made by Mr. Justice Coutts Trotter.

A preliminary objection is raised that no appeal lies in such a matter except under the provisions of section 215, Criminal Procedure Code. Mr. Govindaraghava Aiyar, who appears for the appellant, admitted before us that he could not impeach the order on the grounds mentioned in section 215. But he says that apart from the provisions of that section an appeal lies on general grounds to this Court under the provisions of section 15 of the Letters Patent. We have no hesitation in holding that section 215 applies to this case and an appeal is precluded by the express and clear language of that section, except under its provisions. That section says: "A commitment once made under section 477 or by a Civil or Revenue Court under section 478 can be quashed by the High Court only and only on a point of law." This is a specific injunction that a commitment made under section 478 by the Civil Court can be quashed by the High Court only on a point of law. Section 478 says that the proceedings of a Civil Court acting under section 478 shall be deemed to have been held by a Magistrate. The argument is that under section 15 of the Letters Patent there is an appeal from the order of Mr. Justice Coutts Trotter sitting on the original side of this Court and that section 215 should not be interpreted so as to take away that right. We do not desire to deal with the question whether, under section 15 of the Letters Patent, an appeal would lie from the order of commitment made by the learned Judge trying a civil suit on the original side of this Court. But supposing for the sake

merely of argument that such an appeal could be preferred under the general words of section 15 of the Letters Patent, section 215 of the Criminal Procedure Code, in our opinion, explicitly and clearly says that an order of commitment made by any Civil Court can be quashed only on a point of law. That is a specific provision regarding orders of commitment by the Civil Court under the provisions of section 478 of the Criminal Procedure Code, and to that extent it clearly modifies the general provisions of section 15 of the Letters Patent, supposing that an appeal would lie under it in a case of this nature.

There are no rulings on the point. But we think that the enactment is not open to any doubt. Mr. Govindaraghava Iyer has referred us to a number of decisions on the interpretation of some of the sections in the Criminal Procedure Code. But we do not think it necessary to refer to them as, in our opinion, they are quite beside the point. We dismiss the appeal with costs of the Government Solicitor.

M. C. P.

Appeal dismissed.

PATNA HIGH COURT.
CRIMINAL REVISION No 321 of 1919.
October 15, 1919.

Present:—Mr. Justice Das.
RAMOO SINGH—PETITIONER

*versus***EMPEROR—OPPOSITE PARTY.**

Criminal Procedure Code (Act V of 1898), ss. 476, 537—Proceedings under s. 476, when should be started—Preliminary enquiry, whether necessary—Enquiry, nature of Order under s. 476, whether can be questioned in subsequent trial—Successor-in-office of Magistrate making order under s. 476, whether nearest Magistrate—Case sent for trial to successor-in-office—Illegality.

Proceedings under section 476 of the Criminal Procedure Code should not be taken until the very close of the case in which false evidence has been given, inasmuch as if taken earlier, such action is likely to intimidate subsequent witnesses and defeat the object of the trial [p. 175, col. 1.]

As a rule a Magistrate should not make up his mind to start proceedings under section 476 of the Criminal Procedure Code against a witness before he has heard all the evidence in the case. [p. 175, col. 1.]

The holding of a preliminary enquiry under section 476 of the Criminal Procedure Code is discretionary, but it should be held, wherever it

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appears to be necessary to hold it in the interests of justice, and wherever it is held, it must be a real enquiry and not merely a formal one, ample opportunity being given to the accused to show cause why he should not be prosecuted. [p. 175, col. 1.]

The only way in which the validity of an order under section 476 of the Criminal Procedure Code can be challenged is by invoking the revisional jurisdiction of the High Court, but inasmuch as the exercise of that jurisdiction is purely discretionary, such order cannot be challenged as a matter of right. Therefore, a person against whom an order under section 476 of the Criminal Procedure Code is made is not precluded from challenging the validity of the order in the subsequent trial or in an appeal from the conviction obtained in the subsequent trial. [p. 175, col. 2.]

The successor-in-office of a Magistrate who has started proceedings under section 476 of the Criminal Procedure Code cannot be said to be the nearest Magistrate indicated by the section to whom the case might be sent for enquiry or trial. [p. 176, col. 1.]

A direct disobedience of an express provision of the Criminal Procedure Code as to a mode of trial cannot be regarded as a mere irregularity and in a case of this nature the question of prejudice does not arise. [p. 176, col. 1.]

Criminal revision against the order of the Sessions Judge, Patna, dated the 2nd September 1919, refusing to make a reference to the High Court against the order of the Sub-Divisional Officer, Barh, dated the 1st September 1919, convicting the petitioner under section 193, Indian Penal Code and sentencing him to be rigorously imprisoned for one month.

Messrs. S. P. Sen and B. N. Mitter, for the Petitioner.

The Government Pleader, for the Opposite Party.

JUDGMENT.—The petitioner has been convicted under section 193, Indian Penal Code, and has been sentenced to one month's rigorous imprisonment. It appears that he gave evidence on his own behalf in certain proceedings under section 133, Criminal Procedure Code, which were drawn up at the instance of the Crown against him and certain other persons in respect of a certain pathway which he and the other persons claimed as their private property. In the course of his evidence he made two statements, namely that no pathway had existed at all, and secondly, that no man had ever come to the criminal Court through the footpath over the fields from the sub-jail. In respect of these statements, proceedings were drawn up against him under section 476 of the Code. The learned Sub-Divisional Officer has come to the conclusion

that the latter statement is a deliberate lie and has accordingly convicted him.

It will be convenient, first, to deal with the procedure which was adopted by the learned Sub-Divisional Officer. On the 17th July last proceedings under section 133 of the Code were drawn up against the petitioner and certain other persons. From 1st August up to 14th August witnesses on behalf of the Crown were examined. On 15th August the second party was called upon to produce its evidence. The petitioner was the first witness on behalf of the second party. He happened also to be the last, inasmuch as directly his evidence was over the learned Magistrate passed an order requiring the petitioner to execute a bond for his appearance in Court the next day.

On the 16th August the learned Magistrate drew up proceedings under section 476 against the petitioner and called upon him to show cause that very day at 3.30 P. M. why he should not be prosecuted under section 193, Indian Penal Code. He then proceeded to deliver judgment in the case under section 133 of the Code. By his judgment he made the conditional order absolute against the second party.

At 3.30 P. M. the petitioner shewed cause. He pointed out that the order under section 476 was illegal, inasmuch as the case under section 133 had not come to an end when proceedings were drawn up against him under section 476. The learned Sub-Divisional Officer conceded the strength of this argument, for he promptly dropped the proceedings which he had already drawn up against the petitioner, and drew up fresh proceedings against him. He thereupon sent the case to Mr. Mansfield, his successor-in-office, for enquiry or trial.

This narration of events is, in my judgment, a sufficient condemnation of the procedure that was adopted by the learned Magistrate. In the first place, there was no justification for the order requiring the petitioner to execute a bond for his appearance in Court the next day. It will be remembered that when this extraordinary order was passed, the case under section 133 had not come to an end. The evidence given by the petitioner may have been false, but it was not manifestly false as it would be if he had made two contradictory statements. Its

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falsity could only be established after the termination of the whole case, and then only after a critical examination of the evidence that was adduced in the case. If the learned Magistrate desired to prevent the second party from adducing any other evidence in the case, he certainly could not have chosen a better mode of expressing his wish. It is my deliberate conviction that the procedure adopted by the learned Magistrate might well have intimidated the witnesses on behalf of the second party and resulted in a complete failure of justice. It will be remembered that no other witnesses came forward to give evidence on behalf of the second party.

In the second place, it is a matter of regret that the learned Magistrate was unaware of the salutary principle that proceedings under section 476 should not be taken until the very close of the case in which false evidence has been given. The reason for this rule is that such action is eminently calculated to intimidate subsequent witnesses and defeat the object of the trial. It is true that the learned Magistrate subsequently corrected his error, but in my view, the subsequent correction was only formal and did not do away with the objection that the learned Magistrate made up his mind to start proceedings under section 476 against the petitioner before he had heard all the evidence in the case.

In the third place, the preliminary enquiry held by the Magistrate could not but be an absurd formality. The petitioner was called upon to shew cause at 3-30 P. M. on the same day why he should not be prosecuted for having given false evidence. The holding of a preliminary enquiry is no doubt discretionary, and the learned Magistrate might well have sent the case to the nearest Magistrate without holding any preliminary enquiry at all, but that course was not adopted by the learned Magistrate. He clearly thought that it was necessary in the interests of justice to hold a preliminary enquiry. If that was his view, he should have given ample opportunity to the petitioner to shew cause why he should not be prosecuted under section 193, Indian Penal Code. In my view the preliminary enquiry, whenever it takes place, is intended to be a real one. In this case from the attitude which was adopted by the learned Magistrate it could not but be a formal one.

The learned Government Pleader, who argued the case on behalf of the Crown with conspicuous ability and fairness, did not attempt to defend the procedure that was adopted by the learned Magistrate. His point, however, was that the propriety of the order under section 476 cannot be challenged after the trial and after the conviction of the petitioner, and he relied upon the case of *Baij Nath Singh v. Emperor* (1). In that case Mr. Justice Atkinson was of opinion that if an irregularity takes place and is allowed to pass unheeded and unnoticed, and a fresh prosecution follows, founded upon the irregularity, and conviction follows, then after conviction the accused party cannot raise the intermediate irregularity in an antecedent proceeding as a ground for challenging the validity of the subsequent conviction. This decision is binding on me, but with great respect I cannot assent to it. The whole question is—had the petitioner a right to challenge the validity of the order under section 476? If he had no such right, then it is difficult to see how he can be prejudiced by not pursuing a remedy which was not available to him as a matter of right. Now the only way in which he could challenge the validity of an order under section 476 was by invoking the revisional jurisdiction of this Court. It is well settled that exercise of revisional jurisdiction is purely discretionary and no one is entitled to invoke the revisional jurisdiction of the High Court as a matter of right. It seems to me, therefore, that the petitioner could not as a matter of right challenge the validity of the order passed under section 476 of the Code. If that be so, I cannot see how he can be prejudiced by not pursuing a remedy which was not open to him. I am, however, bound by the decision of Mr. Justice Atkinson and in conformity with that decision I must hold that it is not open to the petitioner to raise the irregularities in the proceeding under section 476 as a ground for challenging the validity of the conviction. It is worthy, however, of note that if the petitioner had come to this Court in proper time, this Court in accordance with a series of decisions would have been bound to set aside the order under section 476 of the Code.

(1) 37 Ind. Cas. 36; 1 P. L. J. 553; 18 Cr. L. J. 52.

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Coming now to the case itself, the first point that has been argued before me is that Mr. Mansfield was incompetent to try the case. Mr. Mansfield is the Sub-Divisional Officer and is the successor-in-office of the Sub-Divisional Officer who passed the order under section 476 of the Code. It is argued that the learned Sub-Divisional Officer was bound to send the case for enquiry or trial to the nearest Magistrate and that Mr. Mansfield could not be said to be the nearest Magistrate, inasmuch as he was the successor-in-office of the Sub-Divisional Officer in question. I am of opinion that this argument is well founded. It was argued, however, by the Government Pleader that the whole object of the Legislature was to provide that the enquiry or trial should take place before a Magistrate other than the Magistrate passing the order under section 476 of the Code, and he relied upon the deliberate use of the word "Magistrate" by the Legislature in opposition to the word "Court" appearing in the first portion of the section. I appreciate the strength of this argument, but can it be said that at the time when the Sub-Divisional Officer passed the order under section 476 Mr. Mansfield was the nearest Magistrate of the first class in relation to the Sub-Divisional Officer passing the order under section 476? Clearly he was not, for Mr. Mansfield succeeded to the same office held by the learned Sub-Divisional Officer. It seems to me, therefore, that Mr. Mansfield was incompetent to try the case and to convict the petitioner under section 193, Indian Penal Code. In my view, it is not an irregularity which may be cured under the provisions of the Code. Here is a direct disobedience to an express provision of the Statute as to a mode of trial, and it has been held by the Judicial Committee that such disobedience cannot be regarded as a mere irregularity. The question of prejudice does not arise in a case of this nature.

It is, therefore, necessary to see whether there should be a re-trial of the petitioner. In my view there ought not to be a re-trial of the case. I am satisfied that there cannot be a conviction under section 193 in this case at all. As I have said

before, this is not a case where the petitioner has made two statements, one of which must necessarily be false. Its falsity has been established to the satisfaction of the learned Magistrate only because he has believed the evidence adduced on behalf of the Crown. In my view, before there can be a conviction under section 193, Indian Penal Code, it must be shown that the statement said to have been false could not but be false. Now, what is the statement in this case? The statement is "no man ever came to Criminal Court through any footpath running from the sub-jails across the fields and terminating near the Sub-Divisional Officer's bungalow". The learned Magistrate correctly points out that when the petitioner used the word "footpath" he meant a public footpath. No doubt witnesses had come and said that they had used the footpath for going to the criminal Court every day, but in my view that does not establish that the footpath in question must necessarily be a public footpath. It may be that they were allowed to use the footpath without any objection on the part of the persons who are the proprietors of the footpath. But the point is, did they use this footpath as of right as a public footpath? There is in the records of the case evidence which suggests that the footpath in question was not a public footpath. The Survey Map and the Record of Rights are entirely in favour of the petitioner. It was found by the learned Sub-Divisional Officer in the section 133 case that the petitioner and others had used this footpath for agricultural purposes without protest from anybody. Therefore, on the materials before the Court it was impossible to say that the statement made by the petitioner could not but be false. In that view, I am of opinion that there ought not to be a re-trial in the case. I would accordingly allow this application and set aside the conviction and the sentence passed on the petitioner.

Application allowed.

SITARAM v. RAKHADU.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 157 OF 1918.

September 26, 1919.

Present:—Mr. Mittra, A. J. C.

SITARAM—PLAINTIFF—APPELLANT

versus

RAKHADU—DEFENDANT—RESPONDENT.

Wajib-ul-arz, whether creates right—Garpagari, right of, to recover dues from tenants.

A *wajib-ul-arz* is a mere record of custom; it does not create a right.

A *wajib-ul-arz* mentioned a *garpagari*, whose duty it was to ward off hailstorm by means of *mantras*, as one of the village servants, who got a sheaf of corn from the tenants at the time of the crops.

Held, that the entry did not make it obligatory upon the tenants to seek the *garpagari*'s services and to pay for them.

Appeal against the decree in Civil Appeal No. 28 of 1918, passed by the District Judge, Bhandara, dated the 26th February 1918, arising out of the decision in Civil Suit No. 145 of 1917, passed by the Second Munsif, Bhandara, dated the 14th December 1917.

Messrs. M. R. Dixit and V. V. Ohitale, for the Appellant.

Mr. K. L. Daftari, for the Respondent.

JUDGMENT.—The plaintiff is hereditary *garpagari* of Manzas Chichala, Pathri and Chichbodi, Tehsil Bhandara, and the defendant is a tenant in these villages. According to the plaintiff's Pleader's statement the duty of a *garpagari* is to ward off hailstorm by means of *mantras*. The *wajib-ul-arz*, clause 7, mentions the plaintiff as one of the 'village servants,' who gets from the tenants a sheaf of crops at the time of *dhan* and summer crops and who holds *muafi* land from the Malguzar. The plaintiff claims a decree for Rs. 10 (ten) as the value of his customary dues not paid by the defendant. The Courts below have found, as pleaded by the defendant, that the plaintiff did not go out in the storm to recite *mantras* and that there was a hailstorm in one of the years for which the claim is made, and have dismissed the suit.

The *wajib ul-arz* does not create a right but records the custom. If the tenants do not require the plaintiff's services, these cannot be thrust upon them, for a tenant may be a Mahomedan or a Christian who has no faith in the plaintiff's power to ward off the hailstorm. If the defendant had employed

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another person in the place of the hereditary *garpagari*, there might have been a cause of action. I cannot read the *wajib ul-arz* as making it obligatory on the defendant to seek the plaintiff's services and pay for them. If the plaintiff's services are availed of, then in the absence of a special contract, the customary rate is to be paid. The suit has been correctly decided and the appeal is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 10 OF 1919.

September 25, 1919.

Present:—Mr. Justice Sadasiva Aiyar,
Mr. Justice Seshagiri Aiyar and
Mr. Justice Burn.

SUBRAMANIA AIYAR AND OTHERS —
PLAINTIFFS—APPELLANTS

versus

Fujari LAKSHMANA GOUNDAN AND
OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Religious endowment—Dedication of temple to public, tests for determining—Foreign decisions, expediency of resorting to, for conclusions on questions of fact.

The following circumstances may be taken as establishing that a shrine founded and built by a person has been dedicated for public worship and that the temple has become a public religious endowment:—(1) Worship by the public in the temple for a long time, (2) contributions by members of the public for extension of temple buildings and *utsavams* and founding *kattalais*, (3) building of choultries by the public, (4) installation of a copper, instead of a stone, idol by the founder, (5) conducting of processions regularly in public streets, (6) entries in books maintained by public servants treating the temple as public [p. 189, cols. 1 & 2.]

The following facts do not necessarily militate against a public dedication:—(1) The temple being founded by a private individual, (2) management being in the family of the founder or their spending the income of the temple uncontrolled by the public, (3) the tomb of the founder being in or in the vicinity of the shrine, (4) performance of *pujas* to the images of the founder or his descendants, (5) the family of the founder being the *pujaris* of the temple, (6) restrictions being placed against promiscuous entrance into the shrine (7) the mem.

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bers of the founder's family submitting themselves to be taxed on any particular occasion for the income of the temple. [p. 189, col. 2.]

(Authorities reviewed.)

Per *Sadasiva Aiyar, J.*—Where the shrine in which the idols are installed takes the form of a temple larger than the size of an ordinary middle class house and especially if the temple has *prakarams* and *mantapams*, it is incredible that, except in a few instances in Malabar, such a temple should be a private temple. Even in Malabar, the presumption would be that such a temple is a public temple till the contrary is proved. [p. 181, cols. 1 & 2.]

It is dangerous and inexpedient for Indian Courts to rely on English and foreign decisions to arrive at conclusions on questions of fact. [p. 183, col. 1.]

Per *Seshagiri Aiyar, J.*—There are two classes of dedications which must be differentiated. The consecration of a temple for public worship is a dedication in the strict sense of the term. In some cases the word dedication is employed to denote an endowment of property to the temple. In the latter case it has to be shown that the property ceased to belong to the individual and was given up for the use of the temple. In the first class of cases it will generally be sufficient to show that there has been free access to the temple and that there have been public worship and public celebrations. [p. 190 col. 2; 191, col. 1.]

Appeal under clause 15 of the Letters Patent against the judgment of Mr. Justice Oldfield, dated the 10th December 1918, in Appeal No. 164 of 1917 preferred against the decree of the Court of the Temporary Subordinate Judge, Salem, in Original Suit No. 4 of 1916.

FACTS.—The question in this case was whether the suit temple was a private or public endowment. The present appeal was against the differing judgments of *Abdur Rahim, J.*, (who held it to be public) and *Oldfield, J.* (who held it to be private).

This appeal came on for hearing on the 5th, 8th, 9th and 11th September 1912 respectively.

Messrs. *A. Krishnaswamy Aiyar* and *M. Subbarayya Aiyar*, for the Appellants—The endowment is public. It is admitted that members of the public subscribed large sums which were collected by the founder. His intention was to construct a temple which should in every respect be like the famous temple at Palani. The public have been regularly worshipping from the time the temple was founded. Endowments for various items of worship have been made by many members of the public. There is the practice of receiving donations from members of the public for *Archanas* per-

formed on their behalf. Festivals are being conducted on a very grand scale to which thousands of people come from various districts, etc., etc.

The nature of the endowment has to be understood from the facts above set forth. A trust for a Hindu idol and temple is to be regarded in India as "one created for public charitable purposes." *Manohar Ganesh Tambekar v. Lakhmiram Govindram* (1). The test is whether the purpose of the temple is a public purpose. See also *Kalidas Jivram v. Gor Parjaram Hirji* (2), *Thackersey Dewraj v. Hurbhum Nursey* (3), *Ohintaman Bajaji Dev v. Dhondo Ganesh Dev* (4), *Chotalal Lakhmiram v. Monohar Ganesh Tambekar* (5). The fact that a certain number of the public always used the temple, etc., was relied on for an inference that the donor intended a public endowment, *Jugalkishore v. Lakshmandas Raghunathdas* (6). See also *Jafarkhan v. Daulshah* (7), *Girdharlal v. Naranlal* (8). The character of offerings as helping the determination of the nature of the endowment is discussed in *Natesa v. Ganapati* (9), *Peesapati Sitaramanujachari v. Kanduri Vellama* (10), *Subramania Aiyar v. Venkatachala Vadhyar* (11), *Kalyana Venkataramana Aiyangar v. Kasturi Ranga Aiyangar* (12). Reference was also made to *Mohan Lalji v. Gordhan Lalji Maharaj* (13), *Maharajee Brojosoondery Debea v. Ranees Luchmee Koonwaree* (14), *Girijanund Datta Jha v. Sailajanund Datta Jha* (15), *Lam Churn Tewary*

(1) 12 B. 247 at p. 261; 6 Ind. Dec. (N. S.) 650.

(2) 15 B. 309; 8 Ind. Dec. (N. S.) 210.

(3) 8 B. 432.

(4) 15 B. 612; 8 Ind. Dec. (N. S.) 413.

(5) 24 B. 50; 2 Bom. L. R. 516.

(6) 23 B. 659; 1 Bom. L. R. 118.

(7) 9 Ind. Cas. 358; 13 Bom. L. R. 49.

(8) 17 Ind. Cas. 779; 14 Bom. L. R. 1135.

(9) 14 M. 103.

(10) 30 Ind. Cas. 822; 2 L. W. 858; 18 M. L. T. 543; (1915) M. W. N. 842.

(11) 37 Ind. Cas. 688; 4 L. W. 444; (1916) 2 M. W. N. 351.

(12) 38 Ind. Cas. 73; 40 M. 212; 31 M. L. J. 777; 20 M. L. T. 490; 5 L. W. 625; (1917) M. W. N. 400.

(13) 19 Ind. Cas. 337; 35 A. 283; 17 C. W. N. 741; 11 A. L. J. 548; 17 C. L. J. 612; 15 Bom. L. R. 606; (1913) M. W. N. 536; 14 M. L. T. 27; 40 I. A. 97 (P. C.).

(14) 20 W. R. 95; 15 B. L. R. 176 note (P. C.); 4 Sar. P. C. J. 810.

(15) 23 C. 645.

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v. *Protap Chandra Dutt Jha* (16), *Lakshmi Kunwar v. Murari Kunwar* (17), *Jitendra Kumar Chatterji v. Nriya Gopal Mukerjee* (18), *Sharfuddin v. Maqbulunnissa* (19).

Mr. K. Srinivasa Aiyangar, for the Respondents.—Private religious trusts have been recognised by the Legislature in section 2 of the Indian Trusts Act. But whether the owners can jointly put an end to them and whether those are to be preserved for the spiritual benefit of future generations as well are questions which are still unsettled. What is indisputably private to begin with can be assumed to be public only on the strongest proof of dedication, *Appu Patlar v. Kurumba Bhagwati* (20). Grants to Gurus and persons of spiritual eminence are common throughout India where there can be no question of dedication to the public at all. See *Sathappayyar v. Periasami* (21) and *Sethuramaswamiar v. Meruswamiar* (22).

Every religious Hindu would naturally consider the sanctity of a family deity enhanced by performances of grand Poojas and in no Hindu home is admission refused to an intending worshipper. So nothing turns upon the facts mentioned by the appellants. The acceptance of offerings and minor endowments is optional with the Poojaris and owners. The size of an endowment is not a matter of weight, as that varies with the intention and possibilities of the parties.

In the present case, there is no evidence that subscriptions were collected for constructing this temple. The founder's family are the Poojaris in spite of the fact that they belong to the Goundan caste and they have been dealing with the temple and its effects absolutely till the present suit. The non-prohibition of the public from worship is not the same as an invasion of rights, *Folkestone Corporation v. Brockman* (23).

(16) 2 C. L. J. 448 at p. 450.

(17) 45 Ind. Cas. 213; 5 O. L. J. 97.

(18) 16 Ind. Cas. 831; 18 C. W. N. 140.

(19) 49 Ind. Cas. 101; 4 O. L. J. 174.

(20) 11 Ind. Cas. 633; 21 M. L. J. 588.

(21) 14 M. L. J. 1.

(22) 43 Ind. Cas. 806; 41 M. L. J. 296; 7 L. W. 22; 4 P. L. W. 91; 34 M. L. J. 130; 16 A. L. J. 113; 27 O. L. J. 231; 22 C. W. N. 457; 20 Bom. L. R. 514; 45 I. A. 1 (P. C.).

(23) (1914) A. C. 338 at p. 369; 83 L. J. K. B. 745; 110 L. T. 834; 78 J. P. 273; 12 L. G. R. 334; 30 T. L. R. 297.

There can be private ownership of Debutter property. The use of the word "Dharma-karta" or 'trustee' or 'Shebait' in some survey or other record is of no value by itself in determining the nature of an endowment, *Konwar Doorganath Roy v. Ram Chunder Sen* (24). Private temples have been recognised in this Presidency in the District of Malabar and elsewhere from the earliest times. See *Satrasala Venkatachellamiah v. Pouchangum Narrainappa* (25) and *Ohemmanthatti Ohapuni Naiyar Meyene Itachi* (26).

The elements required to prove a dedication are set forth by the Privy Council in *Venkateswara Iyan v. Shekhari Varma* (27). And I submit that they ought to be clearly proved in the present case. See *Pattannur Valangeri v. Narayanan Nambiar* (28).

[SADASIVA AIYAR, J.—Can the temple properties be sold for your private debts?]

They may not be liable, as the trust is intended to be preserved. But nonetheless the owners can restrict outsiders from having anything to do with it.

I submit that the facts that the founder's family act as Poojaris in spite of their caste; that they have been appropriating the income without any intervention by the public; that the image of the donor is given a prominent place in the temple and other facts prove a course of conduct evidencing an absence of dedication which has not been rebutted.

Mr. A. Krishnaswamy Aiyar, in reply, referred to the practice of erecting images of donors in South Indian temples as of no value in this respect. Vide Gopinath Rao's *Elements of Hindu Iconography*, Volume II, Part II, page 481.

JUDGMENT.

SADASIVA AIYAR, J.—The material facts are set out in the judgment of my learned brothers. I agree entirely with their conclusions. Some of the observations in the judgment of Seshagiri Aiyar, J., such as "in the north, we find innumerable instances where endowments are made in the name of a reputed saint who

(24) 2 C. L. J. 341.

(25) Mad. Sud. Ad. (1853) p. 104.

(26) Sud. Ad. (1862) p. 90.

(27) 3 M. L. J. 334 (P. C.); 8 I. A. 143; 4 Sar. P. C. J. 259.

(28) 10 Ind. Cas. 398; 21 M. L. J. 585; 10 M. L. T. 64; (1911) 2 M. W. N. 378.

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worships the idol." "The personal sanctity of the founder seems to have had more influence in the north than in the south." "Most of the temples in the south do not owe their existence to Aryan influence but were built and endowed by the non-Aryans, while the endowments in the north are mostly by Aryans", are observations based upon my learned brother's knowledge of and personal research into subjects to the study of which I have not been able to bestow as much time and industry as he. So far as I have been able to study some of the subjects referred to, my provisional conclusion is that Brahmana Hindus are not so predominantly Aryans in blood and non-Brahmana Hindus are not so predominantly non-Aryans in blood as usually assumed, and I am not satisfied that "Dravidian" is opposed to "Aryan" and does not really represent the mingling of an earlier Aryan wave of immigration with sub-races of the fourth or third root-race. A non-Brahmana or Dravidian does not at all, therefore, mean to my mind a pure non-Aryan and so far as southern India at least is concerned, a Dravidian does not connote a non-Aryan. These are, however, large controversial questions and I feel diffident to express decided opinions on them. Further, this is an important case and I think it desirable that notwithstanding my entire agreement in substance with the judgments of my learned brothers, I should say something in my own words though very little and nothing is added thereby to the reasons found in their judgment.

I attach much importance to the fact that a fixed stone idol was installed by Lakshmana Goundan. A fixed stone idol (especially if it is of a comparatively large size) is never within my experience set up for mere family worship. Stones used in family worship are usually small moveable Bana Lingams or moveable Saligramams. So also where even moveable metal idols are in question, if they are of comparatively large size and are taken out in processions at regular and well known festivals, that fact is almost conclusive in my opinion (so far, at least, as southern India is concerned) that they are intended for public worship. Where the shrine in which the idols are installed takes the form of a temple larger than the size of an ordinary middle-class house and especially if the temple has Prakarams and Mantapams, it is almost incredible to me that

(except in some few instances in Malabar) such a temple should be a private temple. Even in Malabar, I would hold that the presumption is that such a temple is a public temple till the contrary is proved. Idol worship itself was established in the beginning for communal purposes according to the Shastras. Bhuddistic influences had much to do with the development of idol worship in India—Bhuddistic temples arose in connection with Stupas over the relics of the Lord Buddha intended to be publicly worshipped. According to the Bhagavata Purana, worship of God in the Krita Yuga consisted in each one seeing the Lord in all living beings and worship consisted in mental reverence towards and friendly help to all the creations of the Lord. Seeing that in the Thretha Yuga, men began to get conceited and selfish and were not willing to see God in their neighbour whom they considered lower than themselves in mental equipment, idol worship was introduced as a very inferior mode of worship to that which prevailed in the Krita Yuga. (See the 14th Chapter of the 7th Skanda of the Bhagavatam, especially Slokas 40 and 41). That worship of idols is intended for the masses is also clear from Slokas 22 to 27 of the 29th Chapter, 3rd Skanda, where idol worship is spoken of in depreciatory language by Kapila Muni, an Avatara of God, if it is accompanied by contempt towards any of God's creatures, though its usefulness for communal worship by ordinary people who cannot rise to higher forms of worship is acknowledged. (See the 11th Skanda, 2nd Chapter, Slokas 45 to 55, especially Sloka 47 as regards the comparative excellence of different modes of worship of the Lord, idolatry being the lowest form, though even those who have risen to higher forms may follow it in order not to perturb the ignorant and those unfit for higher modes). As regards immoveable idols, there is no daily invocation (Avabhanam) at the beginning of the Pooja or taking up of the deity into oneself (Visarjanam or Athmasaropanam) at the end of the worship and the intention, therefore, in establishing an idol so firmly rooted in the ground is that it should be open for public worship at all convenient times. (See 11th

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Skandam, 27th Chapter, 12th and 13th Slokas.) Whenever a public *mandiram* or temple is created, a trustee for regulating public worship therein is always essential and if periodical festivals, Chatrams for pilgrims, processions in car streets, etc., accompany the worship, it is impossible in my opinion to treat such a temple as a private temple. (See Slokas 48 to 53 of 27th Chapter, 11th Skanda). That the sites for car streets for the particular temple in dispute were purchased and secured between 1844 and 1848 during the lifetime of Lakshmana Goundan himself appears from Exhibits 19 series. (In the chronological index, these documents are described as executed in favour of the 1st defendant instead of, of the 1st defendant's grandfather owing to their names being the same).

Much was made on the respondents' side of the fact that the images of the founder and his wife are found in the outer Court of the temple. That they are found in a worshipping posture (and not in the posture of giving or blessing) is conclusive, in my opinion, to show that it was not intended that they were to be considered as deities to be worshipped in the temple, but only devotee-founders whose images are merely honoured, and such images of founders are found in numerous public temples. A private temple is founded only by a rich worldly man who wishes his family to be blessed by the special family idol or idols established therein, so that the family may continue to be rich and powerful and always be continued in male lineal succession. Of course, I do not say that even worldly people could not establish or have not established public temples; but if a man establishes a private temple (apart from mere worship in family Poojah rooms), it is a clear indication that the founder is a person whose special affection for his family has not expanded into universal brotherhood. The character of Lakshmana Goundan, the founder of this temple, was, however, so holy that contrary to the custom of his caste his body was buried as if he was a saintly Sanyasi. (Among almost all castes of Hindus, it is only when the astral or passional body has been so purified during the lifetime that it has lost all impuri-

ties that burial is allowed instead of cremation; in other words, it is saintly Sanyasis who have or are assumed to have so purified themselves that are buried.) A saintly Sanyasi does not do any act with a selfish motive or with a view to promote the special welfare of his blood relations. Having regard to these well-known Hindu ideas, I find it very difficult to hold that Lakshmana Goundan intended that the Palani god, whom he brought down to his village and successfully invoked in the immovable stone-image which he established, should be a source of special pecuniary or even spiritual benefit to the members of his family alone or predominantly, and I have no reasonable doubt that he intended it for public worship.

The collection of offerings from devotees in Hundi pots placed either at the entrance to the temple or at the entrances to special inner shrines is not only not indicative of the temple being a private temple but, in my opinion, is a strong proof that it is rather a public temple than a private temple. That Brahmin and Vaisya families (like that of plaintiffs' 1st witness) should treat an idol established by a non-Brahmin as their Kula Daivam, unless the founder was supposed to have by his unselfish holiness and unworldliness established the idol for the benefit of the world at large, is not easily conceivable by me.

I am quite sure that no orthodox Brahmin or Vaisya will treat the image of God in a temple as a Daivam to be worshipped by him (much less as his Kula Daivam) unless that image had been established according to tradition by either a Brahmana or by a person, whether Brahmana, non Brahmana, Aryan, non Aryan or even a Rakshasa, who had gone beyond and above caste and had become casteless in the higher sense (in which sense there was no caste among mankind in the Krita Yuga according to Shastras). Such castelessness results from supreme devotion, supreme Gnana or supreme selflessness. Many such public temples in southern India (including Palani itself) have been, by tradition, established by such non-Brahmana devotees who had transcended caste and individual family and other attachments by their

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devotion or selflessness—I have no doubt that Lakshmana Goundan, the founder of the plaint temple, had obtained such saintly reputation before he established this temple that he was held to have risen above caste and self into castelessness and selflessness, and I have, therefore, no reasonable doubt that in founding this temple, he must have intended it as a public temple for the benefit of his fellow-Hindus without distinction of family connection or caste or sect.

Having regard to the corrupt customs and ideas which have been prevailing in the Hindu religion and society for several centuries past, the fact that Mattadhipathies, temple trustees and others have not been called to account for their misdeeds and misappropriations by the general Hindu public who have possessed, for a long time, very little public spirit, cannot be given much weight in the consideration of the question whether a man who has been mismanaging an institution as a trustee to the knowledge of the public for a long time is liable to be called to account by the public. As a very learned writer has recently said: "The error of decadent India has been to lay too much stress on the Law of Heredity in connection with national organisation, to assert loudly with false claims of degenerate pseudo-religion and pseudo-science that that law is the sole arbiter of psycho-physical type, and to forget, to ignore and refuse recognition now altogether in theory to the equally important and equally operative Law of Spontaneous Variation". (Instead of the expression "Spontaneous Variation", I would use the expression "the effects of Individual Tapas", which includes Educational culture and the effects of Environment, which includes the Forces of nature or Devas and the influence of the thoughts and actions of other human beings. The word "spontaneous" conveys the notion of chance and absence of cause, whereas the Shastras inculcate the prevalence of Law throughout the universe. According to the Shastras, Tapas and Environment are of very great importance in Kali Yuga, while heredity should be given very much less weight now than in preceding Yugas). Thus the fondness for introducing the hereditary principle even in such matters

as succession to the trusteeship, succession to priestly functions in a temple and even to the function of a cook or garland weaver in a temple has been due to this perverted and grossly exaggerated worship of the hereditary principle which is the bane of the modern caste system. No wonder, therefore, that the spiritual aroma of Lakshman Goundan, the founder, first trustee and first Poojari, is considered by many of the devotees of the idol in this temple to still hover round the 1st defendant (his grandson) and that the idea of calling him to account as the trustee of a public temple does not appeal to some of the witnesses on the side of the defence. But the facts which they speak to, as pointed out by the learned Officiating Chief Justice, by Mr. Justice Seshagiri Aiyar and by Mr. Justice Burn (whose clear summings up on this point I adopt, as I cannot hope to better them) fully establish, in my opinion, that the temple is a public one. Of course, if what I may be permitted to call a mechanical view of the evidence is taken, some weight might be given to the vague opinion-evidence of some of the defendants' witnesses that the temple is a private temple, but as Justice Sir Abdur Rahim points out, such evidence is of very little value when we are entitled ourselves to draw the proper inference from the proved facts. The fact, again, that the Poojari is allowed to be a non Brahmana by hereditary caste is of no significance as even in Palani itself, the Poojari was a non Brahmana till about a century ago and the Lord Kandaswami's devotees are mostly non-Brahmins and are not usually inclined to make distinctions between Brahmana and non-Brahmana worshippers. (One of the Devis of Lord Skanda was, by tradition, a maiden belonging to a very rude Hill-tribe)

I am aware that the learned Subordinate Judge (himself a Hindu) has taken a view favourable to the 1st defendant's contention. But it is clear that he was persuaded by one of the learned High Court Vakils, who appeared for the 1st defendant before him, to look to the English case of *Bosquet v. Heath* (29) for guidance in the decision of the question in dispute (See paragraph 48

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of the lower Court's judgment). That case related to a chapel dedicated to the purposes of divine worship according to the rites of the Church of England and its decision depended on the particular facts proved therein. The danger and inexpediency of quoting and relying on English and other foreign decisions by Indian Courts, especially where a decision has to be arrived at on a question of fact, are pointed out by their Lordships of the Privy Council in two cases reported as *Bhola Nath Nundi v. Midnapore Zemindary Co.* (30) and *Imambandi v. Mutsaddi* (31). The relevant passages have been extracted by me in my judgment in *Seeni Nadan v. Muthuswamy Pillai* (32) and I need not repeat them here.

In the result I would allow the appeal and remand the case for the framing of a proper scheme, the prayer in the plaint for the removal of the 1st defendant from the trusteeship and Poojari office being disallowed. In framing such a scheme, the lower Court should give weight to the fact that a large number of worshippers respect the 1st defendant (though it may be that their mental attitude cannot be defended on entirely rational or Shastraic grounds) as the descendant of the holy founder.

As regards costs, I would direct the costs of both sides to be met out of the temple funds.

SESHAGIRI AIYAR, J.—The three plaintiffs obtained the sanction of the Collector of Salem under section 92 of the Code of Civil Procedure for instituting this suit. The two defendants are father and son. They raised the objection *in limine* that as the temple was not a trust created for public religious purposes, the suit was not maintainable. The Subordinate Judge upheld this plea and dismissed the suit. In this Court, on appeal from his decree the present Officiating Chief Justice was of opinion that the temple in suit was a public religious endowment. Mr.

Justice Oldfield took a different view. Hence this appeal.

Both the plaintiffs and the defendants are agreed that the temple came into existence about the year 1819 or 1820. Its traditional origin is thus stated: The grandfather of the 1st defendant was a pious and religious man. He was in the habit of going to Palani every year to worship the deity Subramania, known also as Kandaswami. He carried on his shoulders a *kavadi* (usually, two baskets one hanging from each end of a pole which is carried on the shoulders of the devotee) with offerings to that famous shrine in the Madura District. After some years, he had a dream in which he was told that it was unnecessary for him to travel to Palani every year, and that the deity would manifest itself to him in his own place, if he would establish an idol there. Acting upon this revelation, the grandfather whose name was Lakshmana Goundan built a temple on land belonging to him and installed the deity in it. There is some dispute whether the place where the particular part of the temple stands was originally a portion of the dwelling house. The evidence to which our attention has been drawn shows that it was a vacant site adjoining the house, and that originally a small Mantapam was built for installing the idol. It was subsequently re built with granite stones. As an adjunct to the principal deity, the idol of *Idumban*, who according to Puranic story was the commander-in-chief of god Kandaswami, was installed in a room of the house in which Lakshmana Goundan and his people lived. Immediately after this installation, the family vacated the house and removed to a newly built house near by. The belief that the Palani god had come down to this place, the fame of the founder, his sanctity and a further belief in his power of foretelling events through the god's favour attracted a large number of people to the shrine. In course of time, the temple was extended. A number of Mantapams were erected in close proximity to the place where the deity was enshrined. Copper idols known as *utsava-igrahams* were introduced. These idols were taken in procession on specified occasions. Two cars and other vehicles for the processions were built. A car street was

(30) 31 O. 503 (P. O.); 31 I. A. 75; 8 C. W. N. 425; 14 M. L. J. 152; 8 Sar. P. O. J. 611.

(31) 47 Ind. Cas. 513; 45 I. A. 73; 35 M. L. J. 422; 16 A. L. J. 800; 24 M. L. T. 330; 28 C. L. J. 409; 23 C. W. N. 50; 5 P. L. W. 276; 20 Bom. L. R. 022; 45 O. 878; (1919) M. W. N. 91; 9 L. W. 518.

(32) 53 Ind. Cas. 213; 37 M. L. J. 284 at p. 300; 23 M. L. T. 223; (1919) M. W. N. 640; 42 M. 821.

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laid down, the owners of the houses existing on the street site having agreed to sell away their houses. Outsiders built Chatrams in the car street for feeding devotees who attend the festivals. Rich families and communities provided funds for celebrating *utsavams*. These are the admitted facts. I shall immediately refer to some other facts which have been disputed here and in the Court below. The point for decision in these circumstances is, "was there a dedication of the shrine for public worship and has the temple thereby become a public religious endowment?"

Some of the circumstances relied on by the plaintiffs have, to a certain extent, been stated by me already. I shall now refer to the disputed facts. The plaintiffs' case was that there was a temple in the place where the present idol is installed, that the founder Lakshmana Goundan was given funds for building the present temple, and that consequently from the outset the institution was a public one. Both the learned Judges have rejected this contention. There is no reliable evidence of there having been a public temple in the place where the present temple stands. It is true that a goddess is referred to as existing in a portion of the temple. But the evidence is not satisfactory to prove that this goddess was the object of public worship at any time. However that may be, there can be no question that the funds for building the temple came from devotees. The 1st defendant contended that moneys were offered to his grandfather on account of his piety and sanctity, that the offerings were his private property and that consequently the temple built by him with those offerings was a private one. The evidence is not very definite on this question. But notwithstanding the high character of Lakshmana Goundan, it is abundantly clear that it was the deity which attracted the worshippers and that it was the deity for whom the offerings were made. The temple was on the model of the Palani temple. The festivals are still celebrated as in Palani. The accepted story on both sides is that it is the deity at Palani that had promised to establish itself in this shrine; therefore, it is impossible to believe that offerings were made to Lakshmana Goundan personally, and not to the idol. Lakshmana

Goundan's inspiration and his power of foretelling were all derived from the Deity which he had installed and which he was worshipping. It is not usual with worshippers in this part of India to make large offerings to the priest apart from the idol. The Subordinate Judge in paragraph 44 does not say that the offerings were made to Lakshmana Goundan personally. Those who are acquainted with the sentiments which Hindus entertain towards the deity at Palani can realise at once what a powerful influence, it exercises over the minds of the people and how devoted worshippers are to it. It is, therefore, impossible to believe that the offerings were made to the Poojari and not to the deity.

One other fact on which there has been some dispute is this. Many families in the district have been treating this deity as their *Kula Thaivum*. It is a pity that witnesses were not asked to explain the true significance of this expression. *Kula Thaivam*, according to Hindu notions, is the deity who presides over the destinies of a particular family. Once a year and sometimes oftener pilgrimages are undertaken by the family to the place where the deity is. Before marriage and other auspicious ceremonies are performed in the family, special Pooja is made to the deity. When a member of the family becomes sick, vows are made to the deity. The evidence on this question has been accepted by the learned Judges and by the Subordinate Judge. The latter says in paragraph 44: "Many people consider the deity worshipped in the temple as their *kula-deivam* and make and fulfil vows in this temple." Now it is impossible to hold that a deity which is regarded in this manner can be the private property of an individual. If it is private property, the owner can prevent access to the temple, can prevent the performance of the vows and can interdict the performance of the Poojas. I might say that it will almost shock the sentiment of a Hindu to be told that a deity which is regarded as the *kula deivam* by a number of people is the private property of any one individual. Mr. Justice Oldfield apparently realises the importance of this fact, but gets over it by saying that this belief in the minds of the people was not brought about by any act or omission on the part

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of Lakshmana Goundan and his heirs. The learned Judge apparently thinks that there is no estoppel against Lakshmana Goundan. With all deference I am unable to agree. It is almost impossible for a Hindu to believe that Lakshmana Goundan and his heirs were not aware that vows were being taken, and special Poojas were being arranged on the ground that the idol was the *kula deivam*. They were on the spot to perform the Pooja. They must have known at the time of the special Poojas why they were being done. I must, therefore, respectfully dissent from the explanation which the learned Judge has offered on this question. The fact, therefore, stands that the deity was regarded by many people, as the Subordinate Judge says, as their family deity.

I have already referred to the fact that outsiders have provided funds for the performance of festivals in the temple. The evidence upon that question consists of Exhibits B, B (1), D, G, H, H (1), J, J (1), L and M. Certain accounts, namely K (1), K (2) and K (3), were exhibited in the lower Court. As it was objected in this Court that these three exhibits have not been properly proved, I shall not consider them in connection with this subject. There is also oral evidence on this question. The defendant himself admits that provision has been made by the public for conducting festivals. Exhibit G is the family partition deed in which a sum of Rs. 600 was set apart for the performance of charities. Exhibit H is a compromise decree among the members of a family making a similar provision. Exhibit H (1) relates to a Chatram. Exhibit J (1) is a Will by a devotee. Exhibit M is an agreement among the members of a family. Exhibit L is a sale-deed, in which it is recited that the land was purchased for performing a festival. Letters were also produced in which the 1st defendant and his son had asked some of the persons who performed festivals to remit money. Mr. K. Srinivasa Aiyangar who appeared for the defendants contended that the sums contributed were not enough for the conduct of the festivals and that the 1st defendant and his ancestors supplemented the contribution from their own income. This may be true. But it does militate against the fact that notwithstanding such contribution, the public regarded that

they had a right to conduct festivals for the deity. The learned Vakil for the respondents referred us to decisions in which it was held that a public trustee was bound to accept a contribution from a worshipper and contended that as on the evidence given in this case, it was clear there was no obligation on the part of the defendants to accept the offerings, the defendants were not trustees of the temple. There is some vague evidence given, mostly by the defendants' witnesses and also by some of the plaintiffs' witnesses, to the effect that permission of the defendants had to be obtained before performing a festival. This is all opinion evidence. Not a single instance was deposed to, in which the defendants refused permission. Moreover the performance of festivals is largely in the discretion of a trustee. Even in a public temple, the trustees are not bound to conduct a festival because a worshipper wants them to do so. No doubt, the discretion should not be arbitrary. But unless trustees are clothed with some powers to regulate the mode of worship, the affairs of an institution cannot be properly carried on; Courts in this Presidency have always recognised in the trustee a right to exercise judicious discretion regarding the performance of festivals. Therefore, even accepting everything that way deposed to on this point, it does not follow that the worshippers sought permission of the defendant and his ancestors merely because they considered that the temple was the private property of the 1st defendant.

The above remarks to a certain extent apply to the erection of choultries near the temple. There are four choultries altogether. Three of them belong to the worshippers. One was built by the defendants' ancestors. This is another very important circumstance, indicating that the temple is a public one. If the conduct of a festival and the taking out of the deity depended upon the whim and pleasure of the defendants' family, is it conceivable that large sums of money would have been spent upon constructing rest-houses and Chatrams in the place? To say the least, this fact argues a consciousness on the part of the worshippers that the temple was public property and that they had a right of access to it. Mr. Srinivasa Aiyangar addressed the same argument regarding the existence of choultries as he advanced regard-

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ing Kattalais. Another fact to which I made a casual reference at the outset should again be noticed. The existence of the fixed stone idol which is not carried in procession may be consistent with the idol being the private property of the owner. But it is hardly conceivable, in this part of India at any rate, that a copper idol would be introduced for being taken in procession if the temple itself was private property. The very object of a procession is that the image representing the idol inside should be taken out for public worship. Therefore, this circumstance strongly negatives the suggestion that the temple was a private one.

Then there is another circumstance which very strongly supports the view taken by the learned Officiating Chief Justice. Some of the items in the plaint schedule stand in the name of the deity. As regards item No. 2, Exhibit C, the revenue register of the village contains a significant entry in column 15. The column is headed: "Name and relationship of original grantee and of subsequent and present holders—Length of possession." As against this item the entry is: "Deity Kandaswami Pajari and Dharmakarta by Pudupalani Goundan, on purchase." Mr. Srinivasa Aiyangar referred us to Exhibits 15 and 15 (a) by which these lands were acquired by Lakshmana Goundan. Exhibit 15 was on the 13th of January 1837 and Exhibit 15 (a) was on the 29th of November 1847. The purchases were made as if by a private owner. It was contended that no significance should be attached to the entry in the village register, having regard to the origin of the title. To my mind, the very origin of the title and the subsequent entry afford the clearest indication that after the purchase, the lands were dedicated for public purposes. The next item which I shall refer to is item No. 1. Exhibit D, the settlement and survey register of Mamundi village of the year 1871, contains two entries: In column 11 under the heading "Pattadar's name" the entry is "Kallipatti Kandaswami," that is, the deity. In column 12 under the heading "Remarks" the entry is "Pajari Palani Goundan". The learned Vakil suggested that the term Poojari is a name which was prefixed to the members of the family as they were doing Pooja; and he also suggested that the term Dharmakarta in Exhibit C

was a similar prefix. But that suggestion will not explain column 11. When we remember that these entries in settlement registers are made after enquiry by the Revenue officers, and on statements made by persons in possession, it seems to be clear that this property was dedicated to the temple and the members of the defendants' family regarded themselves as trustees of the temple. Another item is contained in Exhibit F. That is the re-survey and settlement register of the village of Mullasamudram. There are two items in this document: Survey No. 19 (3) and Survey No. 19 (4). 19 (3) is entered as private property of Lakshmana Goundan. 19 (4) is entered as temple Poramboke. The contrast between the two descriptions is very significant. This is item No. 5 in the plaint schedule. Exhibit V of the year 1871 also refers to it. Exhibit E relates to another item in the plaint. It is the register of Ballakulli village and was apparently made out in the year 1863. Under column 16 the entry is: "Kallipatti Kandaswami Deity, Pajari and Dharmakarta Pudupalani Goundan." As regards this item our attention was drawn to Exhibits 18 (a) and 18 of the years 1903 and 1912 respectively, in which it was recited that the defendants were owners of the property. Apparently the 1st defendant had conceived for some time the idea of appropriating the income from the endowed properties for his own private use. This casual statement by lessees in this document cannot take away the value of Exhibit E. The learned Vakil realised the force of these entries in these documents and suggested that they may be explained on the ground that these were endowments made by the defendants to their family deity. It was argued that the expression "Dharmakarta and Pajari" are not inconsistent with the private character of the institution. Reference was made to the words "Debutter and Shebai" occurring in cases decided in Calcutta and Allahabad. Whatever may be the notion entertained in the northern part of India as regards the significance of such words, there can be no doubt that in this part of India the word Dharmakarta is not applied to the owner of a private institution. The fact is significant that before public Revenue officials some statements must have been made which led to the entry, proving beyond doubt that the

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defendants' family regarded themselves as trustees of a public institution and not as owners of a private temple. One other fact which was not disputed is that a large section of the public have been worshipping this deity.

As against these circumstances Mr. Srinivasa Aiyangar referred us to some facts, which, he contended, were not consistent with the public character attributed to the institution. He referred to the fact that a Hundi was being kept for throwing in the offerings. The existence of the Hundi is not denied. One fact, which apparently escaped the notice of the Subordinate Judge and which to my mind is very significant, is that Lakshmana Goundan himself maintained an account of the collections in the Hundi and also an account of the jewels. Exhibit 39 is of the year 1849. The entries in the cadjan account, whose genuineness was not disputed before us, relate to the collections from the Hundi box on the Thy Pushyam festival in the year 1849. The various items which make up the total of nearly Rs. 400 are given. If Lakshmana Goundan believed that he was accountable to no one, why did he keep an account of the offering? No doubt, no other account has been produced. But if there are accounts, they must be in the possession of the 1st defendant. He has not chosen to produce them. This does not show that no accounts existed. Exhibit 40 was also kept by Lakshmana Goundan. It contains an account of the jewels belonging to the deity. I have not heard any explanation about these two documents. The learned Vakil said that no regular accounts were kept of the Hundi collections. As I said before, the outside public is not in a position to know whether accounts were kept or not. Stress was laid on the fact that the public never asked for an account of the Hundi collections. Persons who are conversant with the habits of the people in India can attach no importance to this fact. A Hindu, after having made an offering to the deity, never troubles himself about its application. He considers that his duty is ended and that, if persons who are entrusted with the control of those offerings, do not behave as they ought to, the deity would look to their punishment and that he has no further concern with it. This is the

general attitude of the people. With the spread of education, no doubt a new ideal has come into existence. The educated public now wants that the offerings should be devoted to the proper purposes of the institution. That shows the awakened consciousness of the people and accounts for the institution of a large number of suits for framing schemes. I do not think the fact that for a long time, the priest in charge was allowed uncontrolled possession of the income, is any indication, at any rate in India, that the priest was the owner of the offerings. The next circumstance relied on by the learned Vakil is that permission was obtained from the Poojaris for the performance of *utsavams*. I have already referred to this matter. One other argument was that for getting beyond what is known as *pithalai vasal padi* (the brass door way) some present had to be made in the Hundi and that, therefore, the people were conscious that the idol was the private property of the Poojari. This again is a misapprehension. In Tirupathi, the most famous shrine in all India, a fee is demanded for entrance into the Pagoda except on one occasion during the day. In Srirangam, another famous shrine, the trustees have levied a particular fee for entrance into a particular part of the temple on special occasions, such as the *Ekadesi* festival. In the Rock fort temple at Trichinopoly, every one who wants to go to the topmost part is asked to pay a contribution of not less than three pies. These levies are made not because the temple or the idol is private property, but because the trustees have to regulate the affairs of the temple. They have to collect money somehow for purposes of worship and they have to take special precautions about entrance into particular places. In order that the temple may have more income these devices are resorted to. I say nothing as to whether they are legal. But these practices do not argue that the idol is private property. The next circumstance relied on for the respondents is that the family of the defendants are the Archakas. It is true they do not belong to a class from which the Poojaris of a temple are drafted. But there is no rule that unless a person

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belongs to a particular class he should not perform worship in a temple. Having regard to the fact that the reputed founder of the institution himself performed the Pooja, it is only natural that his descendants should continue the worship. In the well-known temple at Chidambaram there are a large number of Archakas who claim to have come down to earth along with the deity for which they are performing Pooja. They do not belong to the caste from which ordinarily temple Archakas are drawn. It is only in the nature of things that the descendants of the person who performed the first Pooja should continue the worship. I do not think, therefore, that this fact militates against the public character of the temple. It was also argued that the defendants' family have, to the exclusion of the members of the public, been the sole managers and that this is an indication that the public have no right to interfere with the management. The answer to that is that it is not unnatural that the founder should be the first trustee and that his descendants should be the hereditary trustees. It is the commonest thing in India that so long as the founder's family lasts, even in the settlement of schemes, Courts turn to that family for providing a trustee, whatever restrictions they may place on his management. In the present case, nobody would have questioned the management of the grandfather of the 1st defendant, who seems to have led a holy life and who seems to have been conserving property for the benefit of the temple. He lived till the year 1857. His son had a shorter career. We know very little about him. He apparently purchased some property for the temple, and from the evidence it appears that he conducted the charity efficiently and honestly. He died in 1863 leaving the 1st defendant, who was then a minor. During his minority, his mother seems to have conducted the affairs properly. 1st defendant's career in life has not been good. I refer to it not for the purpose of raking up his antecedents with a view to discredit his evidence, but for the purpose of showing that the public naturally had no faith in his character or capacity to manage. He was convicted of murder and the sentence was commuted to one of transportation for some

years. He came out in the year 1903. It is not a violent presumption to make that the man against whom this charge of murder was made would not scruple to create evidence in his favour for the ownership of this temple. Therefore, I attach no importance to some of the documents which came into existence since 1903, to which I shall presently advert as they were strongly relied on by the defendants. After the 1st defendant returned, matters seem to have gone on from bad to worse. Enquiries were instituted in the year 1908 regarding his management. Exhibit 45 (a) was in the year 1909. Then we have Exhibit 45 (b), which was an enquiry in connection with the sanction in the year 1913. All these show that the public were not satisfied with the conduct of affairs by the 1st defendant. It may, therefore, be said that the public at the earliest possible opportunity began to question the 1st defendant's stewardship. I have already said that it was not shown that either Lakshmana Goundan or his son had behaved improperly in the management of the trust. Mr. Srinivasa Aiyangar relied strongly upon the fact that even after his release from jail, 1st defendant was allowed to conduct the worship. There is evidence that this man went through the ceremony of purification, which, according to Hindu notions, qualifies a person guilty of offences to perform worship. I do not think that circumstance tells against the public character of the temple. Another circumstance relied on was the fact that the tomb of the grandfather adjoins the temple. Mr. Justice Oldfield is admittedly wrong in saying that the tomb is inside the temple. Even that will not affect the question. In some of the important temples in south India, the tomb of a great saint is within the temple. For example in Palani, on the model of which this temple was built, there is the tomb of the first saintly worshipper within the temple. Poojas are offered to it every day. In Srirangam, the tomb of the great founder of Vaishnavism, Sri Ramanuja Chariar, is within the four walls of the temple. One more circumstance on which stress was laid was the fact that Pooja was being done to the image of the founder and his wife. I do

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not think that that circumstance is of any value. In Srirangam, Pooja is done to Sri Ramanuja almost as grandly as is done to the deity itself. There are processions also for him. It all depends upon the veneration in which the founder is held whether any festivals are performed in his honour. There are not circumstances which establish that the temple is a private one.

I shall now refer to a few documents on which Mr. Srinivasa Aiyanger laid some emphasis. He referred to Exhibit 26, an income-tax notice issued in the year 1908. There is only one of these notices exhibited. 1st defendant came out of jail in 1903, and it is no wonder that he allowed himself to be taxed on the income derived from the temple offerings. As to whether the tax was remitted and how long it continued we have no evidence. As I said before, any document which came into existence after 1903 can have no value in the case. Exhibit 25 is an application by the present defendant, in which he asked the Revenue Authorities to allow a peon attached to the temple to wear a silver badge. He refers to the temple as his own Devasthanam. This is consistent with his being the trustee of the temple. Even if it were otherwise, I attach no importance to this man's self-serving statements. Some enquiries were made in the years 1909 and 1913 by the Revenue officials [*vide* 45 (a) and 45 (b)]. The Tahsildar and the Deputy Collector were apparently of opinion that this temple was a private one. The opinion of these Revenue officials cannot weigh much in the case. What enquiries they made and how far they were influenced by the statement of the 1st defendant, we do not know. I do not think that their conclusion is of any value in dealing with this case. I have now referred to all the circumstances relied on by the plaintiffs and by the defendants.

To sum up, on the side of the plaintiffs we have these facts (a) the public have been worshipping in the temple for a century and they consist of persons not only residing in or about the place but of persons from the districts of Trichinopoly and Coimbatore and even from the neighbouring State of Mysore; (b) the money for the building of the temple has come from their contributions; (c) some

members of the public have established Kattalais for *utsavams* in the temple; (d) some of them have purchased lands for the conduct of charities in the temple (Exhibits S, D and L); (e) some of them have built Chatrams wherein food is distributed and in which travellers rest themselves on occasions of festivals; (f) there is an *utsava vigraham* which is taken in procession on specified occasions; (g) cars were built and a street was laid out in which processions are regularly conducted; (h) many persons regard the deity as their *kula-deivam*; (i) vows are taken for the performance of tonsure ceremony in the temple; (j) the grandfather himself built a choultry for the accommodation of travellers; (k) the grandfather kept accounts of the Hundi collections and also a list of the jewels belonging to the idol; (l) there are entries in the Village Registers in which the deity is entered as the Pattadar of some lands, and the defendants' ancestors as Dharmakartas or Poojaris of the temple; (m) there must have been statements made to Revenue officials by the member of the defendants' family from which alone the entries in Exhibits E and F could have been made showing that certain properties belonged to the temple and that the defendants' family were only trustees. As against these facts we have others: (1) that the temple was founded by the ancestor of the defendants; (2) that the management continued in the defendants' family uncontrolled hitherto; (3) that there is a tomb of the founder adjoining the shrine; (4) that some Poojas are performed to the images of the founder and his wife; (5) that the Hundi collections and other offerings have been at the disposal of the defendants' family without being called to account; (6) that the family of the defendants are the Poojaris of the temple; (7) that some sort of restriction is placed against promiscuous entrance into the shrine; (8) that the temple itself has been built upon land belonging to the defendants; (9) that in one year the 1st defendant submitted himself to be taxed in respect of the income from the temple. I have dealt with each of these circumstances separately. The cumulative effect of the circumstances

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relied upon by the plaintiffs is so strong that I have no hesitation in holding that the temple is a public one. The circumstances relied upon by the defendants are all of them explainable with reference to the fact that the original founder was a holy man and that the people trusted his successors to carry out the objects of the trust. A further explanation is furnished by the general attitude of the people in India towards persons whose ancestors had a high reputation for sanctity.

It was rightly conceded by Mr. Srinivasa Aiyangar that the question whether an institution is dedicated to public worship is ordinarily a question of fact. Nonetheless he quoted a number of decisions for the purpose of showing on what principles a conclusion of this kind should be based. Mr. Krishnaswamy Aiyar, on the other hand, cited other decisions to draw our attention to circumstances which should guide Courts in deciding whether there is dedication or not. Before dealing with these cases I should like to make one remark of a general character. In southern India, excepting Malabar, on which I shall say a few words later on, there is no private temple in which the outside public has established Kattalais and in respect of which they have built Chatrams for the accommodation of travellers. Mr. Srinivasa Aiyangar with his large experience of litigation told us that he is unable to mention another instance of a similar kind. He referred to temples in Malabar and to private institutions in Bengal. It is necessary to deal with these two instances. In Malabar people are divided into Tarwads, which are practically separate domains; each clan or Tarwad has its own place of worship, its own burial ground, its own bathing tank, etc. Each of these Tarwads has been regarding itself as a separate entity different from the rest. There are, therefore, numerous private temples in Malabar and the questions which have come before the Courts have mostly related to the right of trusteeship in such temples inhering in the members of the Tarwad. Malabar in this respect stands by itself. This clannish feeling is not what we find outside the west coast. In the south, common worship in the temple, and communal rights in burial grounds and in bathing places are everywhere

to be found. Therefore, in dealing with a case coming from the east coast, no decision in respect of temples situate in Malabar can be of any practical assistance. As regards Bengal again, it will not be gain-said that there public temples do not exist to the same extent to which they do in the south. Whereas the rule in the south is that endowment of property is made to the idol in a temple, in the north we find innumerable instances where endowments are made in the name of a reputed saint who worships the idol. The personal sanctity of the founder seems to have had more influence in the north than in the south. When we remember that most of the temples in the south do not owe their existence to Aryan influence but were built and endowed by the non-Aryans and when we also remember that the endowments in the north are mostly by Aryans, the distinction between the two classes of temples would be apparent. Moreover, no cases from Calcutta were quoted before us to show that the outside public established Kattalais or performed festivals in temples owned by a private individual. Therefore, the cases relating to Malabar and to Bengal would not help us in the determination of the present case.

With these preliminary remarks, I proceed to discuss shortly the cases which were quoted before us. The learned Vakil for the respondents relied upon *Satrasala Venkatachellamiah v. Pouchangum Narrainappah* (25). In that case it does not appear that there was any question of dedication. In this connection I must take the opportunity of differentiating between two classes of dedications. The dedication with which we are concerned, properly speaking, is the consecration of a temple for public worship; that is throwing open the portals of a temple for public worship. It is a dedication in the strict sense of the term. In some cases the word dedication is employed to denote an endowment of property to the temple. The question has been discussed whether the mere use of the income for purposes of worship amounted to a dedication of the property to a temple. In the case of a dedication of the second kind, it has to be shown that the property ceased to belong to the individual and was given up for the use

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of the temple. In the first class of cases it will generally be sufficient to show that there has been free access to the temple, and that there have been public worship and public celebrations. I think it is necessary that we should bear in mind these distinctions in dealing with some of the cases. In the case in *Satrasala Venkatachellamiah v. Pouchangum Narrainappah* (25) the question was whether the person who built the temple or the person who installed the idol was entitled to management and possession. The question of dedication was not in issue in that suit. The decision in *Satrasala Venkatachellamiah v. Pouchangum Narrainappah* (33) makes this position clear. The next case quoted was *Ohemmanthatti Ohapunni Naiyar v. Meyene Itachi* (26). That is a Malabar case. In that case, the question was whether the property was inalienable because it was attached to a temple. Here again no question of dedication was considered. *Pattanur Valangeri v. Narayanan Nambiar* (28) is another Malabar case. Reference was made in that judgment to a decision, *Appu Pattar v. Kurumba Bhagwati* (20). In that decision, the learned Judges distinctly say that there was no issue whether the temple was public or private. Therefore, the case was decided on assumptions. These were all the Madras cases referred to. The next case was one *Doe d Howard v. Pestonji* (34). As pointed out by Mr. Krishnaswamy Aiyar, this case seems to have depended largely upon the view taken by the Chief Justice that the document exhibited in the case was not sufficient to operate as a conveyance of property. In more than one place the learned Chief Justice says that there are no words of conveyance and there are no trustees to whom the property is conveyed. Apparently at the time this case was decided it was considered essential that to have an effective dedication there must be a deed which an *English lawyer* would regard as a proper conveyance. Moreover in that case there was a special reservation by the executants of documents in these words: "The property shall always be subject to our authority and to that of our heirs." See page 536. The decision in *Konwar Doorganath Roy v. Ram Chunder Sen* (24) admittedly related to a private

(33) Sud. Dew. Ad. (1854) 100.

(34) Perry's Oriental Cases, 535; 4 Ind. Dec. (o. s.) 488.

temple. The question in that case was whether the utilisation of the income by the family was evidence of dedication of the property to the idol. The Judicial Committee came to the conclusion that there was not sufficient evidence of endowment. This case pertains to the second class of dedication to which I referred already. This case does not affect the present case. *Pestonji Jivanji v. Shapurji Edulji Ohinoy* (35) has no bearing on the present case. There apparently the founders' heirs were held to have the right of the management and to have the right to prohibit the Parsee community from putting up a new tower. When the founders' descendant sued for an injunction to restrain the erection of the new tower, it was held that it was not established that the public had this right to so put up the new tower. No question as regards dedication is discussed by the Judicial Committee. There was an issue about it and the Judicial Committee accepted a finding of fact and proceeded to give their decision on the basis of that finding. These are all the cases relied on on behalf of the respondents.

Mr. Krishnaswamy Aiyar for the appellants quoted a large number of decisions before us. The most important of them is the judgment of Mr. Justice Scott in *Thackersey Dewraj v. Hurbhum Nursey* (3). The circumstances relied on as indicating dedication are to a large extent the same as those to be found in the present case. Great stress was laid in that case on the fact that the temple was open to public worship. The next decision in *Monahar Ganesh Tambikar v. Lakhmiram Govindram* (1) is a very instructive case. The learned Judges, of whom Mr. Justice West was one, say:—"It is indeed a strange, if not wilful, confusion of thought by which the defendants set up the Shri Ranchhod Raiji as a deity for the purpose of inviting gifts and vouchsafing blessings, but as a mere block of stone, their property for the purpose of their appropriating every gift laid at its feet. But if there is a juridical person, the ideal embodiment of a pious or benevolent idea as the centre of the foundation, this artificial subject of rights is as capable of taking offerings of cash and jewels as of

(35) 35 C. 478; 12 C. W. N. 465; 35 I. A. 79; 7 C. L. J. 401; 10 Bom. L. R. 287; 18 M. L. J. 199; 14 Cal. L. R. 102; 4 N. L. R. 65; 3 M. L. T. 399 (P. C.).

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land. Those who take physical possession of the one as of the other kind of property incur thereby a responsibility for its due application to the purposes of the foundation—compare *Griffin v. Griffin* (36), *Mulhallen v. Marum* (37), *Aberdeen Town Council v. Aberdeen University* (38). They are answerable as trustees even though they have not consciously accepted a trust, and a remedy may be sought against them for maladministration by a suit open to any one interested, as under the Roman system in a like case by means of a *popularis actio*." This quotation, if I may say so with respect, very succinctly sums up the duties of persons who found temples. In the beginning, the offerings are made without any idea of calling the founder to account because of the sanctity of the shrine and because also of the piety of the founder. It would be almost repugnant to all notions of Hindu theology that this founder and his heirs should be permitted to regard the deity as their private property, for exhibiting which they are entitled to make income for themselves. It would undoubtedly be regarded as a fraud practised upon the public that the income derived with reference to the sanctity and holiness of a shrine should be regarded as the perquisites of the persons in charge, and that they should be allowed to mismanage and misappropriate the income. The offerings are handed personally to them because they are the custodians of the deity; they should utilise these offerings for the benefit of the deity and for providing conveniences for the worshippers who come there for worship. It would strike at the very root of religion in India to hold that the person who is permitted by the worshippers to receive the offerings is the owner of the income and not simply the trustee thereof. The passage from 12 Bombay is a compendious expression of Hindu ideas on this question. In *Ohintaman Bajaji Dev v. Dhondo Ganesh Dev* (4); a temple was regarded as public, notwithstanding the fact that the founders and their heirs mixed the income arising from the offerings with their own private income and notwithstanding the fact that the temple itself was built over the grave of the first founder. *Jugalkishore v.*

Lakshmandas Ragunathdas (6) and *Girdharlal v. Naranlal* (8) are further instances of the same kind. In Madras, the most notable instance of a temple, originally founded by private persons, being regarded as a public temple is the Chidambaram temple. The Archakas there claim to have come down to earth along with the idol they have set up. Undoubtedly every pie that is offered is distributed among the Archakas. They keep no accounts which is open for public inspection. They render no accounts to the public of the income. But there is no doubt that the public have a right of access to the temple. The public have largely endowed Kattalais for the worship, have established choultries, have constructed feeding houses and are conducting festivals. Naturally these circumstances have been taken into account in pronouncing that the temple is a public one and not a private one. [See *Natesa v. Ganapati* (9).] During recent years there have been some cases in Madras which require consideration. *Peesapati Sitaramanujachari v. Panduri Vellamma* (10) and *Muthiah Chetti v. Periannan Chetti* (39) and *Subramania Aiyar v. Venkatachala Vadhyar* (11) are cases where the question arose whether the temple was a public one or a private one. In all of them the conclusion was that the temple was a public one, *Peesapati Sitaramanujachari v. Kunduri Vellamma* (10) was decided by the Chief Justice and Srinivasa Aiyangar, J. The question there arose directly. Mr. Justice Srinivasa Aiyangar refers to the fact that there was an installation of a stone idol and the introduction of a copper idol. He says: "In fact, the Puja and other services in the temple in no way differ from those in a public temple. It is admitted that the general public, ever since the construction of the temple and the consecration of the idols, have been worshipping in the temple. It is said that they do so with the permission of the Dharmakarta for the time being." * * * "It is also clear from the evidence, that the general public have been making offerings and fulfilling vows in the temple." * *

* "Exhibit C shows that a person who was a stranger to the defendant's family gave some lands to the temple."

(36) (1804) 1 Sch. & Lef. 352; 9 R. R. 51.

(37) (1843) 3 Dr. & War. 317.

(38) (1877) 2 App. Cas. 544.

(39) 34 Ind. Cas. 551; 4 L. W. 228.

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The learned Judge then refers to other circumstances, namely the defendant's calling himself a Dharmakarta, the enfranchisement of the Inam lands, and concludes: "The evidence above set out clearly establishes that the suit temple was dedicated for public worship." The non-keeping of accounts, as in the present case, was relied on in that case and the further fact that the bulk of the property was given by the defendant's husband was also mentioned. These circumstances were held not to weigh against the public character of the temple. The learned Judge's wide experience of temple litigation gives to this ruling peculiar importance. The learned Chief Justice in a very short judgment says: "Having regard to the ideas prevailing among Hindus in this part of India, I think there is sufficient evidence of an intention to dedicate these properties for public charitable purposes, that is to say, for the purposes of a temple for the use of Hindu worshippers." I attach very great importance to this *dictum*. The learned Chief Justice has been the chief law officer of the Crown in the Presidency as Advocate-General. It was his duty as such officer to grant sanction for instituting suits under the Civil Procedure Code. In the above passage he refers to the "ideas prevailing among Hindus in this part of India," as a very important factor in coming to the conclusion that the temple was a public one. I may claim some acquaintance with temples in southern India and in my opinion the *dictum* of the Chief Justice succinctly expresses the ideas of the Hindu public on this question. The idea prevailing in south India is that when once a great man installs a deity and the public have a right of worship in it, it is a public temple. That is the consciousness of the community and the fact that this consciousness is relied on by the learned Chief Justice with his large experience on the Bench and with his knowledge gained while he was Advocate-General makes the decision in *Peesapati Sitaramanujachari v. Kanduri Vellamma* (10) particularly valuable. In *Muthiah Ohetti v. Periannan Ohetti* (39) on facts very similar to the present, the Chief Justice and Phillips, J., came to the conclusion that the temple was a public one. Ayling and Srinivasa Aiyangar, JJ., in *Subramania Aiyar v. Venkatachala Vadhyar* (11) gave a similar decision.

It is unnecessary to multiply citations further. For all these reasons I am of opinion that the temple is a public one. Mr. Srinivasa Aiyangar argued that as no date can be predicated as being the date of dedication, it must be proved that the founder dedicated it at the moment he installed the idol and otherwise no dedication should be inferred. I do not think that this contention is well founded. I should not be supposed as suggesting that the moment the idol was installed, the founder did not consecrate it for public worship. Even if that conclusion is not possible, when he purchased the property under Exhibits 15 and 15 (a) and subsequently allowed that property to be utilised for temple purposes, he must have dedicated the temple for public worship. In the absence of any writing and in the absence of any evidence of persons who were alive in 1819, it is not possible to say when the dedication was made. It is the usage in the temple and it is the practice that has been observed that should guide us in determining this point. From this point of view, I have no hesitation in holding that the temple was dedicated at least during the lifetime of Lakshmana Goundan. That disposes of the main question argued before us.

One or two subsidiary questions were casually alluded to by the learned Vakil for the respondents, on which it is necessary to say a few words. The learned Vakil argued that the present plaintiffs have not shown that they have such an interest as is necessary to enable them to institute a suit under section 92, Civil Procedure Code. No issue was taken upon this point, and we find nothing in the judgment of the two learned Judges on this question. If the point had been raised definitely, plaintiffs could have let in evidence to show that they had a substantial interest in the worship of the idol. Therefore this argument comes too late. It was next contended that the sanction obtained from the Collector is not a proper one. There were two petitions by two sets of people to the Collector. The Collector heard both of them together and passed one order on both of them, to the effect that two or more among the five signatories of the two petitions combined should file the suit. He ought to

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have no doubt specified the individuals. The three persons who actually instituted the suit were, however, three of the five persons who applied for the sanction. This irregularity in the sanction cannot vitiate the suit. Moreover, this point does not seem to have been relied on before the two learned Judges. The two petitions must be regarded as one and the order must be taken to have been passed on both, and the fact that the suit was instituted by one man who signed one of the petitions and by two others who signed the other petition is not an objection which vitiates the sanction. On the whole in my opinion the Subordinate Judge was wrong in holding that the temple is not a public religious endowment. His decision must be reversed. As regards the comments of my learned brother on some of the statements made by me, I wish it to be understood that my language was not intended to decide any question of ethnology regarding race.

BORN, J.—The only question for decision is whether the Kandasami temple in Kalipatti village of the Salem District is a public religious institution or not, I agree with the conclusion at which my learned brothers have arrived and shall confine myself to stating briefly the reasons which make me take this view of the facts. There is now little dispute about the main facts, and the controversy is really confined to the question of what inference is to be drawn from them. The following account of the history of the institution appears to be established. The temple owes its origin to Lakshmana Goundan, grandfather of the 1st defendant. In the year Vishu he installed on his house site in Kalipatti an idol of the deity from which the temple takes its name. Other objects of worship were placed in the house itself and thereafter Lakshmana Goundan removed his residence to another building. The temple was erected on the site including the portion which had been previously occupied by the dwelling house. Lakshmana Goundan was a man of small means and the funds for the erection of the temple and the conduct of the worship were derived from offerings obtained by him and from out of his earnings as a seer. As might be expect-

ed in the circumstances, the progress of the building was gradual. The main features had, however, been completed by the time of Lakshmana Goundan's death in 1857. He was succeeded by his son who survived him for a few years only, and during the long minority of the 1st defendant, the affairs of the temple appear to have been managed by a deputy, who was also a member of the family. Additions were made to the temple building and its paraphernalia by this deputy and after him by the 1st defendant. The whole structure was put up by the members of the family. The temple gradually grew in importance and the main festivals are now attended by a large number of persons of different castes and coming from several districts. The 1st defendant has done much to attract visitors to the festivals, e.g., by starting a cattle fair. From the beginning the defendants' family has had the sole conduct of the worship and unquestioned control over all the offerings. Vishu (1821) is recited as the year of the foundation in Exhibit LI, and I see no reason to doubt that this is in accordance with tradition and probably correct. Exhibit XXXII is referred to as indicating that a considerable part of the fabric had been constructed before that date. But this is in conflict with other evidence, e.g., plaintiffs' 22nd witness who remembers the temple when it consisted of nothing more than a brick *mantapam*. The name of the year Pramadi entered in Exhibit XXXII is probably a mistake. Plaintiffs at one time alleged the existence of an older shrine on the same site; but this is a baseless suggestion made for the purpose of strengthening their case in applying for sanction. I agree with the Subordinate Judge in holding that the allegations of collections by strangers for the construction of the temple and of the building of portions of the temple by others than the members of the defendants' family cannot be believed.

The material question to my mind is whether there was any dedication during the life of Lakshmana Goundan. If the temple was a private institution in his time, there is, in my opinion, no evidence which would justify a conclusion in favour of subsequent dedication to public use. There was either such dedication by Lakshmana Goundan or none at all. There is no doubt that in recent years at any rate the 1st defendant had treat-

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ed the temple and the offerings as his exclusive property and that he has publicly asserted private ownership. Lakshmana Goundan was an ardent devotee of the well-known temple at Palani and made regular pilgrimages to that place. The tradition is that in 1821 he had a dream in which he was told that, in recognition of his piety and devotion, the deity that he worshipped at Palani would make Kalipatti also his special abode. This favour was obtained through Lakshmana Goundan, but it is not stated that it was for his exclusive benefit. He certainly did not regard it in this light. The use of the public temple at Palani was followed and, far from attempting to confine the worship to his own family or a restricted circle, he took steps which indicate the desire to attract as many others as possible. The usual features of a public temple were reproduced. A processional way was formed after acquiring portions of the village site necessary for this purpose. A car was constructed, an image to be carried in procession was completed and a Chatram was built for the accommodation of visitors. The public festivals of Palani were celebrated in Kalipatti also. Contributions for special service were received from strangers (*vide* defendant's 1st witness). Lakshmana Goundan no doubt used part of the offerings for the maintenance of his family, as he was quite entitled to do. There seems to be no reliable evidence that he appropriated any considerable part of the temple income to acquiring property for himself. This was a later development. The income appears to have been comparatively small. In 1849 (Exhibit XXXIX) the collections during the chief festivals did not exceed Rs. 400. The emoluments of the deputy appointed during the 1st defendant's minority were fixed at Rs. 4 a month - Exhibit XXIII.

The contention for the defendants is that they are the owners of the temple and are entitled to dispose of it in any way they think fit, as far at least as strangers to the family are concerned. This involves a right to abandon the worship if they so please and to utilise the buildings and site for secular purposes if, *e. g.*, these are likely to prove more profitable. As far as I am able to form an opinion, this is an idea repugnant to the general sentiments of Hindus and I may add that in analagous circumstances, it would

be repugnant to the sentiments of the followers of other religions as well. It is in this light that the intentions of Lakshmana Goundan must be viewed. The feeling would be all the stronger in his case, as he is admitted by all to have been a man of strong religious convictions. He installed an image of the deity worshipped at Palani whose devotee he was. He took steps to secure that the worship should be public, and I am inclined to think that the correct inference from this conduct is that he intended that this worship should be for all time and as of right.

The defendants rely upon certain facts as indicating that this was not his intention. I agree with the learned Judge from whose decision this appeal is preferred that the defendants' witnesses as a body are entitled to considerably greater credit than those produced by the plaintiffs. The question is, what weight is to be attached to their statements in so far as they seem to support the case of private ownership. There is a considerable body of evidence to the effect that on certain occasions, at any rate, entry into the temple is restricted to those who place offerings in the Hundial box. The witnesses state that those who do not pay must perform their worship from without the gateway. No case of exclusion is established. It is within my own experience that Hundial boxes are kept at the entrance of some temples which are undoubtedly public, and the contributions so received form no inconsiderable part of the income of those institutions. An ordinary worshipper considers it part of his duty to make a contribution, however small. I have no doubt that the witnesses are speaking the truth when they say that those who go in make payments, but I am not satisfied that there are any sufficient grounds for holding that this is conduct which establishes rights of ownership in the defendants' family. Some witnesses who contribute to Maravanai state that they do so only with the permission of the defendants. In my opinion, this is not of much importance when it is remembered that the defendants are undoubtedly the sole managers and Poojaris. Permission would naturally be asked from them and they must have a wide

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discretion in deciding whether certain services are to be conducted or not. Most of the statements of the witnesses as to the authority of the defendants over the temple and the offerings are not inconsistent with their powers being limited to those just referred to. The effect of opinions expressed as to private ownership is also discounted by proof of acts and conduct on the part of strangers, which are inconsistent with such a view being held.

§ Certain facts in connection with the temple and the worship performed there are relied upon as showing that it is private institution. These are (1) that no entry is permitted into the Idumbar shrine which appears to stand on the site of the Pooja room of the original house, (2) that the founder is buried within the walls, though not inside the temple and (3) that Pooja is offered at his tomb and to effigies of himself and his wife. The history of the foundation and the repute which Lakshmana Goundan had, account sufficiently for these facts and they do not seem to me to be inconsistent with the temple being a public institution. The acts of reverence so done are subsidiary to the worship of the deity to whom the temple is consecrated and by whose name it is known.

Next, reliance was placed on the fact that the temple has been treated as private by public officers. This view has been maintained in several reports made by Tahsildars and Divisional Officers, *e. g.*, Exhibits XLV (b) and XLVIII. These relate to the period of the 1st defendant's control when he was undoubtedly asserting rights of private property. It is not clear on what enquiry these opinions were based, and it must be assumed that the chief executive officer of the district who granted sanction for the institution of this suit considered the conclusions previously arrived at as open to doubt. The receipts by the 1st defendant have been assessed to income-tax from 1908—Exhibit XXVI. This naturally followed from the 1st defendant's assertions. It was no part of the business of an assessing officer to dispute his liability to pay. The Taluk Board refrained from interfering with the levy of fees for shops on temple Poramboke site during festivals. This decision seems, however, to have been come to on the general grounds

that interference with such income of any temple is inexpedient—Exhibit XLV (a).

Great stress is laid on the fact that the defendants' family has always had the control of the worship and offerings. Until this suit, no attempt was made to question the extent of the Poojari's powers of disposing of the income in any manner he pleased. It is suggested that even these proceedings have not been instituted out of regard for public interest but from less worthy motives. Assuming this to be so, it is frequently the case that indirect motives are the force which overcome the apathy generally displayed in defending public interests. If the income had remained at the modest figure which seems to have been reached at the death of Lakshmana Goundan, it is, in my opinion, very questionable if this suit would ever have been heard of. It is the growing importance of the temple and its festivals and the consequent increase in the income that has attracted interference. Allegations are made in the plaint that the services have not been conducted and that worshippers have been put to great inconvenience. These allegations, like some others made by the plaintiffs, are wholly without foundation. On the contrary, the evidence shows efficient management of the worship and festivals on the part of the defendants and complete satisfaction on the part of the great body of worshippers. In these circumstances, most persons interested were not likely to make any complaint, even though well aware that a considerable part of their offerings were being appropriated by the defendants to their own use. It has also to be remembered that to question the claims of 1st defendant involved undertaking litigation against an opponent possessed of ample means provided by the worshippers themselves. The one thing certain about such a contest is that it will be both costly and protracted. As already stated, there are distinct indications that strangers regarded the temple as a public institution. Three Chatrams have been created for the accommodation of pilgrims attending festivals. Contributions are made by strangers and sometimes solicited from them, for meeting part of the festival expenses. Several instances are proved in which arrangements have been made in the families of worshippers for securing funds required for sub-

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scriptions for the upkeep of Chatrams. Vows are performed at the temple. Many persons go there with *kavadis* just as they do to Palani, and there is also evidence that a few have adopted the deity as their *kuladaivam*. It is very unlikely that these acts would have been done if the temple had not been regarded as public. It is true that there is no evidence of any direct endowment in the shape of lands. The fact that the temple stands on *grama nattam* is unimportant. The site belonged to Lakshmana Goundan and the erection of the temple there does not indicate that it was either public or private. Some lands which were originally personal Inams were acquired by Lakshmana Goundan in his own name without any indication in the title deeds that they were intended for the benefit of the temple; but they are now entered in the public records as held on behalf of the temple by the Poojaris. The history of the entries is not very clear. But they are certainly some indication that the successor of Lakshmana Goundan, in whose time they were made, regarded the acquisitions as having been intended for the benefit of the temple. A portion of an Ayan Patta land, Survey No. 19/4, belonging to the defendants' family was transferred during the minority of the 1st defendant to temple Poramboke. This is, in my opinion, a significant circumstance. It is most unlikely that such a transfer would have been applied for or would have been sanctioned, unless the Pattadar had wholly abandoned any claim to use the land as a source of private gain—yet rental obtained from this land is now claimed by 1st defendant as his private property—[*vide* Exhibit 24 (d)].

In the result, I think that the inference I have drawn as to Lakshmana Goundan's intention from his conduct is not rebutted by evidence produced on the side of the defendants, and that it does receive support from the attitude of strangers towards the temple and from the manner in which some lands have been dealt with by members of the defendants' family. I agree with the order proposed by my learned brothers. Speaking for myself, I trust that in the framing of a scheme, due regard will be paid to the position which the defendants' family has always held in connection with this institution and that interference will

be limited to such measures as are necessary to secure that the income of the temple is properly utilised and accounted for by the defendants and their successors-in-office.]

Appeal allowed.

M. C. P.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 707
OF 1918.

May 12, 1919.

Present:—Justice Sir Asutosh Chaudhuri, Kt.,
and Mr. Justice Cuming.

ANNODA CHARAN MONDAL—
DEFENDANT No. 2—APPELLANT

versus

ATUL CHANDRA MALIK AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Probate and Administration Act (V of 1881), s. 90
—*Letters of Administration granted to Hindu widow*
—*Mortgage by widow with sanction of Court, validity of—Legal necessity, proof of, whether necessary—Mortgagee, duty of—Civil Court, whether can set aside grant of Letters of Administration—Pleadings—Fraud, suit based on—Particulars required.*

It is not necessary for a person taking a mortgage from a Hindu widow, who has obtained Letters of Administration to the estate of her deceased husband and has also obtained the sanction of the Probate Court to effect the mortgage, to enquire about the necessity for the loan. If he *bona fide* relies upon the order of the Probate Court and makes the advance, there is no onus upon him to go and enquire about the truth of the allegations upon which the sanction to mortgage was granted to the widow. A reversioner challenging the transaction must show that the mortgagee knew that the facts on the basis of which the sanction was obtained were false, or that he was instrumental in getting the order from the Court on false representations. [p. 199, cols. 1 & 2.]

The proper Court to set aside a grant of Letters of Administration is the Probate Court and a Civil Court has no jurisdiction to declare an order granting Letters of Administration as null and void [p. 200, col. 1.]

When a transaction is assailed on the ground of fraud, allegations of fraud must be particularised in the plaint. [p. 200, col. 1.]

Appeal against the decree of the Additional District Judge, Howrah, dated the 14th of January 1918, reversing the decree of the Subordinate Judge, Howrah, dated the 23rd of September 1916.

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FACTS appear from the judgment.

Babu Dwarka Nath Chakraverty (with him Babu Asiranjan Chatterjee), for the Appellant.—The mortgage was made by the widow not as a Hindu widow but as administratrix to the estate of her deceased husband, and, therefore, under section 90 of the Probate and Administration Act the mortgage is binding on the plaintiffs who are the reversioners. The suit ought to fail for this reason only that the plaintiff has suppressed the fact that the mortgage was made by the widow as administratrix to the estate of the deceased Gopal Chandra and has stated in the plaint that the properties were dealt with by the widow as a mere Hindu widow's estate. Irrespective of legal necessity, so long as the sanction granted by the District Judge to mortgage the properties in suit stands good, the mortgage cannot be challenged unless fraud or collusion in obtaining the sanction is proved. But in this case no such proof has been given. As the plaintiffs did not even allege *mala fides*, fraud or collusion in obtaining the sanction, the suit is not maintainable. Refers to *Kamikhya Nath Mukerjee v. Hari Churn Sen* (1). The mortgage having been made with the sanction of the District Judge, the mortgagee is protected. Further, the defendant No. 2, the appellant, is not bound to account to the plaintiffs as to whether the mortgage was satisfied or as to whether the mortgage was for consideration.

This is not a case of alienation by a Hindu widow, and, therefore, the suit by the plaintiffs is not maintainable. Refers to section 4 and section 90 of the Probate and Administration Act.

Babu Ram Chandra Majumdar (with him Babu Bijon Kumar Mukherjee), for the Respondents.—The appeal is concluded by findings of fact, and your Lordships cannot, in second appeal, interfere, however gross and inexcusable the error in the findings of fact may be. Refers to *Durga Chowdhurani v. Jewahir Singh Chowdhari* (2). There is no force in the argument that as there is sanction under section 90 of the Probate and Administration Act the

transaction cannot be impeached unless the sanction is revoked. The object of granting Letters of Administration is not to give validity to debts incurred by Hindu widows or owners of limited interests to serve their own private purposes. In this case the husband of Mokhada did not leave any debts behind him. The debts were all incurred by the widow or by her father who was managing the estate on her behalf. By taking the Letters of Administration the position of the widow is not changed. As to the force of Letters of Administration and sanction under section 90, see *Nursingh Chunder Bysack, In the goods of* (3), *Lalit Chandra Chowdhury v. Baikuntha Nath Chowdhury* (4). The Letters of Administration can be treated as a nullity if they were granted without jurisdiction. In view of the findings of fact that the mortgage was not for legal necessity and the mortgage did not make the enquiries which he was bound to make, the second appeal must fail.

Babu D. N. Chakraverty, in reply.—The validity of the Letters of Administration cannot be challenged in this Court.

JUDGMENT.—The plaintiffs instituted the suit for a declaration that they were the reversioners of the estate of one Gopal Chandra Shaw, their maternal uncle, that a mortgage which had been executed by his widow Mokhadamoyee Dassi was not operative against them and that the properties covered thereby could not be sold in execution of the decree obtained by the mortgagee against her. They also applied for a temporary injunction restraining the sale and for a declaration that they were not affected by the mortgage deed or the decree or by the sale of the mortgaged properties as directed by the said decree. It appears that the plaint was subsequently amended and an allegation was added that the mortgage-debt had been satisfied. It was also alleged by them that the lady had no legal necessity and, therefore, could not bind the estate in any manner. It is noticeable that there is nothing said in the plaint about this lady having obtained Letters of Administration to the estate of her husband.

(1) 26 C. 607.

(2) 18 C. 23 at p. 30; 17 I. A. 122 (P. C.); 5 Sar. P. C. J. 560.

(3) 3 O. W. N. 635.

(4) 5 Ind. Cas. 395; 14 O. W. N. 463; 15 O. L. J. 305.

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It is clear upon the evidence that citations were issued so far as the reversionary heirs were concerned and that some of them were present when the Letters were granted. There is no question that the plaintiffs are the present reversionary heirs of Gopal Chandra Shaw.

The learned Subordinate Judge held that there was legal necessity for the loan contracted by the widow Mokhadamoyee, that she applied for leave to mortgage the property after having obtained Letters of Administration and such leave was granted by the Court, that the reversioners, at least some of them, had knowledge of the application but did nothing. He held upon these facts that the plaintiffs "had knowledge of the legal necessity." As regards the allegation that the mortgage-debt due to the decree-holders had been satisfied, he found that the documents relied upon by the plaintiffs were not genuine, that the mortgage bond "had not been paid in part and not been satisfied from the income of the land in the mortgage suit," and, therefore, it stood good and valid. He, therefore, dismissed the suit.

On appeal the learned Additional District Judge has reversed that decision upon the following findings: (1) that the mortgage in question was not for legal necessity; and (2) that the defendant No. 2, the mortgagee, did not by *bona fide* enquiry satisfy himself that there was such necessity. It appears to us that he has entirely overlooked the question about this lady having obtained sanction of the Probate Court to mortgage the property. After such sanction the defendant No. 2 advanced money, presumably relying upon the fiat of the Court. There is nothing to show, nor has it been found, that the transaction was collusive or fraudulent or that there was anything which tainted the transaction with fraud. It was not a case of advancing money having regard to the legal necessity of a Hindu widow, but merely upon leave granted by the Court which permitted her to mortgage the property. It is incorrect to suppose that having regard to the sanction given by a Probate Court a person had still to enquire as regards the necessity for such advance. If he *bona fide* relied upon the order and made the advance, there is no onus upon him to go and make enquiries about the truth of the allegation upon which the sanction was given. To challenge such a transac-

tion it has to be shown that the person who got the mortgage knew that the facts were false or that he was instrumental in getting the order from the Court upon false representation. The learned Judge has, however, elaborately gone into the question of legal necessity and he has gone to the extent that even the earlier mortgage transaction in which this estate was concerned was not a good mortgage, and he has not considered the case from the point of view we have above mentioned. We call his attention to *Kamikhaya Nath Mukerjee v. Hari Ohurn Sen* (1).

Then as regards the question of payment of the mortgage-debt, he says this:—The accounts show that Mokhada paid off the money due to Annoda, the mortgagee. He says the learned Subordinate Judge had not sufficient grounds for finding that the documents relied upon by the other side were fabrications. He doubted if there were sufficient grounds. Dealing with the accounts Exhibit 11 and an abstract of that account Exhibit 5 which purports to have been signed by the mortgagee, he says, there is no express denial of the signature by Annoda the mortgagee but that Annoda merely denied that he made the endorsement. He says that it is alleged that Annoda was looking after the property of the widow and adds: "Taking it that he was looking after the property I must say I think there is quite sufficient evidence for holding this—and it was his business to see that proper accounts were submitted and the occurrence of such an endorsement is most natural." Then he refers to the security bond which was given by Annoda and three of his relatives in respect of the Letters of Administration, and refers to the fact that they were to see that the estate was properly administered and accounts submitted and that the accounts would in the natural course be placed before Annoda. He does not definitely find that the account Exhibit 5 was signed by Annoda. He stops short of coming to such a finding; although the tendency of his mind was in that direction, he does not say so. He evidently did not feel justified in saying so. It is the same sort of equivocal finding about the letter and the postcard. He says that he doubts if there is sufficient ground for the Subordinate Judge's finding

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that they were fabrications. Having regard to the serious nature of the allegations and also having regard to the considered judgment of the Subordinate Judge, it was only right and proper that he should also definitely and clearly state his views. This is a very important point in the case, but he has not dealt with it from the proper point of view.

So far as the mortgage-deed is concerned, the suit was instituted by the mortgagee, a decree was obtained thereupon and now there is an appeal pending against that decree. The question as to whether the mortgage-deed has been paid off or not is the subject-matter for determination in that suit and if the plaintiffs knew of that suit, it was right and proper for them to ask to be added as parties so far as that suit was concerned. In the suit as framed it was not suggested that Mokhadamoyee had fraudulently suppressed the fact or that she had colluded with the mortgagee in obtaining that mortgage decree. Allegations of fraud have got to be particularized in the plaint. We do not find any such allegation here. What the precise nature of the fraud is has not been stated, nor what part was taken by either Mokhadamoyee or the mortgagee in respect of that transaction. If they want to make a case of fraud which they have not made, it may be open to them to pursue their remedies hereafter. But so far as the present suit is concerned, we do not think that any fraud has been alleged and we cannot, therefore, deal with the matter in the manner it has been done by the Appellate Court.

It has been strenuously argued before us that the Letters of Administration were obtained by Mokhadamoyee without making any allegation that anything remained to be administered in the estate, that the order was improperly made and upon insufficient materials and the sanction to borrow was also not properly granted. The Letters of Administration, however, have not been withdrawn and the Civil Court has no jurisdiction to declare the order as null and void. The proper Court to set aside the Letters of Administration is the Probate Court. We think also that it was exceedingly improper on the part of the plaintiffs not to mention anything about the Letters of

Administration in their plaint. They should not have suppressed that fact. We think it was deliberately done, inasmuch as they felt it was a serious difficulty in their way.

In the result we are of opinion that the findings upon which the learned Judge reversed the decision of the Subordinate Judge are not satisfactory and we think that he has not arrived at a wrong decision in the matter, which we now reverse. The appeal is allowed and the plaintiffs' suit is dismissed with costs in all the Courts.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 461 OF 1918.

September 24, 1919.

Present:—Mr. Findley, A. J. C.

Musammatt UMRAOBI—PLAINTIFF—
APPELLANT

versus

Musammatt HIMMATBI AND ANOTHER—
DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Suit for possession based upon false cause of action—True cause of action known to plaintiff not put forth—Subsequent suit based upon true cause of action, whether barred.

In a suit for possession the plaintiff must establish his title in that very suit by urging and proving all that would go to establish his title. He cannot reserve one or more of such grounds for a future suit. [p. 20, col. 2.]

If a plaintiff sues for property on a false claim or cause of action when in reality he has in fact and in law a true claim and cause of action for the same property of which he is aware, he must be taken in law to have abandoned his true claim and cause of action. [p. 201, col. 2.]

Ramaswami Ayyar v. Vythinatha Ayyar, 26 M. 760; 13 M. L. J. 448, followed.

Appeal against the decree of the District Judge, Nagpur, in Civil Appeal No. 156 of 1917, passed on the 28th June 1918, arising out of Civil Suit No. 112 of 1917, passed by the Additional Senior Subordinate Judge, Nagpur, dated the 31st July 1917.

Mr. Atmaram Bhagwant, for the Appellant.

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Messrs. S. K. Barlingay and K. L. Daftari,
for the Respondents.

JUDGMENT.—The sole question for decision in this second appeal by the plaintiff *Musammatt Umraobi* is whether the learned District Judge was correct in declining to follow the decision of Batten, A. J. C., in *Gopala v. Ania* (1) on the ground that the facts of that case were distinguishable from those of the present one. It is admitted that the present plaintiff-appellant brought the previous suit (*cf.* 2. D 2) in 1915, in which she claimed the property in suit as the residuary of Subhanali, whereas in the present suit she now claims as the heir of Vilayatoli. The former man died in 1905 and the latter in 1907. It is perfectly clear that in the pleadings in the previous suit the contention of the then defendant was brought to the notice of the plaintiff, *viz.*, the possibility of her being able to claim as Vilayatoli's heir, but she declined to base her title in that suit on this ground. The learned Counsel for the appellant has shown no good cause to-day as to why she could not have claimed in the alternative either as heir of Subhanali or as heir of Vilayatoli. All he has been able to urge is that the dates of the causes of action and the evidence which would have been necessary in either case would have been different. I am, however, unable to accept this position. It seems to me perfectly clear that the title under which the plaintiff was litigating was one and the same. She claimed to be entitled to the property by inheritance and it was perfectly open to her to have urged that if she could not have inherited from Subhanali, she might have inherited from Vilayatoli. Both positions were open to her at the time. As a matter of fact Vilayatoli derived his title also from Subhanali, so that the two questions could have been most conveniently and properly tried together.

The question, therefore, is whether the lower Court was bound in the circumstances of this case to follow the ruling of Batten, A. J. C., already quoted. It seems to me quite unnecessary in the present case to express any opinion as to whether I should or should not with all deference be able to accept that decision of the learn-

ed Additional Judicial Commissioner, for it seems to me that that case and the present case are clearly distinguishable. The Pleader for the appellant has urged that should I see cause to differ, the matter at issue might be referred to a Bench: but in the circumstances of the present case I do not think this course is necessary. In the said case Batten, A. J. C., made a distinction between it and the cases reported as *Girdhar Manordas v. Dayabhai Kalabhai* (2) and *Guddappa v. Tirkappa* (3), on the ground that the plaintiff was suing, first, as a lessor, and secondly, as an owner against a trespasser, while in the first of the cases quoted the plaintiff in both cases sued the defendant as his tenant, and in the second case the plaintiff brought two suits in both of which he sued for title. This latter position is precisely what we have in the present case, and it seems to me that the learned Additional Judicial Commissioner would not have found it necessary to follow his decision in *Gopala v. Ania* (1) on the admitted facts of the present case. Even in the decision in *Ramaswami Ayyar v. Vythinatha Ayyar* (4) the learned Justices remarked as follows:—

"This is only an authority for the position that if one is dispossessed of land and he brings a suit to recover possession on the strength of his title, he must establish his title in that very suit by urging and proving all that would go to establish his title and cannot reserve one or more of such grounds for a future suit; and this is what is laid down in Explanation 2 of section 13."

At a later part of that judgment it was also remarked:—

"If a plaintiff sues for certain property on a false claim or cause of action, when in reality he has, in fact and law, a true claim and cause of action for the same property, of which he was aware, he must be taken in law to have abandoned or relinquished his true claim and cause of action."

Now every word of the last quoted passage would seem to apply *proprio vigore* to the facts we have to deal with in the

(2) 8 B. 174 (F. B.).

(3) 25 B. 189; 2 Bom. L. R. 872.

(4) 26 M. 760; 13 M. L. J. 448.

(1) 2 N. L. R. 94.

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present case. In the previous suit the plaintiff deliberately chose, in spite of the challenge of the then defendant, to base her action on title as derived from Subhanali, while it was equally open to her at the moment to have either in the alternative or as a supplementary ground to have based her claim on inheritance from Vilayat-ali. She deliberately refused to take this course, although she was challenged to do so by the defendant. I would also refer in this connection to the remarks of their Lordships of the Privy Council in *Kameswar Pershad v. Rajkumari Ruttan* (5), which seem to me peculiarly apposite in the present case. Supposing the defendant in the previous suit in 1915 had not taken the defence he did with reference to Vilayat-ali, can it be for one moment supposed that it would subsequently be open to him in the event of the plaintiff's success to have filed a suit for a declaration in favour of the title which he alleged had passed to him? This supposition seems to me a quite impossible one. As was remarked in the case of *Guddapa v. Tirkappa* (3), it seems to me clear that the present plaintiff could also in the previous suit have urged his heirship from Vilayat-ali as a ground of title. It existed at the date of the former suit, and in the present case it has not been suggested that the plaintiff was ignorant of it, nor has any tenable ground of excuse for that plea not having been put forward been suggested in this Court. The decision of Scott, C. J., and Batchelor, J., in *Hargovan Ramji v. Mulji Harjivan* (6) goes considerably further than it is necessary to do for the purposes of the present case; while the decision of the majority of the Judges in *Masilamania Pillai v. Thiruvengadam Pillai* (7) is clearly in favour of the contentions urged on behalf of the present respondents. That decision, I may remark, came into existence several years after the decision of Batten, A. J. C., in *Gopala v. Ania* (1) and had it not been that I think the present case is distinguishable both for the reasons given above and for those specified by the learned District Judge from the

decision in *Gopala v. Ania* (1), it might have seemed advisable to me to have referred the point for the opinion of a Bench. As it is, however, I am forced to the conclusion that the finding of the District Judge that the present appellant's suit was barred by section 11 of the Civil Procedure Code was correct. The appeal accordingly fails and is dismissed. The appellant must bear the respondents' costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1633 OF 1918.

August 19, 1919.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Moore.

VENKITASUBBAN PATTAR AND OTHERS
—DEFENDANTS NOS. 1, 3 TO 6, 8 TO 10, 14 TO
16, 18, 21, 25 TO 27, 31 TO 37, 40, 42, 44
AND 29—APPELLANTS

versus

AYYATHURAI alias RANGANATHA
SASTRIGAL AND OTHERS—PLAINTIFFS
NOS. 1 TO 7 AND DEFENDANTS NOS. 7, 24, 28,
39, 41 AND 43—RESPONDENTS.

Village temples—Control and management vested in villagers—Decision of majority, whether binds minority—Civil Procedure Code (Act V of 1908), s. 11—Res judicata, determination of, by reference to pleadings, issues and judgment—Question of law, when res judicata.

The relationship of the inhabitants of a village in respect of a temple and its properties owned and managed by them in common partakes more of the character of a corporation than that which exists among the members of a club or trustees, public or private, and the law regulating the latter does not apply to them. [p. 205, col. 1.]

In matters relating to the management of village temples the decision of the majority in meetings duly convened binds the minority. [p. 205, col. 2.]

To constitute a matter *res judicata* the matter directly and substantially in issue in the subsequent suit must be the matter which was directly and substantially in issue, either actually or constructively, in the former suit. Whether a matter has been dealt with and adjudicated on is to be determined by a reference to the plaint, the written statement, the issues and the judgment. An issue of law may be *res judicata* if the cause of action in

(5) 20 O. 79; 19 I. A. 234; 6 Sar. P. C. J. 241.

(6) 4 Ind. Cas. 241; 34 B. 416; 11 Bom. L. R. 921.

(7) 31 M. 385.

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the subsequent suit is the same as that in the former suit. The operation of a decree as *res judicata*, so far at any rate as the subject-matter of a direct adjudication contained in the decree is concerned, can in no way be affected, in the absence of fraud or collusion, by the fact that the suit was the result of a mistake of law or that the decree proceeded on such mistake. As between the parties thereto it must be held to be binding and to operate as *res judicata*. [p. 206, col. 2.]

Second appeal against the decree of the District Court, South Malabar, in Appeal Suit No. 500 of 1917, preferred against the decree of the Court of the District Munsif, Alatur, in Original Suit No. 54 of 1916.

FACTS.—Suit for an injunction to restrain the defendants from establishing an idol in the common village of the plaintiffs and defendants. The defendants formed the majority of the villagers. A suit for injunction in respect of the same dispute by these plaintiffs against these defendants was disposed of in second appeal by the High Court in 1895, when it was held that the defendants having acted wrongly inasmuch as they did not consult these plaintiffs, the injunction was properly granted. But the right to establish the particular Lingam then in dispute (called a Bana Lingam) was not adjudicated on, as it was outside the powers of a Civil Court. According to the decree, the defendants gave notice to the plaintiffs convening a meeting. But the evidence on record did not show either that a meeting was held or that the plaintiffs were allowed an opportunity of expressing their views. The Lingam in the present suit was a different one from the previous suit. Both the lower Courts granted the injunction. The defendants appealed.

Messrs. O. V. Ananthakrishna Aiyar and S. V. Parameswara Aiyar, for the Appellants.—A village community is like a corporation and the rule as to corporate bodies applies, *vis.*, the will of the majority will prevail. *Yegnarama Dikshitar v. Gopala Pattar* (1), following *Hasan Raza Sahib v. Hasan Ali Sahib* (2).

[SESHAGIRI AIYAR, J., asked whether there was anything in the decision of 1895 which could operate as *res judicata*.]

There is no *res judicata*. For that suit was restricted to the attempt to consecrate a particular Lingam. The present Lingam is different. The decision was not an adjudication *in rem*.

The Court could not have adjudicated on what was purely a religious or caste question. See *Lali Shamji v. Walji Wardhaman* (3), *Kaveri Ammall v. Sastri Ramier* (4), *Krishnasami Chetti v. Varasami Chetti* (5). These cases clearly lay down that a *bona fide* decision arrived at by the majority of the community in respect of purely religious or caste questions will bind the minority.

Mr. P. R. Ganapathy Aiyar for the Hon'ble Mr. T. R. Ramachandra Aiyar and Mr. O. S. Ananthanarayana Aiyar, for the Respondents.—The villagers form the trustees of a private trust. Hindu idols are property with which the Court can deal as with other property. In dealing with such property the majority of the trustees cannot act by themselves, in the absence of express provision therefor. It may be that in public trusts the majority may bind the minority. In *Luke v. South Kensington Hotel Co.* (6) the act of two of the trustees alone in foreclosing a mortgage was held not to bind the other trustees and the trust. See also *Astbury v. Astbury* (7) (acknowledgment by some of the trustees alone held insufficient).

Corporations stand on a different footing, as they act through the members. Trustees are jointly and severally liable. See *Ebsworth & Tidy's Contract, In re* (8), *Ramanathan Chetti v. Murugappa Chetti* (9), *Eyunni Raghavacharyulu v. Epuri Govindasari* (10). See also *Tempest v. Camoys* (11), where it was held that a power cannot be exercised by a majority so as to bind a dissenting

(3) 19 B. 507 at p. 526.

(4) 26 M. 104 at p. 110; 13 M. L. J. 58.

(5) 10 M. 133.

(6) (1879) 11 Ch. D. 121; 48 L. J. Ch. 361; 40 L. T. 638; 27 W. R. 514.

(7) (1898) 2 Ch. D. 111; 67 L. J. Ch. 471; 78 L. T. 494; 46 W. R. 536.

(8) (1889) 42 Ch. D. 23 at p. 49; 58 L. J. Ch. 665; 60 L. T. 841; 37 W. R. 557.

(9) 29 M. 283 at p. 288; 10 C. W. N. 825; 33 I. A. 139; 1 M. L. T. 327; 3 A. L. J. 707; 4 C. L. J. 189; 16 M. L. J. 265; 8 Bom. L. R. 498 (P. C.).

(10) 48 Ind. Cas. 198; 41 M. 1068; 35 M. L. J. 202.

(11) (1882) 21 Ch. D. 571; 51 L. J. Ch. 785; 48 L. T. 13; 31 W. R. 326.

(1) 41 Ind. Cas. 738; (1917) M. W. N. 595.

(2) 38 Ind. Cas. 528; 40 M. 941; (1917) M. W. N. 889; 5 L. W. 409; 33 M. L. J. 348.

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minority. The Courts have always been reluctant to say as a general proposition of law that the majority may override the minority. That is regarded as an exception to the general rule. See also *Yegnarama Dikshitar v. Gopala Pattar* (12).

Mr. C. V. Ananthakrishna Aiyar, in reply.—*Yegnarama Dikshitar v. Gopala Pattar* (1) lays down that where private ownership is set up on behalf of a fluctuating body like the present, it has to be strictly proved. See also *Suppan Asari v. Vannia Konar* (13), which clearly lays down that a caste as a body may hold property in a corporate capacity, even though the right *inter se* among the members is not by contract but a matter of status.

JUDGMENT.—Plaintiffs and the defendants are members of Kuzhalmannam, a Brahmin village in the Palghat Taluk. The suit was brought for a perpetual injunction restraining defendants Nos. 1 to 45 from consecrating a Lingam in the Siva temple in the village which belongs in common to plaintiffs and the defendants without the consent of the community as a whole. It appears that for many years past the village has been divided into two factions, known as the eastern and western factions. Plaintiffs and defendants Nos. 45 to 57 belong to the western faction. Defendants Nos. 1 to 44 belong to the eastern faction and are in a numerical majority. It seems that the Shiva Lingam was stolen in 1888 and the members of the 1st defendant's faction wanted to have it replaced by another. The proposal was opposed by the plaintiffs' faction and litigation ensued, and the plaintiffs' faction succeeded in obtaining an injunction restraining the defendants from consecrating the particular Lingam in dispute. Plaintiffs' case, as put forward in the plaint, shortly was that in January 1916 some members of 1st defendant's party sent a notice stating that a meeting of the members of the community should be convened to decide the question of consecrating a new Lingam, that a meeting was held but had to be postponed as the leading members of the 1st defendant's faction stayed away and no definite decision was arrived at, that the Lingam which

was proposed to be consecrated was not fit to be consecrated, and that they were entitled to a perpetual injunction restraining the defendants' party from performing the Linga Prathista without consulting the plaintiffs' party. The answer of the contesting defendants was that the plaintiffs purposely abstained from attending the meeting on January 23th, 1916, at which it was resolved that the Kalasam should be performed. The principal issues in the suit were, whether there was a valid consultation in regard to the performance of the Linga Prathista among the villagers as alleged by defendants Nos. 1, 3 and 4 and whether the defendants were entitled to consecrate the Lingam without the express consent of the plaintiffs' faction in writing, according to the custom of the village, of the parties. The District Munsif found that the defendants had not proved that there was any consultation among the villagers, and that plaintiffs were entitled to the injunction asked for. On appeal the District Judge in a brief and unsatisfactory judgment, without going into the facts or recording findings on the questions at issue between the parties, *viz.*, whether there had been any consultation among the villagers in regard to the consecration of the Lingam, and whether the defendants were entitled to fix the Lingam without the consent of the plaintiffs, disposed of the case on the broad ground "that the plaintiffs were entitled to an injunction restraining the defendants from doing anything in the temple to which they objected, unless the defendants could prove that they had constitutional authority for their action." The District Judge refused to accept the defendants' contention that the temple should be governed by the will of the majority of the house-holders, and observed that defendants' only remedy was to apply for a scheme of management. Before dealing with the questions argued before us in the appeal we may mention that the defendants did not object that the plaintiffs were not entitled to bring the suit, and we proceed on the assumption that the suit is maintainable. Mr. Ananthakrishna Aiyar for the appellants contended that, as the plaint temple is admittedly a village temple belonging to the Brahmin village Kuzhalmannam, the lower Court

(12) 47 Ind. Cas. 548; (1918) M. W. N. 595; 8 L. W. 357.

(13) 24 Ind. Cas. 467; 27 M. L. J. 110.

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ought to have held that the majority of the house-holders have the right to resolve upon any act of management relating to the temple and to enforce the same, that the consecration of a new Lingam in the temple is a proper and necessary act, and that the plaintiffs' contention that without the consent of the minority there can be no valid acts of management is unsustainable. Mr. Ananthakrishna Aiyar strongly relied upon the decision in *Yegnarama Dikshitar v. Gopala Pattar* (12), which was affirmed by the Full Bench in *Yegnarama Dikshitar v. Gopala Pattar* (12). In that case the facts were that the inhabitants of a certain village owned a temple in common and the temple owned moveable and immovable properties. Disputes as to the management of the temple properties were referred to arbitrators, who passed an award on which a decree was passed entrusting the management of the temple and its properties to the persons selected by the residents of particular streets. The plaintiffs in the suit, who were some of the villagers interested in the communal properties, sued to have it declared that a resolution passed by a majority of the villagers at a certain meeting in regard to the future management of the village Devasom was not valid and binding. It was held that the relationship of the inhabitants of a village in respect of a temple and its properties owned and managed by them in common partakes more of the character of a corporation than that which exists among the members of a club or of trustees, public or private, and the law regulating the latter does not apply to them. It was further held that when a corporation consists of an indefinite number, the major portion of the members present at a meeting is competent to bind the minority but where the body is definite, there must be a major part of the whole number, and that the rule applies to India which recognises fluctuating communities as legal persons owning property, as for instance, the caste and the village, and in matters relating to the management of caste property and the administration of its affairs the majority of the caste has authority to control the minority.

We think that the principle of this decision applies to the present case, although

it is true that the act complained of, *i.e.*, the proposed consecration of a Lingam in the temple, is of a religious nature and not strictly speaking a matter relating to the administration of the temple. The right to establish a Lingam in the temple is an incident of the management of the temple by its owners. The plaintiffs state that the temple belongs in common to both the factions of Kuzhalmanam village. We think that the proper view to take is that the relationship of the Brahmin house-holders, an indefinite number of persons, in respect of the temple and its property is analogous to the case of a corporation which owns properties and that a majority of the members are competent to bind the minority and that the principle which governs the case is that laid down in *Cooper v. Gordon* (14). In *Cooper v. Gordon* (14) it was laid down that so far as the administration of the affairs of a church was concerned, the appointment of a minister by the majority bound the minority. As observed by Mr. Justice Abdur Rahim in *Yegnarama Dikshitar v. Gopala Pattar* (1) with reference to village and caste owning property, "If such an indefinite and fluctuating body had not the inherent powers to provide for the management of their property by means of resolutions which had the approval of the majority and passed at a meeting properly and regularly convened, the business of such communities could not be conducted at all." In this connection we may refer to the pertinent observations of Mr. Justice Farran in *Lalji Shamji v. Walji Wardhman* (3): "It is clear upon the authorities that in matters relating to management of caste property and the administration of its affairs, the majority of the caste has authority to control the minority." The learned Judge further observes that, in the absence of a written or proved customary constitution, the affairs of a caste could not be administered if the decision of a majority duly arrived at and notified were not binding on the minority. We are altogether unable to agree with the view taken by the District Judge that "it would be unsafe to allow any self-constituted body (whatever that may mean) to do acts which other worshippers profess to find offensive to their

(14) (869) 8 Eq. 249; 38 L. J. Ch. 489; 20 L. R. 734; 17 W. R. 908.

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scruples and the proper course would be for the defendants to apply for a scheme of management."

Mr. Ganapathi Aiyar for the respondents endeavoured to support the decision of the lower Appellate Court on the ground that this is a case of a private trust, and contended that the act of the majority of trustees cannot bind a dissenting minority nor the trust estate, and that in order to bind the trust estate there must be the act of all the trustees. The learned Vakil cited the following cases: *Luke v. South Kensington Hotel Co.* (6) and *Astbury v. Astbury* (7). These decisions do not appear to have any bearing on the questions raised by the appeal. No such case was raised on the pleadings or issues. It was never suggested that this was a case of a private trust, and that the plaintiffs and the defendants are trustees. A question of this kind not raised on the pleadings cannot be gone into in second appeal.

Next it is contended on behalf of the respondents that the suit is barred as *res judicata* by reason of the judgment and decree in Second Appeal No. 1811 of 1897. A suit, Original Suit No. 148 of 1895, was brought in Temmalprom Munsif's Court by certain members of the Kuzhalmannam village community for a perpetual injunction to restrain the defendants, who were members of the same community, from establishing a Bana Lingam in the plaint temple. It was alleged in the plaint that the Bana Lingam was Uggra (horrible) and that if established in the temple, it would "bring misery and wretchedness to the villagers." The relief asked for was a perpetual injunction restraining the defendants from establishing the said Lingam. The issues framed were: (2) "Is the Bana Lingam the defendants have and referred to in the plaint a good one? Will the establishment of the said Lingam be detrimental to the interests and welfare of plaintiffs and other members of Kuzhalmannam Brahmin village?" (3) Are the plaintiffs entitled to the reliefs claimed? The District Munsif found on the second issue that the Bana Lingam which the defendants desired to establish had bad properties and should be rejected as unfit to be established in the temple, and that establishing it in the Siva temple would be against the interests of the villagers, and passed a decree restraining

the defendants from establishing the Bana Lingam in the Kuzhalmannam temple. On appeal the Subordinate Judge held that the plaintiffs were entitled to the injunction, on the ground that they had not shown that in acting as they did they had obtained the consent of plaintiffs' faction, and they were bound not to consecrate the disputed Lingam unless and until the same was sanctioned by the entire community. The decree of the District Munsif was, however, varied by adding the words "unless and until they obtain the sanction of the village community as a whole after giving every member a reasonable opportunity of expressing his own opinion and influencing the opinion of the rest in the matter." In Second Appeal No. 1811 of 1897 the learned Judges (Davies and Boddam, JJ.) observed that the District Munsif had exceeded his jurisdiction in raising and deciding the 2nd issue, and that if the introduction of an idol was objected to by members of the community to which the temple belonged, the Court would interfere to prevent that being done by granting an injunction. In the result the decree of the Subordinate Judge was modified by striking out that part of the decree which qualified the injunction granted, otherwise the decree was confirmed. To constitute a matter *res judicata* the matter directly and substantially in issue in the subsequent suit must be the matter which was directly and substantially in issue, either actually or constructively, in the former suit. Whether a matter has been dealt with and adjudicated on is to be determined by a reference to the plaint, the written statement, the issues and the judgment. An issue of law may be *res judicata* if the cause of action in the subsequent suit is the same as that in the former suit. The operation of a decree as *res judicata*, so far at any rate as the subject-matter of a direct adjudication contained in the decree is concerned, can in no way be affected, in the absence of a fraud or collusion, by the fact that the suit was the result of a mistake of law or that the decree proceeded on such mistake. As between the parties thereto it must be held to be binding and to operate as *res judicata*, *Kaveri Ammall v. Sastri Ramier* (4). On a reference to the pleadings and judgments in the suits it is clear, we think, that the subject-matter

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of the former suit was entirely different from the subject-matter of the present one, and that the same questions were not directly and substantially in issue in the two suits. The grievance of the plaintiffs in Original Suit No. 198 of 1895 was that the Bana Lingam which the defendants wanted to establish in the temple was "Uggra" and that if established would bring disaster on the villagers. The District Munsif addressed himself to this particular question, as his finding on the 2nd issue shows and his decree refers to "the Bana Lingam." The Sub-Judge also held that the defendants were not entitled to establish the disputed Lingam until it had been sanctioned by the entire community. The effect of the judgment of the High Court was to restore the decree of the District Munsif. The substantial question in issue in the present suit is the right of the defendants to perform Linga Prathista without consulting and obtaining the assent of the plaintiffs' faction. We must, therefore, hold that the judgment and decree in the former suit do not operate as *res judicata*.

In the result we reverse the decrees of the lower Courts and allow the appeal. We observe that paragraph 11 of the plaint states that the Lingam which was proposed to be consecrated was not fit to be consecrated and if established, would bring misfortune on the villagers. This is a question of fact which has not been decided by the lower Court but is covered by the 7th additional issue. The case is remanded to the lower Appellate Court for disposal in the light of the above observations on the evidence on record. Costs will abide the result.

M. C. P.

Appeal allowed; Case remanded.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 158 OF 1918.

May, 30, 1919.

Present :—Mr. Justice Mullick and Mr. Justice Adami.

GANESH LAL—RECEIVER—APPELLANT
*versus*KUMAR SATYA NARAYAN SINGH—
RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XL, rr. 3, 4, O. XLI, r. 1 (s)—Order holding Receiver liable for sum of money—Appeal, whether lies—Receiver appointed by subordinate Court—High Court, power of, to examine account.

An order holding the Receiver of an estate liable to the estate for a certain sum of money is not appealable, unless it is accompanied by an order under rule 4 of Order XL of the Civil Procedure Code. [p. 208, col. 1.]

A Receiver appointed by a Court subordinate to the High Court is not an officer of the High Court, and that Court has no jurisdiction to examine his accounts in order to ascertain his liabilities. [p. 209, col. 1.]

Appeal from an order of the Subordinate Judge, Bhagalpur, dated the 29th May 1918.

Mr. Rajendra Prasad, for the Appellant.

Mr. Hasan Imam (with him Messrs. S. P. Sen, Surendro Mohan Das and S. O. Roy), for the Respondent.

JUDGMENT.

MULLICK, J.—A preliminary objection is taken by the respondent Kumar Satya Narain Singh, who is now the owner of the estate, that no appeal lies.

In my opinion this objection is well founded. Under Order XLIII, rule 1, of the Civil Procedure Code a right of appeal is given against an order under rule 1 of Order XL. Now it is admitted that the Subordinate Judge has made no order under that rule in the present case.

It has been held that there is no right of appeal against the orders of the Court giving directions in passing a Receiver's account [*Keshobati v. McGregor* (1)]. In *Mohini Mohan Patra v. Baroda Kanta Sarkar* (2) their Lordships of the Calcutta High Court, following *Edwards, In re* (3), held that it is competent to a Court to re-open a Receiver's accounts even after he has been discharged; but that an order giving directions as to

(1) 35 C. 568; 12 C. W. N. 648.

(2) 12 Ind. Cas. 780; 14 C. L. J. 445.

(3) (1892) 31 L. R. Ir. 242.

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the examination of the accounts was not appealable. On the other hand in *Anand Das v. Ram Perakash Das* (4) an order conferring power on the Receiver to pay part of the surplus income to a party was held appealable as coming within rule 1 of Order XL.

Whether or not an order declaring the Receiver liable in respect of a sum of money would have come under the purview of section 503 of the Civil Procedure Code of 1882 and would, therefore, have been appealable under section 588 of that Code, need not now be considered. It is sufficient to say that under the present Code of Civil Procedure a decision of this nature would not seem to be appealable unless it is accompanied by an order under rule 4 of Order XL. That rule gives a Court power to take certain steps against the Receiver for the realisation of the money and it seems that in the present case, until the Subordinate Judge acts under this rule, there is no right of appeal by the Receiver. The Receiver undoubtedly had a lien upon the properties in his charge in respect of salary, allowances and other dues. In the present case he has given up possession and Mr. Rajendra Prasad on his behalf thinks that the only remedy left open to him, if we hold that there is no right of appeal, is by way of separate suit against the estate. We are not called upon to express any opinion as to the mode in which the Receiver should recover such moneys as he thinks may be due to him from the estate. All that we can say is that the authority upon which the Division Bench of this Court seem to have relied in their order of the 9th May 1918, namely, the case of the *Eastern Mortgage and Agency Co. Ltd. v. Fakuruddin Mahomed Ohowdhury* (5), does not apply to the facts of this case. In that case the Receiver having paid money to a party contrary to the directions given under rule 1 of Order XL, an appeal was held to lie.

It is next contended that the order of the Division Bench, even though erroneous, is binding upon the respondent before us. From the judgment of their Lordships, however, it does not appear that the respondent at any stage made an admission that the appellants had a remedy by appeal.

Mr. Rajendra Prasad next relies upon the rule in *Gandy v. Gandy* (6). In that case it was held that a party who had maintained that a deed was to be construed in a certain manner could not afterwards be allowed to resile from that position and to maintain that the deed should be construed in a diametrically opposite manner. Following out the same line of argument Mr. Rajendra Prasad relies upon that class of cases in execution where a party, having admitted that a certain claim could not be investigated in execution proceedings, could not afterwards be heard to maintain the opposite view in a regular suit brought for the purpose of enforcing the claim. The gist of Mr. Rajendra Prasad's argument under this head is that a party cannot be allowed to approbate and reprobate at the same time. That principle, however, does not apply to the facts of the present case. Here there was nothing done by the respondent which would let in the operation of that principle. The Court was of opinion that the Receiver would be well advised to apply for a discharge, and it merely threw out a suggestion that he might possibly have a remedy by way of appeal against the decision of the Subordinate Judge in the matter of the accounts. In my opinion there is no bar to the respondent now taking the objection that as the Statute gives no right of appeal, we cannot proceed to hear the appellant.

Mr. Rajendra Prasad finally contends that the Receiver in this case was appointed not by the Subordinate Judge but by the High Court and that, therefore, any finding arrived at by the Subordinate Judge as to the liability of the Receiver to the estate is open to revision by this Court in exercise of its inherent powers.

In *Debendra Bala Dasi v. Ohandra Sekhar Prasad Singh* (7) this Court had occasion to consider whether or not the Receiver appointed by the Court on appeal, against an order passed by a Subordinate Judge refusing to appoint a Receiver at all, was to be deemed to be the servant of the Court for the purposes of Order XL of the Code of Civil

(4) 5 Ind. Cas. 69; 14 C. W. N. 183.

(5) 17 Ind. Cas. 849; 17 C. W. N. 16.

(6) (1885) 30 Ch. 57; 54 L. J. Ch. 1154; 53 L. T. 306 33 W. R. 803.

(7) 35 Ind. Cas. 589; 1 P. L. J. 449.

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Procedure. The point was raised but not decided; and if Babu Murli Lal had still been a Receiver, it might possibly have been argued that he was subject to the orders of this Court and that this Court was empowered to hear his objections in the matter of the accounts; but so far as Ganesh Lal is concerned, he clearly was appointed not by the High Court but by the Subordinate Judge. In the order of the Division Bench of this Court of the 9th May 1918 Babu Ganesh Lal was throughout treated as an officer serving not under this Court but under the Court of the Subordinate Judge, and we think that that is his true position in the matter. We cannot consider him to be an officer appointed by us and subject to our jurisdiction. Therefore we are unable to entertain the contention that the account taken by the Subordinate Judge with regard to his liabilities should be examined by us.

In these circumstances it is not necessary for us to express any opinion as to what is the effect of the Subordinate Judge's decision. The order that we shall make is that the appeal be dismissed. The Receiver, in view of the special circumstances of this case, will pay only half the costs.

ADAMI, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT. FULL BENCH.

APPEALS AGAINST ORDERS NOS. 188, 260 AND
315 OF 1918.

October 15, 1919.

Present:—Sir Abdur Rahim, Offg. Chief
Justice, Mr. Justice Oldfield and Mr. Justice
Seshagiri Aiyar.

VEYINDRAMUTHU PILLAI—

—APPELLANT IN ALL

versus

MAYA NADAN—RESPONDENT IN A. A. O.
Nos. 188 AND 260 OF 1918.

P. P. A. P. SUBBIA NADAN—RESPONDENT
IN A. A. O. No. 315 OF 1918.

Civil Procedure Code (Act V of 1908), ss. 2 (11),

47—'Representative' in s. 47, meaning of—Purchaser at sale in execution of money decree, purchaser from decree-holder, purchaser under money decree and stranger purchaser at sale in execution of mortgage, whether 'representatives' of either party to suit.

Per Abdur Rahim, Offg. C. J.—A person who has bought the property of the defendant in a suit since the institution of that suit, whether at a Court auction held in execution of a money decree passed in another suit or by private purchase, is entitled and bound to have any question relating to the execution, discharge or satisfaction of the decree decided under section 47 by the Court executing the decree, when his interest is affected either by the decree itself or by the sale held in execution of that decree, and the same rule applies to a purchaser of the property under such sale, whether he is the decree-holder himself or a stranger. Whether the purchaser in the one case or the auction-purchaser in the other is to be regarded as the representative of the judgment-debtor or the decree-holder depends upon the nature of the question raised and who the contesting party is [p. 217, col. 2; p. 218, col. 1.]

(Authorities reviewed.)

Section 47, Civil Procedure Code, should be interpreted in as liberal a spirit as the language would reasonably admit of. [p. 217, col. 1.]

The word 'representative' in the section is not confined to legal representatives. [p. 217, col. 1.]

Per Oldfield, J.—The inclusion of auction-purchasers as parties to proceedings relating to an auction-sale does not make section 47, Civil Procedure Code, inapplicable to them. [p. 218, col. 2.]

Ordinarily, the purchaser at a sale held in execution of a money decree is the representative of the judgment-debtor. Where he is also the decree-holder and his position comes in question in distinct proceedings, his character as decree-holder in one execution can have no effect on his position in another and there is nothing in authority or on principle to debar his being treated like any other stranger to the latter, no reason appearing for according him any other rights than a stranger purchaser from the judgment-debtor, whether by execution or private sale, would acquire. [p. 220, col. 1.]

The purchaser from a decree-holder purchaser under a money decree is a representative of the judgment-debtor for the purposes of enquiry into a question relating to the execution of a distinct decree affecting the same property. [p. 220, col. 1.]

The term 'representative' in section 47, Civil Procedure Code, is not to be identified with 'legal representative' in section 2 (11) of the Code and a purchaser at a Court auction represents some one, that is, either the judgment-debtor or the decree-holder. [p. 220, col. 1.]

Per Seshagiri Aiyar, J.—Where the equity of redemption is purchased under a money decree, in matters relating to the execution of a mortgage decree, the auction-purchaser under the money decree will be the representative of the judgment-debtor in the mortgage decree. [p. 220, col. 2.]

Whether an auction-purchaser, be he the decree-holder himself or a stranger or purchaser from the decree-holder purchaser, is a party to the proceedings

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in respect of the sale depends on whether the issues arising for decision relate (a) to execution, (b) to deciding rival rights of the decree-holder and of the judgment-debtor in the subject-matter. If these conditions are satisfied, the fact that others are interested in the result of the decision should not affect the jurisdiction and competency of the executing Court to deal with the matter. [p. 221, ol. 2.]

Prosunno Kumar Sanyal v. Kali Das Sanyal, 19 C. 683; 19 I. A. 166 (P. C.); 6 Sar. P. C. J. 209, applied.

Appeals against the order of the Court of the Subordinate Judge, Ramnad at Madura, is Execution Appeal No. 374 of 1918, in Execution Appeal No. 322 of 1918, in Execution Petition No. 269 of 1917, in Original Suit No. 64 of 1916, (on the file of the Court of the Temporary Subordinate Judge of Ramnad at Madura), in Execution Appeal No. 36 of 1918, in Execution Petition No. 1 of 1918, in Original Suit No. 64 of 1916, (on the file of the Court of the Temporary Subordinate Judge, Ramnad at Madura) and in Miscellaneous Petition No. 165 of 1918, in Execution Appeal No. 157 of 1918, in Execution Petition No. 269 of 1917, in Original Suit No. 64 of 1916 on the file of the Court of the Temporary Subordinate Judge, Ramnad at Madura, respectively.

FACTS.—The appellant was the vendee from a money decree-holder purchaser. The respondents were the money decree holder purchaser and a stranger purchaser under a mortgage decree against the same judgment-debtor. The first was the prior sale. The question was whether the appellant was a party within the meaning of section 47, Civil Procedure Code, so as to give him the right to present this appeal from the execution proceedings under the mortgage-decree.

These appeals coming on for hearing on the 21st February 1919, upon perusing the petitions of appeals, the orders of the lower Court and the records in the cases, and upon hearing the arguments of Mr. T. R. Venkatarama Sastriar for Mr. V. Purushothama Aiyar, for the Appellant in all, and of Mr. S. T. Srinivasagopalachariar, for the Respondent in Appeals Against Orders Nos. 188 and 260 of 1918, and of Mr. A. Chidambaram, for the Respondent in Appeal Against Order No. 315 of 1918, and the appeals having stood over for consideration till the 11th of March 1919, the Court made the following

ORDER OF REFERENCE TO A FULL BENCH.

OLDFIELD, J.—The same preliminary objection has been taken to the hearing of each of these three appeals, that they are not authorized by section 47 of the Code of Civil Procedure.

The appellant in each is the same individual. But the circumstances differ, except in so far as the same two litigations are in question in each as the origins of the respective titles of the parties. The appellant relies in Appeals Against Orders Nos. 188 and 315 on the sale of part of the suit property to him in execution of a money decree and in Appeal Against Order No. 260 on the sale of part of it to his vendor, the money decree holder, and contends that for all purposes, including these appeals, he became the representative of the judgment-debtor. These sales were, however, subject to a mortgage. On it without notice to the money decree-holder and (it is alleged) without his knowledge, between the attachment and sale under the money decree a suit was filed and a preliminary decree was obtained. After the delivery under the money decree, a final decree was passed on the mortgage and a sale took place. The purchasers of the portions of the property concerned in Appeals Against Orders Nos. 188 and 315 were respectively the mortgage decree-holder and a stranger. They have obtained orders for removal of appellant's obstruction to their possession. Appeal Against Order No. 260 relates to a sum of money in Court, which represents the crop on part of the property and has been awarded by the lower Court to the mortgage decree-holder purchaser. Shortly the array of the parties in their legal character is as follows:—

A. A. O. No.	Money Decree	Mortgage Decree.
188	Purchaser	v. Decree-holder purchaser.
315	Purchaser	v. Stranger purchaser.
260	Decree-holder	v. Decree-holder purchaser's vendee purchaser.

The first point requiring notice is that the parties' rights arose in two distinct litigations and the decision in *Mandavilli Rama Row v. Sivanarayana* (1) gives some

(1) 49 Ind. Cas. 629; 25 M. L. T. 153; 9 L. W. 81.

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support to the view that this fact alone is sufficient to negative appellant's representative character for the present purpose. But that decision is expressed very shortly and it is possible that the learned Judges concerned in fact relied on the broader considerations to be referred to later. In *Muhammad Bava Sahib v. Ramachandra Thevar* (A. S. No. 249 of 1916) it was observed that the purchaser must be a representative for all purposes or none. If there is no objection on other grounds to treating the present appellant as a representative of the judgment-debtor, the fact that he obtained the latter's interest through a Court sale in another execution and not through a private transfer does not appear to affect his rights or to deprive him of the character of a person, on whom an interest has devolved within the meaning of Order XXII, rule 10. It is only possible that one distinction may be necessary, and that only in Appeal Against Order No. 260. If the controversy had arisen in the execution of the money decree, it would have been necessary to regard appellant as the representative of the decree-holder, from whom he purchased, in accordance with the decision in *Sandhu Taraganar v. Hussain Sahib* (2) and the judgment of Wallis, J., in *Nadamuni Narayana Iyengar v. Veerabhadra Pillai* (3). But in those cases only one litigation was in question as an origin of title and the identification of the transferee with the decree-holder was clearly necessary, if the controversy between the latter and the judgment-debtor or his representative was to be settled speedily in execution and a separate suit was to be avoided. In the present case the contrary will be the result, since, as was decided in *Gour Mohun Gouli v. Dinonath Karmokar* (4) and as the judgment of Krishnaswami Aiyar, J., in the case last cited implies, section 47 does not cover disputes between a party and his representative or between the representatives of the same party. Where, as here, two litigations are in question, the purchase by a decree-holder in one of them and his temporary ownership of the property is material only in it and

can have no significance with reference to the right of his transferee of the property to intervene in execution in the other. There would accordingly seem to be no substantial reason against holding that the purchaser in that one from a decree-holder purchaser is for the purpose of execution proceedings in the other the representative no longer of that decree-holder, but of the common judgment-debtor, to whom his interest is ultimately to be traced. It may, therefore, be possible and advisable to restrict the effect of *Sandhu Taraganar v. Hussain Sahib* (2) in this direction.

The position of the parties in the present cases is, however, further complicated by the dicta of Krishnaswami Aiyar, J., in *Nadamuni Narayana Iyengar v. Veerabhadra Pillai* (3) already referred to, that "where the decree is a mortgage decree, the purchaser in execution will be the representative of the judgment-debtor and that, where property is attached and sold under a money decree, a stranger purchasing the property..... is not the representative even of the judgment-debtor, still less can he be the representative of the decree-holder." These dicta were apparently accepted in *Thangavelu Mudaliar v. Mahomed Ibrahim Sahib* (5) and were followed, although not specifically mentioned, in *Arasayee Ammal v. Sokkalinga Mudali* (6). To apply them to the present cases the appellant in Appeals Against Orders Nos. 188 and 315 will not be the representative of either party to the money decree or of the judgment-debtor either under it or the mortgage decree; and the appellant in Appeal Against Order No. 260 will not be the representative of the judgment-debtor, whose property he has acquired, but with reference to *Sandhu Taraganar v. Hussain Sahib* (2), only of the money decree, holder who has no connection with the mortgage proceedings. And accordingly section 47 will not be applicable to appellant's intervention in those proceedings in any of the cases. It has no doubt been argued before us that, if the purchaser under a money decree does not represent the judgment-debtor, he must represent the decree-holder. But the an-

(2) 28 M. 87; 14 M. L. J. 474.

(3) 8 Ind. Cas. 429; 34 M. 417; (1910) M. W. N. 662; 9 M. L. T. 152; 21 M. L. J. 928.

(4) 25 C. 49; 2 C. W. N. 76.

(5) 34 Ind. Cas. 759; 3 L. W. 377.

(6) 33 Ind. Cas. 84; (1916) 1 M. W. N. 287; 3 L. W. 289.

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answer to this, so far as it is based on authority, is given in *Krishna Satapathi v. Sarasvatula Sambasiva Row* (7) and, as it assumes what Krishnaswami Aiyar, J., did not hold, that the purchaser must have some representative character, and as it corresponds with no actual incident of the purchase, it is useless to pursue it further as a reconciliation between the alternative theories. To turn to the other party to these disputes, the person claiming under the mortgage decree sale, he will, as a stranger, be a representative in Appeal Against Order No. 315, but of the debtor according to the authority under consideration, whilst in Appeal Against Order Nos. 188 and 260, as he is himself the decree holder, no question of representation need be considered.

I have referred to the application to the cases before us of the views of Krishnaswami Aiyar, J., in detail in order to illustrate their effect in instance, typical of a majority of the combinations which can occur. The first result that the purchaser at a money decree sale cannot be regarded as a representative, entails that disputes, to which he is a party, and they will be a large proportion of those requiring settlement, cannot be dealt with except by separate suit, whether they arise in connection with the execution of that decree or of some other. This is inconsistent with the expressed disposition of the Judicial Committee and other Courts to extend the scope of section 47. It, moreover, was not justified by the learned Judge by reference to any principle; and, where, as he admitted, the purchaser obtains the right of the judgment debtor in the property, it is with all respect impossible to understand how the legal incidents, including the remedies, with their appropriate procedure, attached to that right, do not pass with it. And there is no necessity to adhere to this view in order to be consistent with other decisions. For in *Paramananda Das v. Mahabeer Doss* (8), *Kuppana Kavundan v. Kumara Kavundan* (9) and the very recent case of *Muhammad Bava Sahib v. Ramachandra*

Thevar, A. S. No. 245 of 1916, the conclusion was in favour of representation of the judgment debtor.

The case of a stranger purchaser under a mortgage decree is similarly dealt with without discussion by Krishnaswami Aiyar, J. His statement that he is the representative of the judgment-debtor is opposed to the opinion of Moore, J., in *Kasinatha Ayyar v. Uthumansa Rowthan* (10). But that decision was doubted in *Sivarama Sastri v. Somasundara Mudali* (11) and there appears to be nothing further in the authorised reports in this Presidency. Here again there is some uncertainty, although less than in the case of a purchaser under a money decree. It is, moreover, desirable that, if an authoritative decision is to be given on this part of the law, the position of purchasers at both descriptions of sales should be settled on identical considerations, so far as they are applicable. That an authoritative decision, such as my learned brother and I cannot give, is rendered necessary by the judgment of Krishnaswami Aiyar, J., in *Nadamuni Narayana Iyengar v. Veerabhadra Pillai* (3) and the cases, in which it has been followed, admits of no doubt. I, therefore, refer to a Full Bench the questions as arising in the case before us:—

1. Whether a purchaser at a sale held in execution of a money decree is a representative of a party and, if so, of which party for the purpose of enquiry into a question relating to the execution of (a) that money decree, (b) any other decree affecting the purchased property and against the same judgment-debtor.

2. Whether a purchaser from a decree-holder purchaser under a money decree is a representative of a party for either of these purposes and, if so, of which.

3. Whether a stranger purchaser at a sale in execution of a mortgage decree is the representative of a party and, if so, of which.

SESHAGIRI AIYAR, J.—I do not wish to express any decided opinion on the cases quoted before us. It is clear that they

(7) 31 M. 177; 3 M. L. T. 306.

(8) 20 M. 378; 7 M. L. J. 89.

(9) 7 Ind. Cas. 418; 34 M. 450; 20 M. L. J. 961; 8 M. L. T. 240; (1910) M. W. N. 574.

(10) 25 M. 529; 12 M. L. J. 1.

(11) 28 M. 119.

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cannot be reconciled with each other. The recent judgment of the learned Chief Justice and Kumaraswami Sastri, J., in Appeal No. 249 of 1916 renders it necessary that the whole matter should be fully considered and that a definite rule of law should be laid down for the guidance of the Courts below. One proposition seems to be hardly disputed, namely, that the purchaser who is a decree-holder, is a party to the suit within the meaning of that expression in section 47 of the Civil Procedure Code. There is considerable divergence of opinion as to whether an auction-purchaser who is not a decree-holder, is a representative of any party to the suit. In this Presidency it seems to have been assumed that he would be the representative of the decree-holder. In Allahabad this view is not accepted. The recent judgment, to which I referred, throws doubt upon the earlier Madras cases. It may lead to no violation of any general principle if he is regarded as representative of one party or the other. But it is absolutely necessary that it should be determined authoritatively whose representative he is, if he is a representative at all. I, therefore, agree that the questions proposed by my learned brother should be referred for the decision of the Full Bench.

These appeals came on for hearing on the 1st and 2nd September 1919, in pursuance of the Order of Reference to the Full Bench.

Mr. T. R. Venkatarama Sastri, for the Appellant.—Section 47 applies. See *Nadamuni Narayana Iyengar v. Veerabhadra Pillai* (3) and the cases in which it is followed.

Mr. S. T. Srinivasagopalachari, for the Respondents.—Section 47 does not apply. The appellant is not the representative of any party to the proceedings on the mortgage-decree.

[ABDUR RAHIM, OFFG. C. J.—If the sale to the appellant was not in Court auction, but privately by the judgment-debtor, you would be a representative of the judgment-debtor.]

Quite so. But section 47, Civil Procedure Code, does not contemplate proceedings under two decrees. The appellant, being a vendee from the decree-holder purchaser under the money decree, is his representative so far as that decree is con-

cerned. He is not the representative of the judgment-debtor. See *Krishna Satapasti v. Sarasvatula Sambasiva Row* (7), *Meda Ohinnasubamma v. Bapireddi Gari Ohinnayya* (12). See also *Manickka Odayan v. Rajagopala Pillai* (13), *Arthanari Ohettiar v. Nagoji Rao* (14).

[SESHGIRI AIYAR, J.—The property is sold subject to the mortgage.]

The liability of the property does not make me a representative of the judgment-debtor. See *Ganapathy Mudaliar v. Krishnamachariar* (15), *Narsinghbat v. Bandu Krishna* (16). *Nadamuni Narayana Iyengar v. Veerabhadra Pillai* (3) does not provide for the case of two decrees against the same judgment-debtor. There is no sort of privity between the appellant and any of the parties to the mortgage-decree. See *Krishnabhupati Devu v. Vikrama Devu* (17). Reference was also made to *Mandavilli Rama Row v. Sivanarayana* (18), *Thangavelu Mudaliar v. Mahomed Ibrahim Sahib* (5), *Arasayee Ammal v. Sokkalinga Mudali* (6), *Radhamadhub Holdar v. Monohur Mukerjee* (19), *Ishan Ohunder Sirkar v. Beni Madhub Sirkar* (20), *Gulzari Lal v. Madho Ram* (21).

Appeal No. 24 of 1916 (unreported) takes a contrary view to *Nadam Narayanauni Iyengar v. Veerbhadra Pillai* (3).

There is no question of *lis pendens*, as the mortgage suit was instituted only after the attachment under the money decree.

Mr. T. R. Venkatarama Sastri, in reply.—The fact that the appellant is no party to the mortgage decree does not prevent the application of section 47, inasmuch as he has purchased subject to the claims under the mortgage. See *Prosunn Kumar Sanyal v. Kali Das Sanyal* (22). See also *Matharasappa Ohettiar v. Muthu Ohettiar* (23), *Sandhu Taraganar v. Hussain Sahib* (2).

(12) 47 Ind. Cas. 628; 41 M. 467.

(13) 30 M. 507; 17 M. L. J. 291; 2 M. L. T. 347.

(14) 14 Ind. Cas. 836; (1912) M. W. N. 513.

(15) 44 Ind. Cas. 855; 41 M. 403; 23 M. L. T. 198; 27 C. L. J. 367; 34 M. L. J. 463; 4 P. L. W. 310; (1918) M. W. N. 310; 20 Bom. L. R. 580; 22 C. W. N. 553; 16 A. L. J. 53; 8 L. W. 427 (P. C.).

(16) 46 Ind. Cas. 113; 42 B. 411; 20 Bom. L. R. 495.

(17) 18 M. 13.

(18) 49 Ind. Cas. 629; 25 M. L. T. 153; 9 L. W. 81.

(19) 15 C. 756.

(20) 24 C. 62 (F. B.); 1 C. W. N. 36.

(21) 26 A. 447; A. W. N. (1904), 61; 1 A. L. J. 85.

(22) 19 C. 683; 19 I. A. 166 (P. C.); 6 Ser. P. C. J. 209.

(23) 50 Ind. Cas. 931; 9 L. W. 596.

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OPINION.

ABDUR RAHIM, OFFG. C. J.—This is a reference to the Full Bench made in certain appeals against orders which arose under the circumstances mentioned in the order of reference. Briefly speaking, the claims of the decree-holder-purchaser of the disputed property in execution of a money decree and of his vendee having been disallowed as against the purchasers under a mortgage decree, one of them being the decree-holder himself with respect to a part of the property, the purchaser of the other part being a stranger, the question arose whether the order of the lower Court comes within the purview of section 47 of the Code of Civil Procedure and is, therefore, appealable. The suit on the mortgage was instituted after the attachment in execution of the money decree and the sale under the money decree which was subject to the mortgage was made between the dates of the preliminary mortgage decree and the final decree. I shall proceed on the basis assumed in the order of reference that the question that has arisen relates to execution, discharge or satisfaction of the decree within the meaning of section 47, and that all that we are asked is whether such a question arose between the parties to the suit in which the decree was passed or their representatives.

As I understand the facts, the question in the appeal arose in execution of the mortgage decree; and, so far as the decree-holder-purchaser is concerned, there can be no question of his position as he is a party to the suit.

But the decisions of this Court as to who are to be deemed, within the meaning of section 47 of the Code of Civil Procedure, to be the representatives of the parties to the suit in which the decree which is being executed was passed, are in a state of considerable conflict. On the question whether the purchaser can be regarded as the representative of the decree holder in cases arising between him and the judgment-debtor or his representative Moore, J., had no hesitation in *Kasinatha Ayyar v. Uthumansu Rowthan* (10) in holding that the auction-purchaser, even if he was not the decree-holder, was the representative of the judgment-creditor, basing his opinion on the Privy Council ruling in *Prosunno Kumar Sanyal v. Kali Das Sanyal* (22) and

on the Full Bench ruling of the Calcutta High Court in *Ishan Chunder Sirkar v. Beni Madhub Sirkar* (20) and on that of a Divisional Bench of the same Court in *Dwar Buksh Sirkar v. Fatik Jali* (24). Bhashayam Aiyangar, J., the other learned Judge, did not express any dissent from that view, but pointed out that the order was nonetheless an order under section 244 (now section 47), because it was also passed under sections 318 and 334 of the Code of Civil Procedure (corresponding to rules 95, 97 and 98 of the Code of Civil Procedure). The ruling was followed by White, C. J., and Subramania Ayyar, J., in *Sandhu Taraganar v. Hussain Sahib* (2), by White, C. J. and Sankaran Nair, J., in *Arthanari Ohettiar v. Nagoji Rao* (14) and by Benson and Wallis, JJ. in *Manickha Olayan v. Rajagopala Pillai* (13). But the opposite view is expressed by White, C. J., sitting with Miller, J., in *Krishna Satapasti v. Sarasvatula Sambasiva Row* (7) and by Wallis and Krishnaswami Aiyar, JJ., in *Nadamuni Narayana Iyengar v. Veerabhadra Pillai* (3) and has been accepted by Sadasiva Aiyar and Bakewell, JJ., in *Meda Ohinna-subamma v. Bapireddi Gari Ohinnayya* (12). In this Court, therefore, the conflict of opinion on the point is such that one could not say that there is a clear preponderance of authority in support of one view rather than the other.

As regards the other High Courts, it was held by Jenkins, C. J., in *Maganlal Mulji v. Doshi Mulji* (25) that an auction-purchaser could not be regarded as the representative of the decree-holder for the purposes of an application under section 3.0 (a) of the old Code, but Order XXI, rule 89, of the new Code now expressly provides that a person owing property which has been sold or holding an interest therein by virtue of a title acquired before such sale may also apply to have the sale set aside on depositing the purchase money. As regards Calcutta and Allahabad no express ruling on the question has been cited before us and I have not found any.

On the question whether an auction-purchaser can be treated as the representative of the judgment-debtor, we find a similar conflict. In *Paramananda Das v. Mahabeer Dossji* (8) Subramania Aiyar

(24) 26 C. 250; 3 C. W. N. 222.

(25) 25 B. 631; 3 Bom. L. R. 255.

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and Boddam, JJ., and in *Sivarama Sastri v. Somasundara Mudali* (11) Subramania Ayyar and Sankaran Nair, JJ., answered the question in the affirmative. But in *Nadamuni Narayana Iyengar v. Veerabhadra Pillai* (3), already mentioned, to which Wallis, C. J., was a party, Krishnaswami Aiyar, J., held that he was not such a representative, and this view has been followed by Sadasiva Aiyar and Moore, JJ., in *Thangavelu Mudaliar v. Mahomed Ibrahim Sahib* (5) and in *Arasayee Ammal v. Sokkalinga Mudali* (6), at least in cases where the decree does not mention or affect the property purchased. In another case reported in *Kuppuna Kavundan v. Kumara Kovundan* (9), both Wallis and Krishnaswami Aiyar, JJ., held that the auction-purchaser would be the representative of the judgment-debtor, and in an unreported judgment in Appeal No. 249 of 1916, Wallis, C. J., sitting with Kumaraswami Sastri, J., expressly disapproved of the dictum of Krishnaswami Aiyar, J., in *Nadamuni Narayana Iyengar v. Veerabhadra Pillai* (3) and of the rulings in *Thangavelu Mudaliar v. Mahomed Ibrahim Sahib* (5) and *Arasayee Ammal v. Sokkalinga Mudali* (6), following *Paramananda Das v. Mahabeer Doss* (8), *Sivarama Sastri v. Somasundara Mudali* (11), *Narayanaswami Naik v. Seshappaiyer* (26) and *Kuppuna Kavundan v. Kunara Kavundan* (9). Though on this aspect of the question also it cannot be said that the law is settled by a long current of decisions in this Court as the learned Chief Justice suggests in the unreported judgment, I agree with him so far that the view that an auction-purchaser of the judgment-debtor's interests in the property in dispute is his representative for the purposes of section 47 of the Code of Civil Procedure has a preponderance of authority in its favour. As regards the other High Courts, both Calcutta and Allahabad [see *Ishan Chunder Sirkar v. Beni Madhub Sirkar* (20) and *Gulzari Lal v. Madho Ram* (21)] have finally decided in favour of the view that the word 'representative', when taken with reference to the judgment-debtor, does not mean only his legal representative, that is, his heir, executor or administrator but it means his representative-in-interest, and

includes a purchaser of his interest, whether by a private sale or at Court auction, who, so far as such interest is concerned, is bound by the decree. In Allahabad [*Madho Das v. Ramji Patak* (27)] and probably also in Calcutta, the purchaser would not be regarded as the representative of the judgment-debtor except in cases where the property purchased by him is involved in the decree in the course of execution of which the question has arisen. But except in *Arasayee Ammal v. Sokkalinga Madali* (6) this distinction does not appear to have been drawn in the rulings of our Court. A recent Full Bench of the Bombay High Court in *Narsinghbat v. Bandu Krishna* (16) has ruled contrary to the view of the law as laid down by the Calcutta and Allahabad Full Benches.

Now, the Code has not defined the word 'representative' though it has defined the phrase 'legal representative'. But that the two terms are not used in a synonymous sense is obvious, for while in section 47 the Legislature uses the word 'representative', it uses the phrase 'legal representative', as it were by contrast, in sections 50 and 52 and so on. Nor can there be any doubt that the word 'representative' was intended to have a wider meaning than 'legal representative.'

I think some light can be obtained on this question if we find out in what matters the purchaser of the interest of the judgment-debtor in property sold in execution can apply to the executing Court for redress or can be proceeded against in that Court. Under section 64 an alienation after attachment is void as against all claims enforceable under the attachment. Under section 74 where the purchaser has been obstructed in obtaining possession by the judgment-debtor or by any one on his behalf, the latter can be dealt with by the Court at the instance of the decree holder or purchaser. Then we find under Order X&I, rule 35, that under a decree for delivery of immoveable property possession may be given by the Court executing the decree by removing any person bound by the decree, which would apparently include a purchaser *pendente lite*. This seems to be made clear by the fact that under rule 54, which provides for

(26) 17 M. L. J. 321.

(27) 16 A. 286; A. W. N. (1894) 84.

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attachment of immoveable property, persons are prohibited from taking any benefit under any transfer made after attachment. In the case of a person who claims a title to the property either independently of the defendant in the suit or if from the defendant he asserts a title anterior to the institution of the suit in which the decree under execution was passed, his claim is placed on a different basis by the Legislature. If such a person is in possession of the property, the Court executing the decree cannot dispossess him and his right to establish his title by a separate suit is expressly recognised. See Order XXI, rules 58, 63, 99, 100 and 101. By rule 89 an application to set aside a sale by depositing the purchase-money may be made by any person owning the property or holding an interest in the property under a title acquired before sale, and such an application would clearly be one between the judgment-debtor or a person who has acquired his interest on the one hand and the decree-holder and the purchaser under the decree on the other. It further says that the judgment-debtor's liability for costs will not be affected by such application. By rule 90 an application to set aside the sale on the ground of irregularity may be made by the decree-holder or any person entitled to rateable distribution or a person whose interests are affected by the sale, and to such an application the purchaser would clearly be a necessary party and questions arising under the application may have to be determined between him and the decree-holder or the judgment debtor, as the case may be. The purchaser may himself apply to have the sale set aside on the ground that the judgment-debtor had no saleable interest and only on questions raised under rules 89, 90 or 91 being decided in favour of the purchaser that the sale will be confirmed. The purchaser can apply for the delivery of the property purchased by him as against the judgment-debtor or against any person claiming under a title created by the judgment-debtor subsequently to the attachment. If the holder of a decree for possession of immoveable property or the purchaser of any such property sold in execution of a decree is obstructed in obtaining possession, that is a matter to be investigated by the executing Court. If the resistance or obstruction is

by the judgment-debtor or by a transferee from him after the institution of the suit in which the decree was passed, in that case the question is to be decided finally in execution. On the other hand if the obstructor is a *bona fide* claimant under a title independent of the judgment debtor then, as already mentioned, he would have a right to sue in spite of the decision in execution.

I think these provisions of the Code show that the Legislature intended that all questions affecting a purchaser of the interest of the judgment-debtor in property which is either affected by the decree or is sold under a decree, are to be decided in execution between the parties interested if the purchase was after the institution of the suit, whether at a private sale or at a sale in execution of a money decree against the defendant. I may here also refer to section 146, which says that "Save as otherwise provided by this Code, or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him." Under this section the claim is not confined to an interest in property. It seems to me that the purchaser of property in execution of a decree may well be said to claim under the decree-holder for the purposes of proceedings under section 47 in which his rights are affected. It may also here be pointed out that the law, so far as the rulings of this Court and also of the Calcutta High Court go, is settled that not only the assignee of a decree-holder comes within the scope of section 47 but a person attaching the decree is the representative of the decree-holder within the meaning of this section—see *Sah Man Mull v. Kanagasabapathi* (28), *Krishnan v. Venkatapathi Ohetty* (29), *Pearry Mohun Chowdhry v. Romesh Ohunder Nundy* (30). I do not see how the case of a purchaser in execution of a decree can well be distinguished on principle. On the other hand, where the interest of the purchaser of property either in execution of the same decree or of another decree is affected by any question

(28) 13 M. 20.

(29) 29 M. 318.

(30) 115 C. 371.

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raised in execution by the holder of the decree under execution the purchaser is entitled to defend his interest as a person claiming under the judgment debtor. As has been pointed out time after time by the Privy Council as well as by the High Courts, section 47, corresponding to the old section 244, should be interpreted in as liberal a spirit as the language would reasonably admit of. I would, therefore, have little hesitation in holding that the word 'representative' is not intended to be confined to legal representative but is used in the wider sense indicated in *Krishnabhupati Devu v. Vikrama De.u* (17): "It is a well-known principle that a purchaser in a Court-sale represents the judgment-debtor to the extent of the right, title and interest as he had in the property purchased at the date of sale and represents the execution creditor, in so far as he had a right to bring such right, title and interest to sale in satisfaction of the decree." This principle was laid down by Muttusami Ayyar and Best, JJ., in holding that the purchaser was a party claiming under the execution creditor within the meaning of section 13 of the old Civil Procedure Code; and there was thus privity of law between the two. No doubt the learned Judges with reference to some cases cited against that proposition dismissed them with the remark that they were cases under section 244 and not under section 13, but they were not considering any question under the former section. I do not see why the principle should not be applied to section 47 of the Code of Civil Procedure as well.

The question, however, seems to be concluded by the ruling of the Privy Council in *J'rosunno Kumar Sanyal v. Kali Das Sanyal* (22), where their Lordships say: "It is of the utmost importance that all objections to execution sales should be disposed of as cheaply and as speedily as possible and their Lordships are glad to find that the Courts in India have not placed any narrow construction on the language of section 244, and that when a question has arisen as to execution, discharge, or satisfaction of the decree between the parties to the suit in which the decree was passed, the fact that the purchaser who is not a party to the suit is interested in the result has never been

held a bar to the application of the section." Their Lordships in laying down the law in these terms observed that as the respondent was not represented before them, they had examined the rulings of the Indian High Courts for themselves; and they also mention that Mr. Doyne who appeared for the appellant admitted before them that it was the common practice to make the auction-purchaser a party to an application for setting aside an execution sale; in that case the appellant wanted by a suit to have the judicial sale of the Zamindari set aside on the ground of fraud on the part of the decree-holder and it was held that the question was determinable by virtue of section 244 only by an order of the Court executing the decree and not by a separate suit. No doubt their Lordships do not say that the auction-purchaser would be a representative of either the judgment debtor or the decree-holder within the meaning of section 244, but they clearly intended to lay down that as a party most interested in the result he would be entitled to be heard in any application under section 244 and that if the question was one of the character described therein, i.e., relating to the execution, discharge or satisfaction of the decree, then it must be determined by a proceeding under that section, in which the auction-purchaser must be joined. In *Maganlal Mulji v. Doshi Mulji* (25) above mentioned it is observed that the Privy Council could not have intended to delete the words "arising between the parties to the suit in which the decree was passed or their representatives" from section 244. But there seems to be no inconsistency, if I may respectfully say so, in holding that the question was one arising between the parties, although an auction-purchaser who was most interested in the dispute was entitled and bound to ask for a decision by the Court executing the decree. Otherwise the result would be that the judgment-debtor and the decree-holder would be bound to have the question settled by the execution Court and so far as the purchaser was concerned, a fresh decision would have to be obtained by a separate suit.

The law, therefore, in my opinion, is that a person who has bought the property of the defendant in a suit since the institu-

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tion of that suit, whether at a Court auction held in execution of a money decree passed in another suit or by private purchase, is entitled and bound to have any question relating to the execution, discharge or satisfaction of the decree decided under section 47 by the Court executing the decree, when his interest is affected either by the decree itself or by the sale held in execution of that decree, and the same rule applies to a purchaser of the property under such sale, whether he is the decree-holder himself or a stranger. Whether the purchaser in the one case or the auction-purchaser in the other is to be regarded as the representative of the judgment-debtor or the decree-holder depends upon the nature of the question raised and who the contesting party is. This is in accordance with the view of the law adopted in *Kasinatha Ayyar v. Uthumansa Rowthan* (10), *Sandhu Taraganar v. Hussain Sahib* (2), *Arthanari Chettiar v. Nagoji Rac* (14), *Manickka Odayan v. Rajagopala Pillai* (13), *Paramananda Das v. Mahabeer Dossji* (8), *Sivarama Sastrial v. Somasundara Mudali* (11), *Suppana Kavundan v. Kumara Kavundan* (9) and the unreported judgment in Appeal No. 249 of 1916 and is opposed to *Krishna Satapasti v. Sarasvatula Sambasiva Row* (7), *Nadamuni Narayana Iyengar v. Veerabhadra Pillai* (3), *Meda Ohinnasubamma v. Bopireddi Gari Chinnayya* (12), *Thangavelu Mudaliar v. Mahomed Ibrahim Sahib* (5) and *Arasayee Ammal v. Sokkalunga Mudali* (6), and the latter rulings to that extent must be considered to be overruled.

OLDFIELD, J.—It is clear that the questions before us were framed on the assumption that the applicability of section 47 of the Code of Civil Procedure to the cases before the Subordinate Judge can be disputed only on the ground that some of those who contested them were neither parties (that is not alleged) nor their representatives; and in particular that the stranger purchaser referred to in the third question at the Court sale in connection with which these proceedings have arisen must be regarded as the representative of one party or other to the decree under execution, if section 47 is to be applied. That assumption, I agree with the learned Chief Justice, must be rejected, because, as the Judicial Committee held in *Prosunno*

Kumar Sanyal v. Kali Das Sanyal (22), the auction-purchaser's inclusion in the proceedings is justifiable on the ground of his interest in their result and without reference to his possession of a representative character. In fact there was in that case, as I understand it, no attempt to decide whether he had one; and, if the judgment in *Magan Lal Mulji v. Doshi Mulji* (25) assumes such a decision, I would respectfully dissent from it. The committee regarded it as sufficient to attract the application of section 47 that a question relating to execution had arisen between the parties to the decree, without reference to the purchaser's inclusion in the proceedings. It need only be added that in order to the arising of such a question, it is not essential that all the parties to the decree should actually be impleaded in the proceedings, in which it is raised. For, although I deprecate the common practice, which is exemplified by the cases before us, of failing to implead in such proceedings either the decree-holder or the judgment-debtor, the nature of the question to be dealt with cannot be affected by their absence. In the cases before us the terms of the reference assume and it is evident that a question relating to the execution of the decree has arisen. It is, therefore, unnecessary to answer the third question referred directly or otherwise than by saying that the inclusion of the auction-purchaser as a party to proceedings relating to an auction-sale does not make section 47 inapplicable to them.

The foregoing, of course, supplies no answer to the other questions referred, in which the representative character of the other contesting party in the cases before us, the purchaser in execution of a previous money decree or his transferee, is in issue. For the connection of either with the proceedings in execution of the mortgage decree, in which the dispute to be adjudicated on has arisen, is indirect and their interest in the result of these proceedings accrued to them independently of the sale, which they impugn. And accordingly, so far as they are concerned, their possession of a representative character must be established, if section 47 is to be applied. It is not suggested that they can be regarded as the representatives of the

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holder of the decree under execution in the present proceedings, since he had no connection with the Court-sale and private sale, under which they claim. The conclusion will, therefore, depend on whether they represent the judgment-debtor in these proceedings, who is also the judgment-debtor under the money decree in execution of which that sale was held. It appeared, it may be observed, in the course of argument that the statement of the parties' characters in my order of reference was inaccurate, inasmuch as in all these appeals, and not only in Appeal Against Order No. 260, the contesting party was the vendee of the decree-holder purchaser under the money decree. This, however, authorizes hardly any restriction of the discussion of the general principle involved. For the three alternatives have still to be considered that the purchaser represents (1) no one or (2) the judgment-debtor or (3) the money decree-holder, either because he in fact derived title from him or on other grounds.

It does not seem to me that any detailed discussion of the numerous decisions enumerated in the judgment just delivered is called for, since the conflict between them is for the most part beyond reconciliation. On two points, however, there is a distinct preponderance of authority in this Court; and I, therefore, take it as settled law that the representative mentioned in section 47 is not to be identified with a legal representative as defined in section 2 (11) and that a purchaser at Court auction represents some one; that is, either the judgment-debtor or the decree-holder. For, although the latter conclusion is contrary to the *dictum* of Krishnaswami Aiyar, J., in *Nadamuni Narayana Iyengar v. Veerabhadra Pillai* (3) and the cases from unauthorized reports, in which it is followed, to which my order of reference refers, it is, as I have pointed out there, unsupported by reference to principle and irreconcilable with another portion of the learned Judge's judgment and another earlier and later decisions.

The question is then whether the purchaser is the representative of the judgment-debtor or decree-holder; and it is sufficient for the present reference to deal with it as regards money decrees only and without regard to the special and more difficult

considerations arising in connection with sale under mortgage decrees, by which the interest of the mortgage decree-holder as well as the equity of redemption is ordinarily transferred. As regards money decrees it seems to me very difficult, if not impossible, to imagine a case, in which the purchaser can become the representative of the decree-holder. The *dictum* of Moore, J., in *Kasinatha Ayyar v. Uthumansa Rowthan* (10) was *obiter*, the fact that the auction-purchaser was the decree-holder affording, as he points out, an alternative ground for his decision; and the sale was in execution of a mortgage decree and was, therefore, subject to the consideration above referred to. In *Sandhu Taraganar v. Hussain Sahib* (2) the question arose regarding a purchaser from the decree-holder purchaser at the Court-sale; and in that case and in *Manickka Olayan v. Rajagopala Pillai* (13) the Court sale was held under the decree, in the execution of which the application of section 47 was proposed. Of the decisions relied on by Moore, J., in *Sandhu Taraganar v. Hussain Sahib* (2), *Prosunno Kumar Sanyal v. Kali Das Sanyal* (22) has already been referred to, whilst *Ishan Chunder Sirkar v. Beni Madhub Sirkar* (20) does not, with all due deference, support him and *Dwar Suksh Sirkar v. Fatik Jali* (24) deals with the transferee from a decree-holder of his decree, not of what he had purchased in execution of it. On the other hand, as the learned Chief Justice has shown, the purchaser at Court-sale has been regarded, so far as appears on general grounds, as the representative of the judgment-debtor in *Krishna Satapathi v. Sarasvatula Sambasiva Row* (7) and *Meda Ohinnasubamma v. Bapireddi Gari Ohinnayya* (12). Apart from authority the fact recognized by Krishnaswami Aiyar, J., in *Nadamuni Narayana Iyengar v. Veerabhadra Pillai* (3) that the purchaser succeeds to the judgment-debtor's rights in the property sold, would ordinarily be sufficient to constitute him his representative in interest, at least in proceedings regarding that property; and the only argument suggested to the contrary, that the purchaser and decree-holder are both interested to support the sale, at which the purchase was made, appears to assume, what is not the case, that they both have or have had in

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succession an identical interest in the property sold.

Holding that the purchaser in execution of a money decree is ordinarily the representative of the judgment-debtor, I consider next whether he is so when, as in the cases before us, he is also the decree-holder and when his position comes in question in a distinct proceeding. It may be pointed out that, where his position does not so come in question, the fact that he is the purchaser does not consistently with the reference already made to *Prosunno Kumar Sanyal v. Kali Das Sanyal* (22) require consideration. When it does, it seems to me that his character as decree-holder in one execution can have no effect on his position in another and that there is nothing in authority or on principle to debar us from treating him like any other stranger to the latter, no reason appearing for according him any other rights than a stranger purchaser from the judgment-debtors, whether by execution or private sale, would acquire.

The foregoing entails that the purchaser from a decree-holder purchaser under a money decree is the representative of the judgment-debtor for the purpose of enquiry into a question relating to the execution of a distinct decree affecting the same property. I would answer the second question referred accordingly. An answer to the first question is not necessary.

SESHAGIRI Aiyar, J.—Before dealing with the questions referred, a short statement of facts may not be out of place. The property in suit belongs to one P. P. Maya Nadar. One Muthuswamy sued him in Original Suit No. 733 of 1915 and obtained a money decree on the 6th of January 1916. In pursuance of that decree the properties were attached on the 21st of June 1916. They were sold on the 24th of October of the same year, purchased by the decree-holder, and the sale was confirmed on the 27th of November 1916. The property was delivered on the 12th of February 1917. The decree-holder purchaser sold the property privately on the 28th of March 1917 to the present appellant. That is the history of one stage of the proceedings. After the attachment under the money decree one M. V. Nadan brought a suit on a mortgage executed by P. P. M.

Nadar on the 14th of July 1916. He obtained a preliminary decree on the 25th of September 1916. The final decree was on the 11th of July 1917. The property was sold on the 17th of December 1917; three items out of four were purchased by the decree-holder himself and the 4th item by one Subbiah Nadan, a stranger. The sale was confirmed on the 21st of January 1918. The purchasers under the mortgage decree in endeavouring to take possession were obstructed by the purchasers under the money decree. Thereupon they applied for the removal of the obstruction. The lower Court held that the purchase under the money decree was affected by the doctrine of *lis pendens* as the sale was subsequent to the institution of the mortgage suit. The present appeals are by the representatives of the purchaser under the money decree against the order of the lower Court directing possession to be given to the purchasers under the mortgage decree.

A preliminary objection was taken that no appeal lies because the purchaser under the money decree cannot be regarded as a representative of any of the parties to the decree. It was under these circumstances the three questions have been referred for the opinion of the Full Bench.

Upon one question there was no contest. It was conceded by the Counsel for the respondent that where the equity of redemption is purchased under a money decree, in matters relating to execution of a mortgage decree, the auction-purchaser under the money decree will be the representative of the judgment debtor in the mortgage decree. This matter apart from concession has been definitely decided by the Full Bench of the Calcutta High Court in *Ishan Ohundur Sirkar v. Beni Madhub Sirkar* (20) and by the Full Bench of the Allahabad High Court in *Gulzari Lal v. Madho Ram* (21). In the first of these decisions it was held that the decision of the Judicial Committee in *Radhamadhub Holdar v. Monohur Mukerjee* (19) is only consistent with the view that the auction-purchaser is the representative of the judgment-debtor. Although the point was not expressly decided by the Board, I respectfully concur with the view taken in Calcutta that that decision is authority for the proposition enunciated. It is true in Bombay they have held that the

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auction-purchaser is the representative of neither the decree holder nor of the judgment-debtor; and in the latest decision of that Court in *Narsinghbhat v. Bandu Krishna* (16) it was held that he is not a representative of the judgment-debtor. But having regard to the decisions of the Judicial Committee and of the two Full Bench cases referred to by me, I am of opinion that the auction-purchaser represents the judgment-debtor in questions relating to the execution of decree in the second suit on the mortgage. But the question whether in the same suit he would be the representative of the judgment-debtor is not quite settled. I shall not discuss the authorities bearing thereon, as in the view I am taking the discussion would be unnecessary. Before proceeding further I might state that the view that the auction-purchaser is the representative of the decree-holder has not been accepted in Calcutta or in Allahabad. It is certainly not the law in Bombay. In this Presidency the weight of authority is against making him representative of the decree-holder. *Krishna Satapathi v. Sarasvatula Sambasiva Row* (7), *Nadamuni Narayana Iyengar v. Veerabhadra Pillai* (3), *Meda Chinnasubamma v. Bapireddi Gari Ohinnayya* (12) take that view. On the other hand, we have *Manickha Odayan v. Rajagopala Pillai* (13) and *Arthanari Ohettiar v. Nagoji Rao* (14) in favour of regarding the auction-purchaser as the representative of the decree-holder. On principle it seems to me that this latter view is wrong. He is certainly not a representative-in-interest. Because beyond being the instrument for bringing the property of the judgment-debtor to sale, ordinarily speaking, a decree holder does not transmit any of his rights to the auction-purchaser. I can understand his legal representative standing in his shoes. I can understand his assignee or other heir prosecuting his right. But I am unable to hold that an auction-purchaser represents the decree holder. On the motion of the decree-holder the Court proceeds to sell the property of the judgment-debtor and the principle of *caveat emptor* has been applied to purchases so made. The only provision in the Code of Civil Procedure which affects the decree holder is that which provides for an application by the auction-purchaser

for a refund of the money from the decree holder in case the sale is set aside. I am, therefore, unable to accept those decisions which hold that he is a representative of the decree-holder, as correct.

But I think all these difficulties may be overcome by a legitimate application of the principle enunciated in *Prosunno Kumar Sanyal v. Kali Das Sanyal* (22). In that case a suit was brought by a judgment-debtor for setting aside the sale of his property on the ground that the decree-holder acted fraudulently. The auction purchaser at the execution-sale was made a defendant. When the matter finally went before the Judicial Committee, their Lordships said:—"Mr. Doyne, who appeared for the appellants, admitted that the question at issue was one relating to the 'execution, discharge, or satisfaction of the decree.' But he argued with much ingenuity that the suit was not barred by the provisions of section 244, because the question concerned the auction-purchaser *as much as any body* (the italics are mine) and, therefore, as he contended, it could not properly be described as a question 'arising between the parties to the suit in which the decree was passed.'" Their Lordships say further on: "It is of the utmost importance that all objections to execution sales should be disposed of as cheaply and as speedily as possible. Their Lordships are glad to find that the Courts in India have not placed any narrow construction on the language of section 244, and that, when a question has arisen as to the *execution, discharge or satisfaction of a decree between the parties to the suit* (the italics are mine) in which a decree was passed, the fact that the purchaser, who is no party to the suit, is interested in the result has never been held a bar to the application of the section." This statement shows that what the Courts have to see is whether the issues arising for decision relate (a) to execution; (b) to deciding rival rights of the decree holder and of the judgment-debtor, in the subject-matter. If those conditions are satisfied, the fact that others are interested in the result of the decision should not affect the jurisdiction and competency of the executing Court to deal with the matter. Their Lordships lay special emphasis on the cheapness and speediness of remedies expected

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of an application in execution. If we turn to the language of section 47, which corresponds to section 244 of the Code, of 1882, the same result would appear to follow. The section lays down only two conditions which have been insisted on by the Judicial Committee. It does not describe who the parties to the execution application should be. The obvious object of the Legislature was that once a matter has been adjudicated upon by a regular trial, question affecting the same matter should, as far as possible, be dealt with in the execution department. In very many cases the same Judicial Officer may have to deal with the matters in execution: that would be a distinct advantage. Further the parties will be saved considerable expense if the question is dealt with in execution. I am, therefore, of opinion that as extended an application should be given the rule enunciated by the Judicial Committee as is consistent with the language of section 47. In *Ganapathy Mudaliar v. Krishnamachariar* (15), another decision of the Judicial Committee, they reiterated the principle enunciated in *Prosunno Kumar Sanyal v. Kali Das Sanyal* (22). In *Krishnabhupati Devu v. Vikrama Devu* (17) this view seems to have found favour with the learned Judges. In *Maganlal Mulji v. Doshi Mulji* (25) there are observations of Sir Lawrence Jenkins which may be regarded as enunciating the same principle. The rule itself is so eminently a workable one and steers clear of many difficulties which have sprung round the application of section 47 that, in my opinion, both the letter of the law and the reason of it demand that this principle should be given wide effect by Courts in this country. I would, therefore, answer all the questions referred to us by saying that if the points for decision in an application before the executing Court relate to the rival rights of the decree-holder and of the judgment-debtor and also relate to execution, discharge, or satisfaction of the decree, it should be dealt with in execution and not by separate suit. The right of appeal and second appeal will be governed by the same rules as affect applications under section 47.

M. C. P.

Order accordingly.

PATNA HIGH COURT.

CIVIL REVISION No. 157 OF 1919.

June 12, 1919.

Present:—Mr. Justice Mullick and
Mr. Justice Jwala Prasad.

MULCHAND SINGH—PLAINTIFF—
APPLICANT

versus

TARNI PRASAD SINGH—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115, O. XLl, r. 5—Receiver, appointment of—Appeal—Order directing—Receiver not to act pending decision of appeal, validity of—Revision, whether lies.

An order made by an Appellate Court on an appeal against an order appointing a Receiver, directing the Receiver not to take any steps in regard to, or exercise any dominion over, the property till further orders, is an order made in the exercise of jurisdiction vested in the Court by law, and the High Court has no power to interfere therewith under section 115 of the Civil Procedure Code. [p. 222, col. 2.]

Where a Receiver is appointed by writ, it is open to the Appellate Court, on an appeal against the order of appointment, to stop the issue of the writ pending the decision of the appeal, or, if the writ has been issued, to direct the Receiver through the Court which appointed him not to take any steps in compliance with the writ of appointment. [p. 223, col. 1.]

Civil revision against an order of the District Judge, Patna, dated the 25th May 1919.

Mr. Abani Bhusan Mukerji, for the Petitioner.

Mr. Siveshar Dayal, for the Opposite Party.

JUDGMENT.

MULLICK, J.—It is quite clear that what the District Judge means is not to discharge the Receiver outright, because he had no power to do that without hearing the appeal, but to direct him not to take any steps in regard to, or exercise any dominion over, the property till further orders on the appeal. That is the only reasonable way in which the order of the learned District Judge can be interpreted; and reading it in that way, we think that it was a proper order and that there is no reason for interfering with it in revision, even if we had power to do so. In my opinion we have no power to interfere, because the District Judge has exercised a jurisdiction vested in him by law.

Then it is said that it was an illegal exercise of jurisdiction on his part, because he has passed it without hearing the opposite party, and reliance is placed upon the case of *Multanchand Shivram v. Khar-sedji Nasarvanji* (1). I respectfully beg to

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differ from that authority, because in my judgment there was no defect as regards jurisdiction. The learned Judge may have committed an error of procedure, but that is not a matter which can come within the purview of section 115 of the Civil Procedure Code as interpreted by this Court.

Finally, it is said that under Order XLI, rule 5, of the Civil Procedure Code, which is the provision of law under which the stay of proceedings in the matter of the order made by the Subordinate Judge has been based by the District Judge, the District Judge has no authority to proceed without requiring security under sub-clause (3) of the rule. In my opinion the provisions of sub-clause (3) of rule 5 are not applicable to the case before us.

The learned Vakil for the petitioner has brought to our notice the case of *Dharram Singh v. Kishen Singh* (2), in which it was held that after a decree had been executed, the Appeal Court could not in exercise of its powers of stay interfere with the execution that had already taken place. The principle of that case also is not applicable to the present case. Here the Court has appointed a Receiver by a writ and it was competent to the Appeal Court either to stop the issue of the writ of appointment pending the appeal, or, if the writ had been issued, to direct the Receiver through the Court which appointed him not to take any steps in compliance with the writ of appointment. That is what the District Judge has done and no more. Therefore, the application will be discharged. But we learn that the 14th instant has been fixed for the hearing of the appeal, and we trust that if the property requires protection, the question of *interim* protection will be considered again if the appeal is not heard on that day.

The application is dismissed with costs.

JWALA PRASAD, J.—I agree.

Application dismissed.

(2) 112 C. L. R. 532.

ALLAHABAD HIGH COURT.

APPLICATION IN FIRST APPEAL No. 121 of 1919.

November 3, 1919.

Present:—Mr. Justice Piggott and Mr. Justice Dalal.

MUHAMMAD YAMIN—PETITIONER

versus

RAZIA BEGAM—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXXIX, r. 1—Injunction, temporary, to restrain marriage, whether can be granted.

A Muhammadan wife obtained a declaration against her husband that she had ceased to be his wife by reason of the fact that she had exercised against him the option of puberty given by the Muhammadan Law. The husband appealed from the decree, and, during the pendency of the appeal, applied for a temporary injunction restraining certain relatives of his wife, who were parties to a cross-suit by the husband for restitution of conjugal rights which had been dismissed and was also the subject of an appeal, from giving the woman away in marriage before the disposal of the appeals:

Held, that the application was not maintainable. [p. 224, col. 1.]

Mr. S. M. Sulaiman, for the Petitioner.

Mr. S. A. Haidar, for the Opposite Party.

JUDGMENT.—The litigation out of which the application before us arises related to the position of Muhammad Yamin, the appellant in this Court, as the husband of *Musammât Razia Begam*. He sued for restitution of conjugal rights and for a declaration of his legal status as the woman's husband. There was a cross-suit based upon an allegation by the woman that she had ceased to be the wife of Muhammad Yamin, if she ever was, by reason of the fact that she had exercised against him the option of puberty given by the Muhammadan Law. Appeals are now pending against the decision of the Court below, which was in favour of the lady's contention. In this application the prayer is that the defendants be prohibited from giving away *Musammât Razia Begam* in marriage to any one, before the disposal of the aforesaid appeals. As it stands, the prayer in the application must be understood to refer to the defendants other than the lady herself, who are relatives

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of hers. It is obvious that such an application could not by any stretch of language be brought within the purview of rule 1 of Order XXXIX, Civil Procedure Code. It is not so clear that an application of this nature might not, under certain circumstances, be taken cognizance of by a Court of Justice as falling under rule 2 of the same Order. In the present case there was a relief by way of injunction sought in Mohammad Yamin's suit, that is to say, he asked for an injunction against the defendants other than Razia Begam, to the effect that they should not place any hindrance in the way of the lady's return to his house. It is contended that this was a suit for restraining these defendants from committing, or at any rate assisting in the commission of, a breach of the contract of marriage between the parties, or in the alternative for restraining them from committing an injury against the marital rights of the petitioner. From this the argument is advanced that the present petition is merely one for a temporary injunction to restrain certain defendants from committing a breach of contract, or injury of a like kind, arising out of the same contract, or relating to the same marital rights. Under the circumstances of the case we think it would be doing some violence to the language of the rule to bring this application within its scope. We note moreover that, according to its terms, the application seeks no remedy against Musammât Razia Begam herself. She is now, under the religious law governing the parties, of an age to enter into a contract of marriage on her own account, and an injunction directed against the remaining defendants would be meaningless if it were not accompanied by some injunction addressed to the lady herself. It has been suggested that we might allow the application to be amended; but the fact remains that, from the petitioner's point of view, and accepting for the purpose of argument his contention that the lady is still in the eye of the law his wife, any such injunction addressed to the lady as the appellant now suggests would amount virtually to an injunction not to commit adultery. Under the circumstances of the case we do not think that this Court ought to interfere in the manner sug-

gested, and we dismiss the application with costs.

Application dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2846 OF 1916.

March 14, 1919.

Present:—Mr. Justice Richardson and Justice Sir Syed Shamsul Huda, Kt.

PROFULLA KUMAR BOSE AND
ANOTHER, MINORS, BY THEIR MOTHER, NEXT
FRIEND AND GUARDIAN,
HEMANGINI BASU—DEFENDANTS—
APPELLANTS

versus

KAMINI KUMAR ROY AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), s. 178—Person employed to take delivery of goods, whether in possession of goods—Pledge by person in possession, validity of—Fraud of third person, effect of.

Where a person, to whom goods are consigned, employs another to take delivery, making over to him the relative documents for the purpose of obtaining delivery, the latter has possession, within the meaning of section 178 of the Contract Act, both of the documents and the goods they represent, and is in a position to make a valid pledge of the goods, inasmuch as he did not obtain them by means of fraud or of an offence within the meaning of the second proviso to the section. [p. 226, cols. 1 & 2.]

The provision contained in section 178 of the Contract Act, so far as it goes, gives statutory effect to the principle that where one of two innocent parties must suffer for the fraud of a third, the loss should fall on him who enables such third party to commit the fraud. But it is unsafe to employ that principle as a separate and independent ground of decision. [p. 225, col. 2.]

Appeal against the decree of the Additional District Judge, 24 Parganas, dated the 31st August 1916, reversing that of the Munsif, 1st Court at Sealdah, dated the 25th February 1915.

Babu Probodh Oharan Chatterjee, for
Babu Satya Oharan Sinha, for the Appellants.

Babus Hara Kumar Mitter and
Rupendra Kumar Mitter, for the Respondents.

PROFULLA KUMAR ROSE v. KAMINI KUMAR ROY.

JUDGMENT.

RICHARDSON, J.—In this case the defendant No. 1 employed the defendant No. 2 to take delivery of a parcel of jute which he had despatched to the Chitpur station of the East Indian Railway. The jute was consigned by the defendant No. 1 to himself, so that the railway receipt was made out in his name as consignee. Without endorsing the receipt he entrusted it to the defendant No. 2 for the purpose of obtaining delivery. The defendant No. 2, therefore, had implied authority to do all that was necessary for that purpose, including authority to endorse the receipt in the name of the defendant No. 1.

What happened was that the defendant No. 2 took the receipt to the plaintiffs, and representing himself to be the partner of the defendant No. 1, asked for a loan for which he offered the receipt as a pledge. The plaintiffs requested him to get the receipt endorsed by the consignee. Two days later the defendant No. 2 again presented the receipt to the plaintiffs with an endorsement upon it purporting to be signed by the defendant No. 1 and to authorize delivery to Nanda Lal Dutt, the servant of the plaintiffs. The endorsement including the signature was in fact written by the defendant No. 2.

The plaintiffs then took delivery and on the security of the goods paid the defendant No. 2 Rs. 1,011 by way of loan together with Rs. 30 for the railway freight. He fraudulently appropriated the money for his own purposes.

In a criminal case instituted by the defendant No. 1, the plaintiffs were charged with collusion with the defendant No. 2 and an order was made prohibiting them from selling the jute. They accordingly instituted this suit to establish their rights as pawnees. The jute is now in their godowns. Their claim is contested by the defendant No. 1, the defendant No. 2 not having appeared. In the trial Court the suit was dismissed. The plaintiffs succeeded in the lower Appellate Court and this appeal has accordingly been preferred by the defendant No. 1.

On the facts found in the Courts below it is finally established that the plaintiffs acted honestly in this transaction and the question is which of two innocent parties

should suffer for the knavery of the defendant No. 2.

It is clear, and has so been found, that the defendant No. 2 had no authority from his principal to pledge either the railway receipt or the goods it represented with the plaintiffs. Under the general law of principal and agent, the loss would *prima facie* fall on the plaintiffs. The Additional District Judge has invoked the principle that "where one of two innocent parties must suffer for the fraud of a third, the loss should fall on him who enabled such third party to commit the fraud." It is unsafe to employ that principle as a separate and independent ground of decision. As to estoppel it is not suggested that the defendant No. 2 was that sort of agent whose ordinary business it is to sell or pledge goods, and his mere possession of the *indicia* of title with the consent of the defendant No. 1 is probably not by itself sufficient to create an estoppel against the latter, but that question was not discussed.

The plaintiffs found their case on the provision contained in section 178 of the Contract Act, which no doubt, so far as it goes, and in the cases to which it applies, modifies the general law and gives statutory effect to the principle on which the Additional District Judge relied. The extent to which for the present purpose that principle is operative is measured by the terms of the section.

The section consists of a sweeping provision to which the plaintiffs appeal, and two provisos. So far as it is material, it runs as follows:—

"A person who is in possession of any goods or of any bill of lading,..... or warrant or order for delivery, or any other document of title to goods, may make a valid pledge of such goods or document:

"Provided that the pawnee acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the pawner is acting improperly:

"Provided also that such goods or documents have not been obtained from the lawful owner or from any person in lawful custody of them, by means of an offence of fraud."

On the questions which arise under that section, the Courts below have for the most

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part taken diametrically opposite views, and it is well to say that on questions of fact we are bound by the conclusions arrived at by the lower Appellate Court.

The first point in controversy arises on the meaning of the word "possession". If the section be construed as it stands, apart from authority, it would at least be a possible view that the word was used in its ordinary and natural sense and that the draftsman or the Legislature intended to include all possession recognized as such by the law, and to leave it to the two provisos to limit the scope of the general rule enacted in the first clause. The law has by degrees attached more and more importance in this connection to the possession of the *indicia* of title *cf. Cahn v. Pockett's Bristol Channel Steam Packet Co.* (1). There are, however, decisions in India which limit the meaning of the term "possession" as used in sections 103 and 178 of the Indian Contract Act, and it was argued for the defendant No. 1 that the defendant No. 2 had not such possession as section 178 contemplates. The contention that he was a mere servant, which found favour with the Munsif, cannot be supported in view of the clear finding of the Additional District Judge, that he was an agent. If he was an agent, his possession (apart, for the moment, from any question arising under the second proviso) would appear to fulfil the requirements suggested by the case law. He had the *indicia* of possession and his possession was acquired under such circumstances that the owner of the goods, although he had parted with the possession, could give instructions to him as to their disposal [*Greenwood v. Holquette* (2)]; if the defendant No. 2 had in fact no authority to pledge the goods, there was nothing to prevent his having such authority and there was little difficulty in leading the plaintiffs to believe that he had. In my opinion the defendant No. 2 had possession within the meaning of section 178 both of the railway receipt and of the goods it represented.

The Munsif found expressly that the railway receipt was a "document of title", and the finding is impliedly adopted by the Additional District Judge [see also the

case in *Bank of Bombay v. Nandlal Thackerseydas* (3)]. In any case the point is not one of much importance, as the pledge came ultimately to be a pledge not of the railway receipt but of the goods, and if any question arises, it arises not under the opening clause of the section, but under the second proviso. I shall deal with that later.

The next point is whether the plaintiffs acted in good faith within the meaning of the first proviso. The Additional District Judge, dissenting from the Munsif, held that they acted as reasonable and prudent men would naturally do. That appears to be a reasonable conclusion of fact and no error of law is disclosed which would justify us in differing from it even if we desired to do so.

The last point is whether the defendant No. 2 obtained the railway receipt, or the goods, from the defendant No. 1 or from the railway company "by means of an offence or fraud" within the meaning of the second proviso. The Munsif answered that question, so far as the goods are concerned, in the affirmative. The Additional District Judge, on the other hand, held that as the defendant No. 2 was in lawful possession of the railway receipt and had authority to take delivery of the goods from the railway, he was in a position to make a valid pledge of the goods to the plaintiffs. I concur in that view. The railway receipt represented the goods and the defendant No. 2 from the time the receipt was handed to him for the purpose of taking delivery was in possession of the goods. The custody of the railway was custody for the defendant No. 1 or any person he might authorize to take delivery. There was no fraud upon the railway when delivery was obtained on the strength of the endorsement signed by the defendant No. 2 in the name of the defendant No. 1. The defendant No. 2, as has been stated, was authorized to do all that was necessary for the purpose of obtaining delivery. It is immaterial that delivery was actually taken by the plaintiffs. In substance, as distinguished from the machinery by which the transaction was carried through, the defendant No. 2 took delivery of the goods from the railway as he

(1) (1899) 1 Q. B. 643 at pp. 656, 660; 68 L. J. Q. B. 515; 80 L. T. 269; 47 W. R. 422; 8 Asp. M. C. 516; 15 T. L. R. 247; 4 Com. Cas. 168.

(2) 12 B. L. R. 42; 20 W. R. 457.

(3) 17 Ind. Cas. 663; 40 L. A. 1; 17 C. W. N. 358; 12 M. L. T. 643; (1913) M. W. N. 29; 15 Bom. L. R. 1; 24 M. L. J. 176; 17 C. L. J. 146; 37 B. 122 (P. C.).

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was authorized to do and then fraudulently pledged them with the plaintiff.

In the result I would dismiss the appeal with costs.

SHAMSUL HODA, J.—I agree.

Appeal dismissed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1113 OF 1917.

June 27, 1919.

Present:—Mr. Justice Coutts and Mr. Justice Das.

CHAIRMAN OF THE MUNICIPAL COMMISSIONERS OF THE MUNICIPALITY OF BIHAR—APPELLANT

versus

Mahant RAMDEO DAS—RESPONDENT.

Bengal Municipal Act (III B. C. of 1884), s. 85 (a) —Income derived from zemindari outside Municipality, whether "circumstances and property within the Municipality."

Income derived by a person residing within the limits of a Municipality from zemindari property situate outside the Municipality is not "circumstances and property within the Municipality," within the meaning of clause (a) of section 85 of the Bengal Municipal Act. [p. 228, col. 1.]

Appeal from a decision of the District Judge, Patna, dated the 2nd June 1917, modifying that of the Subordinate Judge, Patna, dated the 9th May 1912.

Mr. Siveswar Dayal, for the Appellant.

Mr. Rai Guru Saran Prasad, for the Respondent.

JUDGMENT.

COUTTS, J.—This is an appeal arising out of the suit which was brought by Mahant Ishwar Das, the Mahant of a Sikh temple situated within the Bihar Municipality, against the Chairman of that Municipality, for a declaration that he is not liable to be assessed with a personal tax under section 85 of the Bengal Municipal Act, that his *sanghat* is exempt and that the taxes imposed by the Municipality are illegal and *ultra vires*.

The suit was decreed in the first instance by the Subordinate Judge, but on appeal to the District Judge it was found that only

some rooms in the *sanghat* were used exclusively for public worship and the suit was remanded for a decision of the issue—

"What are the circumstances and property of the plaintiff within the Municipality?"

This order of remand was upheld on appeal to the Calcutta High Court. The issue was accordingly tried by the Subordinate Judge, who found that the plaintiff had no circumstances and property within the Municipality. This finding has been accepted by the District Judge except in regard to a small portion. It appears that the respondent has three sources of income, (1) from Zemindari which is situated outside the Municipality, (2) from offerings of the *sanghat* and (3) from certain shops in the town. The suit has been decreed in respect of the first two items, and against this decree the Chairman has appealed.

The main contention before us has been in respect of the income from the Zemindari property. This is situated outside the Municipality, but it is argued that the words "circumstances within the municipality" will cover this income, and the decision in the case of *Chairman of Giridih Municipality v. Srish Chandra Mozumdar* (1) is relied on. That was a case in which the Chairman of the Giridih Municipality brought a suit against a Deputy Magistrate who was drawing a salary of Rs. 300 per month, and tax was assessed on the full amount of his salary. He refused to pay the tax on the ground that he spent half his salary on the maintenance of his family outside the Municipality. The Judge in the Court of first instance accepted this contention, but on an application made to the High Court this order was set aside and it was held that the assessment on the whole of the salary was not *ultra vires*. In that case the meaning of the unfortunate word 'circumstances' was considered and it was held that it is equivalent to 'means' and that it does not restrict the meaning of the word 'property.' It is on this decision that reliance is placed, but that case is clearly distinguishable from the case which is now before us; and a case exactly similar to the present one, namely, *Kameshwar Pershad v. Chairman of the Bhabua Municipality* (2), was actually

(1) 35 C. 859; 12 C. W. N. 709; 7 C. L. J. 631.

(2) 27 C. 849.

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distinguished by Stephen, J., in that case. The present case is exactly on all fours with the case of *Kameshwar Pershad v. Chairman of the Bhabua Municipality* (2), and I agree with the view which was taken by the learned Judges in that case that income from Zemindari property outside the Municipality is not 'circumstances and property within the Municipality.'

The question of assessment on income from offerings of the *sanghat* appears to me to be concluded by the finding of fact that the offerings are made to the *Granth Saheb* and are spent in worship. If this is so, they can be no part of the circumstances or property of the Mahant.

In the result, therefore, I would dismiss this appeal with costs.

DAS, J.—I agree.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 992 OF 1918.

June 2, 1919.

Present:—Justice Sir Ashutosh Chaudhuri, J. Kt., and Mr. Justice Cuming.

KEAGENDRANARAYAN ROY
BURMAN—PLAINTIFF—APPELLANT

versus

BAMNI BARMANI—DEFENDANT—
RESPONDENT.

Registration Act (XVI of 1908), s. 77—Limitation Act (IX of 1908), ss. 14, 29 (1) (b)—Suit to enforce registration of document—Presentation of plaint in wrong Court—Limitation, extension of, whether permissible.

The period prescribed by section 77 of the Registration Act for bringing a suit for the registration of a document cannot be extended by invoking the aid of section 14 of the Limitation Act. Section 29 (1) (b) of the latter Act specially excludes the application of the provisions of that Act to any special or local law which prescribes a special period of limitation for any suit, appeal or application. [p. 229, cols. 1 & 2]

Appeal against the decree of the Officiating District Judge, Rungpore, dated the 7th of February 1918, affirming the decree of the Subordinate Judge of that District, dated the 28th of November 1916.

FACTS appear from the judgment.

Babu Atul Ohandra Gupta, for the Appellant.—*Abdul Hakim v. Latifunnessa Khatun* (1) is against me and I submit that the principle there laid down is not good law. *Khetter Mohun Ohuckerbutty v. Dinabashy Shaha* (2) is direct authority in my favour and it says that section 14 of the Limitation Act applies. The plaintiff is entitled to deduct the period during which he was prosecuting *bona fide* this suit in the Munsif's Court which the Court could not entertain for want of jurisdiction. I submit that section 14 of the Limitation Act is applicable, and if that is found to be so, I am within time.

Babu Brajendranath Chatterjee, for the Respondent.—I rely mainly on *Abdul Hakim v. Latifunnessa Khatun* (1). The Registration Act is a special Act, and it is complete in itself. How could the special period of limitation in the Registration Act be overridden by the general provisions of the Limitation Act? Thirty days' limitation is stated in the Registration Act and not in the Limitation Act, and so it cannot be extended by reference to section 14 of the Limitation Act. *Khetter Mohun Ohuckerbutty v. Dinabashy Shaha* (2), which the other side relies on, has been overruled by later decisions. Section 29 of the Limitation Act distinctly lays down that general rules of limitation shall not be applicable to a case like this.

Babu Atul Ohandra Gupta, briefly replied.

JUDGMENT.—This appeal arises out of a suit under section 77 of the Registration Act for registration of a mortgage bond for Rs. 1,000, said to have been executed by two ladies; one of them admitted execution and the document was registered so far as she was concerned, the other denied and the Sub-Registrar refused registration on the 4th August 1914. On appeal the District Registrar refused registration on the 9th November 1914. This suit was filed on the 8th December 1914 before the Munsif, being then valued at Rs. 500. On the 16th September 1915, the Munsif held that it had not been properly valued. The plaint was then amended and "for the purposes of jurisdiction of the Court" the

(1) 30 C. 532; 7 C. W. N. 550.

(2) 10 C. 265.

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suit was valued at Rs. 1,100. The Munsif then held that it exceeded the limit of his jurisdiction and he returned the plaint on the 14th December 1915. It was then presented before the Subordinate Judge on the 16th December 1915, who dismissed the suit on the ground that it was barred by limitation. The District Judge also took the same view on appeal, both of them basing their judgment on the case of *Abdul Hakim v. Latifunnessa Khatun* (1). Hence this appeal. The appellant contends that the case of *Khetter Mohun Ohuckerbutty v. Dinabashy Shaha* (2) is direct authority that section 14 of the Limitation Act applies and that the plaintiff is entitled to deduct the period during which he was prosecuting in good faith this suit in the Munsif's Court, which that Court could not entertain from defect of jurisdiction. In *Abdul Hakim v. Latifunnessa* (1) the learned Judges held that they were not prepared to follow *Khetter Mohun Ohuckerbutty v. Dinabashy Shaha* (2), specially having regard to the Full Bench case of *Nagendro Nath Mullick v. Mathura Mohun Parhi* (3), which had been followed by the Madras Full Bench in the case of *Veeramma v. Abbiah* (4). Even before *Abdul Hakim v. Latifunnessa* (1) this Court did not take the same view as was taken in *Khetter Mohun Ohuckerbutty v. Dinabashy Shaha* (2), in *Girija Nath v. Patani Bibee* (5). This matter is governed by section 29 (1) (b) of the Limitation Act, which says that nothing in that Act shall affect or alter any period of limitation specially prescribed for any suit, appeal, or application by any special or local law now or hereafter in force in British India. This clause corresponds to section 6 of Act XV of 1877, section 6 of Act IX of 1871 and section 3 of Act XIV of 1859. By section 77 of the Registration Act the period of 30 days is specially prescribed for such suits. Part 12 of the Registration Act specially deals with the procedure when registration is refused. Section 71 deals with the manner in which the reasons for refusal are to be recorded; it provides that a copy of the reasons so recorded shall be supplied without payment and unnecessary delay.

Section 72 relates to an appeal to the Registrar from the order of the Sub-Registrar refusing to register on grounds other than denial of execution. Section 73 deals with applications to the Registrar where the Sub-Registrar refuses to register on the ground of denial of execution. Section 74 relates to the procedure to be adopted by the Registrar on such applications and directs that he shall, as soon as conveniently may be, enquire into the matter. Section 75 deals with the order made by the Registrar and the procedure thereon. Section 76 provides that a copy of the order for refusal is to be supplied without unnecessary delay to the applicant. Section 77 empowers the institution of a suit within 30 days after the date of refusal. These sections contain a complete procedure when registration is refused and section 77 limits the period to thirty days. The prevailing idea is that there should be expedition and no unnecessary delay. It is with that object that a special rule of limitation was laid down under section 77 and the question is, having regard to such a provision, whether the period can be extended under section 14 of the Limitation Act. In *Khetter Mohun Ohuckerbutty v. Dinabashy Shaha* (2) the learned Judges relied upon *Golan Ohnri Nowluchy v. Krishto Ohunder Dass* (6), holding that the principle of that case was directly applicable to the case before them, but that case was practically overruled in *Nagendro Nath Mullick v. Mathura Mohun Parhi* (3). The Full Bench relied upon *Poulson v. Modhoooodun Paul Chowdhry* (7) and the Privy Council case of *Unnoda Persaul Mookerjee v. Kristo Oommar Moitro* (8). In *Girija Nath Roy v. Patani Bibi* (5) the learned Judges had practically taken the same view. In *Veeramma v. Abbiah* (4) the Full Bench accepted the view of the Calcutta Full Bench in *Nagendro Nath Mullick v. Mathura Mohun Parhi* (3). Justice Muthusami Aiyar was of opinion that it would be incongruous to import into the Registration Act the general provisions of the Limitation Act and that indefinite extension was likely to defeat the object of registration and that the Registration Act

(3) 18 O. 868 (F. B.)

(4) 18 M. 99 (F. B.).

(5) 17 O. 263,

(6) 5 O. 314.

(7) B. L. R. Sup. Vol. 101; 2 W. R. Act X B. 11.

(8) 15 B. L. R. 60 note (P. C.); 19 W. R. 5.

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with regard to this matter was complete in itself. We are of opinion that the principle laid down in the case of *Nagendro Nath Mullick v. Mathura Mohun Parhi* (3) governs the question before us and we feel bound to follow it. *Dropadi v. Hira Lal* (9) relates to the Insolvency Act. The Allahabad Court held it was not a complete code in itself. We think that the question of limitation in this case has been rightly decided by both the Courts and this appeal is, therefore, dismissed with costs.

Appeal dismissed.

(9) 16 Ind. Cas. 149; 34 A. 496; 10 A. L. J. 373.

PATNA HIGH COURT.

LETTERS PATENT APPEAL NO. 19 OF 1919.

June 14, 1919.

Present:—Sir Dawson Miller, Kt., Chief Justice, and Mr. Justice Adami.

JAGDIS CHANDRA DAS—APPELLANT
versus

CHANDRA MOHAN DAS—RESPONDENT.

Letters Patent (Pat.), cl. 10—Rules of Patna High Court, Ch. VII, rr. 2, 16, Ch. VIII, rr. 3, 4—Letters Patent Appeal—Procedure on admission—Civil Procedure Code (Act V of 1908), O. XLI, r. 11.

Under rules 2 and 16 of Chapter VII and rule 3 of Chapter VIII of the Rules of the Patna High Court the Bench before which an appeal under clause 10 of the Letters Patent is laid has jurisdiction to deal with it in exactly the same way as appeals posted to a Bench for hearing under Order XLI, rule 11 of the Civil Procedure Code. [p. 230, col. 2; p. 231, col. 1.]

Mr. Lal Mohan Ganguly, for the Appellant.
JUDGMENT.

MILLER, C. J.—This appeal under clause 10 of the Letters Patent has been referred to a Bench of this Court under rules 2 and 16 of Chapter VII of the High Court Rules. The practice in this Court, which has been followed in such cases since the Court was constituted, has been for the Bench before which the appeal comes to deal with it in exactly the same way as cases posted to a Bench for hearing under Order XLI, rule 11, and until now this practice, which has much to recommend it, has never been

questioned. It is now contended, however, that this procedure is not justified either by the rules of this Court or by the Letters Patent or by the Code of Civil Procedure and that in fact the Court is acting without jurisdiction in so dealing with the case.

Under the Letters Patent the Court has power to make rules for delegating judicial as well as non-judicial business and duties to the Registrar, and by the rules certain judicial duties which are performed by a Bench or a single Judge in other High Courts have been so delegated. The adoption of this system has been amply justified by the results, and the saving of the time of the Court, which would otherwise have been occupied in doing business of an interlocutory or preliminary character which can equally well be performed by the Registrar, has been so manifest that other High Courts are, I understand, taking steps to adopt the same procedure.

The duties of the Registrar with regard to appeals under clause 10 of the Letters Patent are to be found in Chapter VII, rules 2 and 16 and Chapter VIII, rule 4 of the rules of this Court. By rule 16 of Chapter VII the Registrar having satisfied himself that the memorandum of appeal is within time and is sufficiently stamped and is otherwise in compliance with the rules, is directed in the case of first appeals to admit them and issue notice to the respondent, in the case of appeals under clause 10 of the Letters Patent to order them to be placed before a Bench to which such appeals are assigned, and in the case of all other appeals to admit them and either issue notice to the respondent or place them before a Bench under Order XLI, rule 11. Rule 3 of Chapter VIII provides that when the appeal is to be heard under Order XLI, rule 11, or is an appeal under clause 10 of the Letters Patent as early a date as possible shall be fixed for hearing the appellant or his Pleader. It is clear from this rule that the practice contemplated in appeals under clause 10 of the Letters Patent is the same as that prescribed by Order XLI, rule 11 of the Code, and this is the practice which has all along been followed and which is now for the first

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time in the history of this Court called in question.

In support of the contention that the Court has no power to deal in this manner with appeals of this nature, it is pointed out that whereas in appeals from original decrees and in all other appeals except appeals under clause 10 of the Letters Patent the Registrar is directed to admit them, those under clause 10 are not admitted before being placed before a Bench and that until admitted, the Court cannot deal with them as appeals either under the procedure prescribed by Order XLI, rule 11, or indeed in any other manner. But the short answer to this is that the Bench itself admits them and then calls upon the appellant or his Pleader to proceed without serving notice on the respondent and if no case is made out why the appeal should be allowed, the Court dismisses it without calling upon the respondent, acting exactly as in cases under Order XLI, rule 11. It is, however, urged that by rule 4 of Chapter VIII of the Court's Rules when an appeal under the Letters Patent has been admitted, notice must be served on the respondent or his Pleader before the appeal can proceed. If this rule stood alone, there might be something to be said in favour of this argument and it may be that the rule is not very happily worded. But reading it in conjunction with the other rules already referred to, it is quite clear that rule 4 of Chapter VIII contemplates only those cases in which the appeal is admitted and the Court, having heard the appellant or his Pleader under rule 3, desires to hear the respondent before finally disposing of the appeal. It is obvious that if the appeal is dismissed there is nothing more to be done under rule 4, which can no longer apply, and I am satisfied that the rules contemplate and authorise the procedure which has been followed since the Court was constituted. The rules have received the sanction of the Governor General in Council and of the Local Government and have the force of law.

It would be sufficient to rest my judgment here and say the case is concluded by the rules, but for the fact that some time was occupied in arguing that the

question is really one of jurisdiction and that the Court has no jurisdiction to try appeals of this nature in the manner which it has adopted. The argument was not put very clearly or scientifically by the learned Vakil for the appellant but as I understand it, it is this; that the Letters Patent grant a right of appeal to the High Court from a judgment of a single Judge of this Court, except in certain specified cases which are not material to the present discussion; that no procedure is prescribed by the Letters Patent for hearing such appeals and the Civil Procedure Code applies only to appeals from subordinate Courts. There is, therefore, no special procedure provided for appeals of this nature and in such cases to deal with appeals summarily, as the procedure provided by Order XLI, rule 11, has been described, is denying the appellant the right of appeal given by the Letters Patent which the Court has no right to do. I confess I have some difficulty in following this argument. Assuming, without deciding, that Order XLII of the Civil Procedure Code, which applies the rules of Order XLI, including rule 11, to appeals from appellate decrees (which the present is) has no application to appeals under clause 10 of the Letters Patent, then no special procedure is laid down governing the Court in such cases, except in so far as the High Court Rules provide. Now the High Court Rules, as already pointed out, although they do not set out in detail the procedure to be adopted in such cases, clearly indicate that procedure by coupling appeals under clause 10 of the Letters Patent with those under Order XLI, rule 11, and directing a date to be fixed for hearing the appellant or his Pleader. This hearing of the appellant or his Pleader undoubtedly constitutes an appeal and the Court considers any argument that may be put forward in support of the appeal by the appellant to whom the right of appeal is granted. If the appellant in the absence of his opponent fails to convince the Court that the judgment appealed against should be set aside or varied, it is difficult to see how the presence of his opponent would assist him in obtaining this result or how he suffers any injury by his absence. If, on the other hand, the argument shows that the appeal is one of substance requiring to be answered by the

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respondent, the case is in effect adjourned for the respondent to appear.

It was contended that two appearances by the appellant in cases where the respondent is called on involved extra expense and I suppose the argument is that, therefore, the practice is objectionable. This, however, is hardly a ground for challenging the Court's jurisdiction and in any case the suggestion is based upon an entire misconception. Although the Court has power under the Code to hear both first and second appeals without serving notice on the respondent, this Court does not in practice exercise that power in the case of first appeals, for the reason that the benefit to be derived from such a procedure is not so manifest in first appeals where questions of fact as well as law have to be considered and it has been found more expeditious in the long run to hear such appeals only after serving notice upon the respondent to appear. In appeals from appellate decrees, however, where the findings of fact cannot be questioned, the questions for determination in the great majority of cases require no lengthy argument and a short discussion as a rule is sufficient to enable the Court to come to a conclusion as to whether the appeal ought to succeed or not. If the Court should have a clear view that the appeal cannot succeed, it is entitled to dismiss it without calling upon the respondent. If, on the other hand, the case is one of doubt or difficulty requiring the presence of the respondent, then notice is served upon him and in due course he appears. But the appellant must in any case appear in order to get his appeal admitted, and the extra time occupied in argument in those cases where the Court wishes to hear the respondent before coming to a decision is a trifling consideration compared with the extra delay and expense that would result in the long run if in all such cases the respondent were called upon to appear. The argument, therefore, on the ground of extra expense is manifestly purely illusory, when one remembers that taking all the cases together the procedure results in a considerable saving both of the time of the Court and of the pocket of litigants.

In conclusion I should like to point out that even if no procedure were provided either by the Code or by the rules of this Court or elsewhere, it would be the duty of

the Court to proceed according to the well-known rule which enjoins upon it the necessity, where no specific rule exists, of acting according to justice, equity and good conscience. Applying the rules of procedure laid down by the Code to cases not specifically mentioned but in all material respects similar to those mentioned seems to me to be not only in accordance with equity and justice but, in the particular case before us, the course best calculated to meet the ends of justice and I, therefore, hold that the objection is not sustainable, and having directed the appellant's Pleader to argue the case before us we have come to the conclusion in this case that the appeal cannot possibly succeed and ought to be dismissed.

ADAMI, J.—I agree.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEAL No. 9 OF 1919.

July 7, 1919.

Present:—Pandit Kanhaiya Lal, J. C.

NAROTAM DAS—PLAINTIFF—APPELLANT

versus

NARAIN DAS AND ANOTHER—DEFENDANTS—RESPONDENTS.

Oudh Rent Act (XXII of 1886), s 38 (2)—Nazrana, whether illegal—Co-sharers—Suit for profits—Nazrana, whether can be included in account—Co-sharer, liability of.

In a suit for profits brought by one co-sharer against another, the *nazrana* realised by the latter can be included in the account, provided the *nazrana* and the enhanced rent taken together do not offend against the provisions of section 38 (2) of the Oudh Rent Act. [p. 233, col. 1.]

A co-sharer is liable to account for whatever profit he receives on account of the joint land to his co-sharers, whether he receives it in the shape of *nazrana* or in the shape of rent. [p. 233, col. 1.]

Appeal against the decree of the District Judge, Rae Bareilly, dated the 17th January 1919, modifying the decree of the Assistant Collector, 1st Class, Partabgarh, dated the 9th October 1918.

Mr. S. N. Roy, for the Appellant.

Mr. D. K. Seth, for the Respondents.

JUDGMENT.—The question for con-

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sideration in this appeal is whether in a suit for profits brought by one co sharer against another, the *nazrana* realised by the latter can be included in the account. Both the Courts below excluded it on the ground that the levy of the *nazrana* was illegal.

The levy is not, however, illegal, if the *nazrana* and the enhanced rent, taken together, do not offend against the provisions of section 38, clause (2), of the Oudh Rent Act (XXII of 1886). A co sharer is, moreover, liable to account for whatever profit he receives on account of the joint land to his co-sharers, whether he receives it in the shape of *nazrana* or in the shape of rent. It is open to a tenant to say that he would not pay the *nazrana* or any enhancement in excess of that sanctioned by section 38 of the Act; but if the tenant voluntarily pays it to the co-sharer who gives him the tenancy on behalf of himself and his co sharers, he has to account for the same to the persons on whose behalf he gave the tenancy. Section 90 of the Indian Trusts Act (II of 1882) provides that where a co owner by availing himself of his position as such gains an advantage in derogation of the rights of the other persons interested in the property, or where any such owner, as representing all persons interested in such property, gains any advantage, he must hold, for the benefit of all persons so interested, the advantage so gained. Section 23 of the Indian Contract Act (IX of 1872) applies to persons who are parties to the contract for the payment of the *nazrana*. It does not debar a co-sharer from claiming from the person realising the same his share of the realisations made. There is nothing to show that the *nazrana* and the enhanced rent, taken together, exceeded the extent of permissible enhancement.

A cross objection has been filed by the defendants respondents with regard to the manner in which the costs have been apportioned. But it does not appear that any mistake has been made therein.

The appeal is, therefore, allowed and the suit remanded to the Court of first instance with a direction to reinstate it under its original number and to dispose of it, after taking such relevant evidence as the parties may adduce, in the manner required by law. The parties will bear their own costs of this appeal.

Appeal allowed; Case remanded.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 42 OF 1919.

September 1st, 1919.Present:—Mr. Justice Heaton and
Mr. Justice Marten.

TRIBHOVANDAS NAROTTAMDAS

— PLAINTIFFS—APPELLANTS

versus

NAGINDAS VIJBHUKANDAS

— DEFENDANTS—RESPONDENTS.

Sale of goods—Construction of contract—Agreement to sell goods of particular description out of goods to be received by seller—Goods received by seller not of that description—Breach of contract—Buyer, whether entitled to damages.

In September 1917 plaintiffs agreed to buy and defendants agreed to sell certain goods and entered into a contract. The material clause of the contract was as follows: "Ghaghrapat (cloth) cases or bales 19 'Gin' at Re. 0-10-8, inches 31. The above-mentioned goods which are to arrive are sold (to you). Those purchased by us from Graham & Co. are sold to you. Shipment thereof January or February. And there are (to be) two to three months in addition. To be delivered early if arrive early. To be delivered as and when the same may be received. To be delivered on the safe arrival of the steamer. Interest (at) eight annas. 'Sai' (allowance) at Rs. 2 per case. If the goods to arrive come 'late' the purchaser is to take (delivery of the same)." The goods which were eventually received by the defendants from Graham & Co. were not of the description which the plaintiffs had agreed to buy. The plaintiffs refused to accept the goods and sued the defendants for damages:

Held, per Heaton, J.—That having regard to the commercial situation in September 1917, it must be presumed that the parties intended that the defendants should offer to the plaintiffs nineteen bales out of those which Graham & Co. were sending to them; and that the bales should be as near the description stated in the contract as possible; that the contract might also have contemplated that if the plaintiffs were quite justly dissatisfied with a tender of goods on the ground that the goods were nowhere near the description contained in the contract, then they might repudiate the bargain altogether, but that neither of the parties could have contemplated that there should follow, on a repudiation of that kind, any right on the part of the plaintiffs to recover damages. [p. 237, col. 1.]

Per Marten, J.—What was sold were ginned goods, what arrived were unginned goods and therefore, the condition precedent of the contract viz, the arrival of ginned goods, not having been fulfilled, neither party was bound by the contract. [p. 239, col. 1.]

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Per *Curiam*, that the plaintiffs' suit must, therefore, be dismissed. [p. 237, col. 1; p. 239, col. 1.]

Original civil jurisdiction appeal from the decision of Macleod, C. J., in Suit No. 149 of 1918.

FACTS and points of law involved in the case are similar to those in Suit No. 15 of 1918, in which Macleod, C. J., delivered the following judgment:—

"The defendants in this case indented through Messrs. Graham & Co. for certain goods called 'Gagrapat.' On the 1st of September 1917 the defendants agreed to sell to the plaintiffs ten cases of Gagrapat at the rate of Rs. 0-10-3 a yard. On the 4th of September 1917 defendants agreed to sell to the plaintiffs ten more cases, similar goods, at the same price.

"The contracts were made on a printed form and at the end of the printed conditions appears the description of the goods in manuscript.

"'Gagrapt cases or bales 10, inches 34, at Rs. $\frac{1}{2}$, $2\frac{1}{4}$ annas.'

"Then it is written. 'We have sold the above written goods to arrive. We have sold the goods to you which we have purchased from Messrs. Graham & Co. The time for the shipment thereof is December or January and 2 to 3 months are of grace. If the goods arrive early we are to give the same early. We are to give the same as and when the same arrive.'

"Then there is a fresh clause: 'If the goods to arrive should come late the party purchasing the goods should receive the same.'

"Ten bales arrived in April and the plaintiffs were informed that the goods were off sample and that Messrs. Graham & Co. had made an allowance of Rs. 1-6-0 per piece.

"Plaintiffs declined to take the goods with that allowance and in consequence the defendants sold the goods in the beginning of August. The remaining ten bales arrived in July. The same complaint was made, and the plaintiff refused to accept the goods. Plaintiff waited till January and then filed this suit claiming damages for

breach of contract owing to the failure of the defendant to deliver the goods contracted for. He claims the difference between the contract rate and the rate for ten cases on the 2nd of August and the rate for the other ten cases on the 7th of August.

"Assuming then that the plaintiff is right and that the goods which were tendered were not the goods contracted for, it follows the goods contracted for did not arrive. The question then arises whether on a proper construction of the contract, the plaintiff is entitled to claim damages. The question at issue lies within a very narrow compass. The plaintiff as purchaser was informed that the goods were English goods which had been ordered through Messrs. Graham & Co. and that they were to arrive. It was then for the parties to contract in any form they pleased with regard to the purchase of the goods. It was open to the seller to guarantee the arrival of the goods, and to draw up the contract in such a form that if the goods did not arrive within the stipulated period, he would be liable to pay damages, or it was open to him to contract that he was only bound to deliver the goods if they arrived and that in the event of the non-arrival of the goods, the purchaser would not be entitled to claim damages.

"Now the limitation as regards the time of shipment in the contract was for the protection of the purchaser. He was not obliged to take delivery of goods which were shipped before or after the period mentioned in the contract. But that does not affect the question whether the seller guaranteed the arrival of the goods. This question depends on the proper construction to be given to the words 'we are to give the same as and when the same may arrive.' If the plaintiff's construction be a correct one, then, as far as I can see, these words appear to be superfluous and there was no necessity for them to be inserted in the contract; because it would follow as a matter of course that the seller, having sold goods to be shipped within a certain period to arrive, would be bound to give delivery as soon as they did arrive. It seems to me that the only construction that can be put on these words is that they mean that the seller has contracted that he will only give

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delivery when the goods do arrive and that if the goods did not arrive at all, then he could not give delivery and there would be no liability put upon him to pay damages for their non arrival. That seems to me to be the plain grammatical sense of these words. And, as a matter of fact, I cannot imagine any person who had indented for goods from England or any other part of the world abroad contracting in any other form, considering the numerous chances there then were of the non-arrival of the goods within the stipulated period; supposing the ship had been sunk, is it conceivable that under this contract the plaintiff could have claimed damages? As I said before, if the seller likes to guarantee the arrival, there is nothing to prevent him from doing so. But that is not what one would expect a prudent man would do, certainly not in September 1917. It seems to me that the onus is really thrown on the plaintiff to show that his seller guaranteed the arrival of the goods, and one would require plain words in the contract to show that the seller had acted in such an imprudent fashion. It would be a different matter if the contract had been for the sale of so many tons or bales of a particular commodity of a particular shipment. Assuming, therefore, that the goods contracted for did not arrive, in my opinion, the defendants were absolved from performing their contract and delivering the goods. The plaintiff, therefore, cannot make any claim for damages for non-delivery. The defendant's counter-claim on the ground that the plaintiff was bound to take delivery with the allowance, his Counsel said, would not be pressed if I found in the defendant's favour on the question of the construction of the contract.

"The suit will, therefore, be dismissed. I may note that the suit has really been tried on a demurrer and, if my decision is reversed, it will still be open to the defendant to prove the custom set up in the written statement and to prove his counter-claim. Plaintiff will have to pay defendant's costs of the action."

Mr. Coltman, for the Appellants.

Mr. Taraporewalla, for the Respondents.

HEATON, J.—The plaintiffs agreed to buy and the defendants to sell certain goods and entered into a contract. The important part of the contract (I will leave out the earlier part with its usual preliminaries) is:

"Ghaghrapat (cloth) cases or bales 19 'Gin' at Re. 0-10 3, inches 34. The above-mentioned goods which are to arrive are sold (to you). Those purchased by us from Graham & Co. are sold to you. Shipment thereof January or February. And there are (to be) two to three months in addition. To be delivered early if arrive early. To be delivered as and when the same may be received. To be delivered on the safe arrival of the steamer. Interest (at) eight annas. 'Sai' (allowance) (at) Rs. 2 per case. Fresh clause:—If the goods to arrive come 'late' the purchaser is to take (delivery of the same)."

The case has never been separately tried and we have been dealing with it on the pleadings, the correspondence which ensued between the parties and the contract itself, the important part of which I have just read out. The contract was made on the 15th of September 1917. In July of the following year, i.e., 1918, correspondence between the parties began. It appears that by that time certain goods had been shipped by Graham & Co. to the defendants and it was known to the defendants that the goods were not by any means exactly of the description given in the contract. A sample was sent by the defendants to the plaintiffs, and the defendants suggested that an allowance should be made; that the plaintiffs should take the goods with an allowance. This the plaintiffs declined to agree to, on the ground that the goods, which were thus offered them, were not the goods they had contracted to take. Subsequently the goods arrived. The plaintiffs refused to take delivery of them, and now they have brought this suit, claiming that the defendants have broken the contract and are liable to pay damages.

Independently of any evidence at all, we may take certain things for granted,

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because it is inconceivable that this contract could have been entered into if those things did not exist. One is that the plaintiffs and the defendants in connection with the contract must have discussed the quality of the goods they were bargaining about and must have discussed, or at any rate the matter must have been mentioned, the kind of goods the defendants had bought from Graham & Co. and which it was anticipated Graham & Co. would send them. Another thing we may take to be undoubted is that the goods to which the correspondence referred and the goods which actually arrived in the end were the goods the defendants had bought from Graham & Co. and were the goods which the defendants had in mind when they entered into this contract with the plaintiffs and were the goods which the defendants represented to the plaintiffs, and the plaintiffs believed, to be the goods that they were contracting to buy. Having assumed as much as this, it remains to interpret the contract. We do not know actually what was the contract between the defendants and Graham & Co., nor do we know what passed between them in the way of correspondence, or what shipping documents there were. They have not been put in. We merely have to construe the contract in the light of its own words and the circumstances that have been mentioned. It does not help us that both the parties have at different times attributed quite different meanings to the contract, and in the case which has been argued before us they do not seem, especially the defendants, to rely on the meaning which they originally gave to the contract. This certainly is rather to be regretted, when we remember that the contract is supposed to express the intention of those who are parties to it; and if those who are parties to it are either so unwilling to disclose their true intention or so uncertain about it that they cannot be consistent in the intentions they assert, there must be some little difficulty in arriving at the real meaning. Undoubtedly that is so. We have to make the best we can of the material before us.

The position, however, when reached, is simple; though it may be difficult to arrive at it. If there was an absolute contract for

sale, or if there was an absolute contract for sale subject to one condition, which was that the goods which the defendants had bought from Graham & Co. should arrive, then the plaintiffs are entitled to say: "You agreed to sell us certain goods. Every condition provided for has been fulfilled. But you have not given us the goods." In that case they would be entitled to damages. But if the contract was not a contract absolute for sale but was based on a mutual understanding that the goods which were to be offered to the plaintiffs were the goods which Graham & Co. were to send to the defendants, then if the plaintiffs refuse to receive the goods, though they may be perfectly right in so doing, they are not entitled to damages, because everything contemplated between the parties has then been fulfilled. It would be possible to occupy a very considerable amount of time by analysing the contract sentence by sentence but I am reluctant to do that; and I think I can express my conclusion sufficiently clearly, perhaps more clearly, without doing it. The contract is not one in common form. It was a contract entered into to meet very peculiar circumstances. Those circumstances were the commercial circumstances of September of the year 1917, and the commerce with which we are concerned was a commerce between England and India. It is, therefore, necessary to recall that in September 1917 England was only emerging from the most severe period of submarine peril and that the effects of the war on commerce, manufacture and trade generally had reached, although not the highest pitch of inconvenience, a very high pitch of inconvenience indeed. It is only necessary to remember these things to understand that traders, if they were, as they are supposed to be, sensible men, would make their terms, with a full understanding of the extraordinary risks involved in bringing to completion the arrangements they embarked upon. Like the Judge, the present Chief Justice, who tried the case on the judgment in which this particular case was settled, I feel quite certain that no sensible commercial man could at that period have entered into a contract of the nature the plaintiffs ascribe to this particular one. It seems to me, and on this point I really do not feel a shadow of a doubt, that what

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the parties intended, what they both had in contemplation, and what they intended the written contract to show, was an intention that the defendants should offer to the plaintiffs nineteen bales out of those which Graham & Co. were sending to them; and that the bales should be as near the description stated in the contract as possible. I dare say the contract contemplated that if the plaintiffs were quite justly dissatisfied with a tender of goods on the ground that the goods were nowhere near the description contained in the contract, then they might repudiate the bargain altogether. But I feel perfectly certain that neither of the parties ever contemplated for a moment that there should follow, on a repudiation of that kind, any right on the part of the plaintiffs to recover damages.

This opinion I have reached on a very careful consideration of the words of the contract and of the uncertainties they so clearly imply, in the light of the known circumstance of the time.

I think the appeal should be dismissed with costs.

MARTEN, J.—This is an appeal in substance, though not in form, from the judgment of my Lord the Chief Justice in Suit No. 15 of 1919. The decision is in the nature of a demurrer, that is to say, that admitting all the facts stated in the plaint the plaintiffs are not entitled to recover the damages they claim. The formal issue, which is not in the paper book but which was No. 1 (a) in the Suit No. 15 of 1919, and which by agreement between the parties in the Court below was also to be raised in the present case, is as follows:—

“Whether on a proper construction of the contract the plaintiffs are entitled to any damages in the event of the goods contracted for failing to arrive.”

The particular contract sued on in this case is not in the paper book, that is to say, the official translation is not in the paper book. We have an official translation of the contract in the other suit but not in this one. However, it was in evidence in the Court below, and we have obtained for our own use a copy of this official translation.

Now, it is quite clear that the goods contracted to be sold were ginned goods.

The goods which have been tendered to the defendants are unginned goods. The plaintiffs plead in effect that these were not the contract goods. They say in paragraph 3:—

“The defendants having failed to deliver the contract goods and having insisted upon the plaintiffs accepting goods different to the contract goods.”

Then that is treated as a breach of contract for which the plaintiffs claim damages. The decision of the learned Judge in Suit No. 15 is that if that is so then the condition precedent in this contract, *viz.*, the arrival of the goods, was never fulfilled and, therefore, the contract was at an end.

The point, therefore, which arises for our decision, is: Was the arrival in Bombay of ginned goods of this description a condition precedent of the contract?

Before passing to the contract, I will say that at the trial of the action it suited neither party to take this point. The plaintiffs wanted damages. The defendants, on the other hand, wanted the plaintiffs to accept the goods with an allowance of Rs. 1-6-0, the goods admittedly being off sample. At the trial they agreed that the case was governed by the decision in Suit No. 15 and that a decree for the defendants should be taken accordingly. In effect, therefore, the decision of the learned Judge was that they were both wrong, and that the contract was at an end.

Now, there are several expressions in this contract which may import words of contingency. The expressions are:—“Goods which are to arrive,” “to be delivered as and when the same may be received,” “to be delivered on the safe arrival of the steamer,” and “if the goods to arrive come late the purchaser is to take delivery of the same.” On the somewhat similar contract that he had before him the view of the learned Chief Justice was as follows:—

“It seems to me that the only construction that can be put on these words is that they mean that the seller has contracted that he will only give delivery when the goods do arrive and that if the goods did not arrive at all, then he could not give delivery and there would be no liability put upon him to pay damages for their non-arrival. That seems to me to be the plain grammatical sense of those words.

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And, as a matter of fact, I cannot imagine any person who had indented for goods from England or any other part of the world abroad contracting in any other form, considering the numerous chances there then were of the non-arrival of the goods within the stipulated period; supposing the ship had been sunk, is it conceivable that under the contract the plaintiffs could have claimed damages?"

In the present case there is an additional clause which was not in the contract in Suit No. 15 and which apparently was not brought to the attention of the learned Judge. I refer to the words "to be delivered on the safe arrival of the steamer." Having regard to those words, the case of *Hale v. Rawson* (1) might afford some argument that the contingency, the parties had in view, was the safe arrival of the steamer and not merely the safe arrival of the goods. It was put to Counsel for the appellants whether he contended that the contract was in all events an absolute one. He admitted, and I think he was bound to make that admission, that at any rate the contract was contingent on the safe arrival of the steamer. It was then put to him: Supposing the goods were never shipped in England, what then? Counsel answered that as then advised it would probably be that the vendor in that event would not be liable for the goods, because, as Counsel said, you cannot tell about the arrival of the steamer until the goods are shipped on the steamer. If you get to that point, it seems to me that it is only a comparatively small step to go from the case where no goods are shipped to the case where goods of a different description from the contract are shipped. It is not a case here of ginned goods, say slightly damaged by sea-water, or some bales damaged by sea-water, being tendered. It was the case of ginned goods and unginned goods, and the amount of the allowance that the defendants were willing to give shows the substantial difference between these two classes of goods.

Personally, on the construction alone, I respectfully agree with what the Chief Justice has stated in case No. 15 of 1919,

(1) (1858) 27 L. J. C. P. (N. S.) 189; 4 C. B. (N. S.) 85; 4 Jur. (N. S.) 363; 6 W. R. 339; 140 E. R. 1013; 31 L. T. (O. S.) 59; 114 R. R. 632.

and I think that what he there stated applies to the present case.

Now, this being my opinion on the construction of the contract apart from authority, is there any authority which prevents my taking that view? I think not, and that on the contrary such authority as there is tends to support the above view. This type of contract—I may describe it as a "goods to arrive contract"—came into operation in Bombay to a large extent during the war. It may have arisen because of the great desire to get goods of any description and at any time from England. Contracts in this form have given rise, so far as I am aware, to a great deal of trouble in Bombay, and it is not surprising to find that there is really very little authority on this class of contracts. I can only express the hope that the Bombay merchants will modify this type of contract and will with the aid of Counsel and their Merchants' Associations settle some common form of contract which will be free from the ambiguities which have led to the present and other litigation.

Turning then to such authority as one can find, perhaps the nearest statement on the point is that in Halsbury's Laws of England, Volume XXV, page 144. There it is stated in the note (g):—

"Where there is a contract for the sale of goods to arrive, or 'on arrival,' in the absence of terms creating such a warranty, the seller does not warrant the arrival of the goods, but the contract is on both sides contingent on their arrival, and when a particular ship is named, contingent both on the arrival of the ship in the ordinary course, and within the time stated, if any, and on the goods being on board; where there is a warranty that the goods are in a particular ship, the contract is subject to the single contingency of the arrival of the ship."

There are a considerable number of cases there referred to, but I think Counsel agree that there is no case precisely on all fours with the one we have to deal with.

Then, in Benjamin on Sale, Fifth Edition, pages 586 and 587, it is stated as follows:—

"It appears from this review of the

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decisions that contracts of this character may be classified as follows:—

"1. Where the language is that goods are sold 'on arrival per ship A. or ex ship A.' or 'to arrive per ship A. or ex ship A.' (for these two expressions mean precisely the same thing), it imports a *double condition precedent*, viz., that the ship named shall arrive, and that the goods sold shall be on board on her arrival.

"2. The language of the contract may, however, show that the words 'arrival' or 'to arrive' are used only in connection with the goods. In such a case this is only a *single condition precedent*, viz., the arrival of the goods. And *semble* that 'to be shipped', or 'on shipment per ship A on arrival', or 'to arrive,' import such a single condition."

Then No. 5:—

"Where the sale describes the expected cargo to be of a particular description, as '400 tons Aracan Neerensie rice,' and the cargo turns out on arrival to be rice of a different description, the condition precedent is not fulfilled, and neither party is bound by the bargain."

It seems to me that the 5th proposition comes rather close to the present case. What was sold were admittedly ginned goods. What arrived were a different description, viz., unginned goods. According to the passage just cited, the result is that neither party is bound by the bargain.

After giving my best consideration to this case, I am of opinion that the judgment in the Court below was correct, and that this appeal ought to be dismissed with costs.

There is one point I should mention, to shew it has not been overlooked. The ground on which the defendant succeeded was not expressly pleaded; but, I think, having regard to the issues which were raised by agreement, that it must be taken that all such amendments were made in the pleadings as were necessary for the determination of the issue on which the case was decided, viz., No. 1 A.

Appeal dismissed.

PUNJAB CHIEF COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 276
OF 1919.

January 26, 1919.

Present:—Mr. Justice Wilberforce.

HAR GOPAL—PLAINTIFF—DECREE-HOLDER
—APPELLANT

versus

RAM RICHPAL AND OTHERS—DEFENDANTS—
JUDGMENT-DEBTORS—RESPONDENTS.

Execution of decree—Decree, legality of, whether can be questioned—Remedy, form of.

The legality of a decree cannot be questioned in execution. The remedy of the aggrieved party is by a regular suit to set aside the decree as illegal.

Miscellaneous second appeal from the order of the District Judge, Karnal, dated the 9th October 1918, affirming that of the Munsif, 2nd Class, Jhajjar, dated the 2nd July 1918, refusing to give possession of land to the decree-holder.

Lala Shamir Chand, for the Appellant.

Mr. Gullu Ram, for the Respondents.

JUDGMENT.—In this case the appellant applied for the execution of a decree providing for payment in annual instalments, in default of which the possession of land was to be handed over to the decree-holder as owner. The lower Appellate Court has held that this, being a provision for conditional sale, was null and void in accordance with *Debi Sahai v. Ramji Lal* (1) and was, therefore, inoperative. Against this decision a second appeal has been preferred.

Counsel for the appellant has cited numerous authorities that an executing Court cannot question the legality of a decree, e.g., *Musammatt Mehr Nishan v. Nawabzada Muhammad Kazim Ali Khan* (2), *Maharaja of Bhartpur v. Rani Konno Der* (3) and *Radha Mal v. Imam Bakhsh* (4). These are clear authorities in his favour. *Debi Sahai v. Ramji Lal* (1) relied on by the respondents is in no way in point. In that case the judgment debtor instituted a regular suit to set aside an illegal decree, a remedy which is open to the judgment-debtor in this case. I accept the appeal, but as the question whether the decree is otherwise executable was not disposed of

(1) 46 Ind. Cas. 460; 56 P. R. 1918; 127 P. W. R. 1918.

(2) 35 P. R. 1900; P. L. R. 1900 p. 357.

(3) 23 A. 181; 3 Bom. L.R. 51; 5 C.W.N. 137(P. C.), 28 I. A. 35; 7 Sar. P. C. J. 792.

(4) 60 P. W. R. 1908.

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by the lower Appellate Court, I remand the case for decision on this question.

Costs will follow the result.

Appeal accepted; Case remanded.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 17 OF 1919.

May 22, 1919.

Present:—Pandit Kanhaiya Lal, J. C.

BABU—PLAINTIFF—APPELLANT

versus

SADASHEO—DEFENDANT—RESPONDENT.

Hindu Law—Minor—Mortgage executed by guardian—Recital in deed of payment of previous mortgages, whether binding on minor—Necessity, proof of.

A mortgage deed was executed by the guardian of a minor on behalf of himself and the minor, it being stated that, the consideration of the mortgage had been credited towards two prior unregistered mortgage deeds, which were neither filed nor proved:

Held, that the mere recital of the existence of the two prior mortgages would not bind persons other than the executant and that it was essential to prove that the mortgage was executed for family necessity and for the benefit of the minor on whose behalf the guardian purported to have acted.

Appeal against the decree of the Subordinate Judge, Rae Bareilly, dated the 4th December 1918, upholding the decree of the Munsif, Dalman, dated the 19th August 1918.

Mr. H. K. Ghose, for the Appellant.

Mr. Rajeshwari Prasad, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for foreclosure brought by the plaintiff-appellant in respect of a mortgage, purporting to have been executed by Raghunandan on behalf of himself and as guardian of his minor brother, Sada Sheo, on the 25th May 1905. The amount secured by the mortgage was Rs. 350, the whole of which was stated to have been credited towards two prior unregistered mortgages held by the plaintiff-appellant, one purporting to have been executed by Bisheshar, Ram Charan and Musammatt Janki for Rs. 50 on *Bhadon Sudi 5*, 1949, and the other by Bisheshar, Musammatt Janki and Raghunandan for Rs. 15 on *Aghan Sudi 1*, 1953. The plaintiff-appellant did not file any of those prior mortgage

deeds or prove their existence. He sought to enforce the mortgage by conditional sale after the death of Raghunandan but was opposed by Sada Sheo, who has since attained majority, on the ground that Raghunandan had no authority to bind him or to make a mortgage of the joint family property without legal necessity.

The Courts below dismissed the claim. Their finding is that the plaintiff-appellant had failed to establish that the previous debts stated to have been credited in the mortgage deed in suit actually existed or that the consideration was taken for the benefit of Sada Sheo or for any legal necessity binding on the family.

The learned Counsel, who appears for the plaintiff-appellant, candidly admits that his client has not been able to produce any evidence about the existence of the alleged prior mortgage bonds, beyond the recital thereof in the deed in suit and a statement in the registration endorsement about their production before the Sub-Registrar. He suggests that the bonds have been mislaid; but the plaintiff who was examined in the suit said nothing about their loss. The mere recital of the existence of two mortgages in a subsequent deed executed by Raghunandan does not, as pointed out by their Lordships of the Privy Council in *Brij Lal v. Inda Kunwar* (1) and *Shrinivasdas v. Meherbai* (2), bind other persons. It was not enough for him to prove that Raghunandan had executed the mortgage deed in suit. It was incumbent on him to show that that mortgage was executed by him for family necessity and for the benefit of the minor on whose behalf he purported to act. On both those points he gave no evidence. The Courts below were, therefore, justified in holding that the defendant respondent Sada Sheo was not bound by the deed of mortgage executed by his brother.

The appeal fails and is dismissed with costs.
Appeal dismissed.

(1) 23 Ind. Cas. 715; 36 A. 187; 26 M. L. J. 442; 18 O. W. N. 649; 12 A. L. J. 495; 19 C. L. J. 469; (1914) M. W. N. 405; 15 M. L. T. 395; 16 Bom. R. 352; 1 W. 794 (P. C.).

(2) 39 Ind. Cas. 627; 41 B. 300; 21 M. L. T. 236; 32 M. L. J. 175; 19 Bom. L. R. 151; (1917) M. W. N. 258; 21 O. W. N. 558; 25 C. L. J. 311; 44 I. A. 36 (P. C.).

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MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 669 OF 1919.

(CASE REFERRED No. 638 OF 1919.)

November 21, 1919.

Present:—Mr. Justice Seshagiri Aiyar and
Mr. Justice Phillips.IPPILI MAGATHA AND ANOTHER—
ACCUSED

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 187—Failure to assist Salt Inspector in making search—Offence—Criminal Procedure Code (Act V of 1898), s. 103, cl. (2), scope of.

Clause (2) of section 103, Criminal Procedure Code, suggests that while the rendering of assistance to a public servant in making a search is imperative on the persons called upon to assist, they are not compellable to attend Court to give evidence without a summons in that behalf.

Failure, therefore, to assist a Salt Inspector in making a search, after being requisitioned by the latter to do so is an offence punishable under section 187 of the Penal Code.

Ramaya Naika, In the matter of, 26 M. 419; 1 Weir 136 (F. B.), distinguished.

Case referred for the orders of the High Court under section 433 of the Criminal Procedure Code by the Acting Sessions Judge, Ganjam, in his letter dated the 13th October 1919.

The Public Prosecutor, for the Crown, referred to *Ramaya Naika*, In the matter of (1). Section 103 of the Criminal Procedure Code only exempts the person called on to assist a public officer from giving evidence in Court without a summons. But the failure to assist the Salt Inspector in making the search is an offence under section 187, Indian Penal Code.

ORDER.—We are unable to agree with the learned Sessions Judge that the present case is covered by *Ramaya Naika*, In the matter of (1). What was decided by the Full Bench in that case was that the words 'assistance' in the first portion of the section must be read as being *ejusdem generis* with the same word occurring in the latter portion of the section. In the present case, the accused were called upon to assist the Salt Inspector in making a search. Under section 103 of the Code of Criminal Procedure, he is authorised to call upon

(1) 26 M. 419; 1 Weir 136 (F. B.).

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villagers to assist him in the execution of that duty. The last sentence of clause 2 of section 103 suggests that, while the rendering of assistance in making the search is imperative on the persons called upon to assist, they are not compellable by the Inspector to attend the Court to give evidence without a summons in that behalf. Therefore, the duty for discharging which the accused were requisitioned by the Inspector was *ejusdem generis* with that mentioned in the second clause: Consequently, the refusal of the accused to assist the Inspector is an offence punishable under section 187, Indian Penal Code. The conviction is, therefore, right. The papers will be returned.

Papers returned.

PATNA HIGH COURT.

CRIMINAL APPEAL No. 210 OF 1919.

November 18, 1919.

Present:—Mr. Justice Das.

BRAHAMDEO SINGHA AND OTHERS—

APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Prosecution, duty of, to call all material witnesses—Evidence Act (I of 1872), s. 134—Witnesses, number of—Proof, quantum of—Evidence, duty of Court to test.

It is the duty of the prosecution to call all witnesses who can throw any light on the enquiry, whether they support the prosecution theory or the defence theory. It is for the Court to choose which theory is correct, not for the prosecution. [p. 246, col. 2; p. 247, col. 1.]

A criminal trial ought not to be reduced into a battle between the prosecution and the defence. [p. 247, col. 1.]

The direct evidence of witnesses must be tested and weighed in the same manner, whatever the numerical strength of the witnesses may be, and the conscience of the Court must be satisfied as to the guilt of the accused persons before they can be convicted of any crime. It can by no means be laid down as a general maxim that the assertion of two witnesses is more convincing to the mind than the assertion of one witness. The story told by one witness may be in itself probable, the story told by two witnesses may be extravagant. The story told by one witness may be uncontradicted, the story told by two

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witnesses may be contradicted by four witnesses. The story told by one witness may be corroborated by a crowd of circumstances, the story told by two witnesses may have no such corroboration. The one witness may be Tillotson or Ken, the two witnesses may be Oates and Bedfoe. [p. 242, col. 2.]

Remarks of Lord Macaulay quoted in Wills on Circumstantial Evidence, 6th Edition, page 34, approved.

Criminal appeal against the order of the Assistant Sessions Judge, Gaya, dated the 27th June 1919.

Messrs. Sami, Nand Keolyar and Gour Chandra Pal, for the Appellants.

The Assistant Government Advocate, for the Opposite Party.

JUDGMENT.—The appellant Dipan Singha has been convicted under section 143 and section 304, Indian Penal Code, and has been sentenced to rigorous imprisonment for five years, and to pay a fine of Rs. 200. The other appellants have been convicted under sections 148 and 304/143, Indian Penal Code, and have been sentenced to pay a fine of Rs. 1,000 each. The Assessors were of opinion that the appellants were not guilty, one of them being of opinion that the case against them was "a malicious and false one."

Having anxiously considered all the evidence in the case and the able arguments that were advanced before me by Mr. Nandkeolyar on behalf of the appellants and the learned Assistant Government Advocate on behalf of the Crown, I am of opinion that the conviction of the appellants cannot be sustained and must, therefore, be set aside.

It is unnecessary to recapitulate the facts of the case, which will be found fully stated in the judgment of the Assistant Sessions Judge. It is sufficient to say that the case for the prosecution is that the appellants, known as the Baboos of Parasia, were building a new house at Parasia and that on the morning of the alleged occurrence, namely, 16th of May last, Brahmadeo Singha visited the house of Deodhary and asked him to go and construct the thatch of the new house which the Baboos were building. The prosecution alleges that the Baboos were exacting forced labour from their tenants without payment of any wages, that Deodhary on being asked to contribute labour that morning refused to go, whereupon Brahmadeo returned to his village but promptly came back with a mob, of which the appellants were members, and inflicted severe injuries on Deodhary and his

brothers, Bishundhary and Sheodhary, from the effect of which Deodhary ultimately died.

There are eleven eye-witnesses to the alleged occurrence, and if the mere numerical strength of the witnesses were to be taken as establishing beyond doubt the fact to be proved, then I have no doubt that the guilt of the appellants has been completely established in this case. (But in my opinion the direct evidence of the witnesses must be tested and weighed in the same manner, whatever the numerical strength of the witnesses may be, and the conscience of the Court must be satisfied as to the guilt of the accused persons before they can be convicted of any crime. "It can", says Lord Macaulay, "by no means be laid down as a general maxim that the assertion of two witnesses is more convincing to the mind than the assertion of one witness. The story told by one witness may be in itself probable; the story told by two witnesses may be extravagant. The story told by one witness may be uncontradicted; the story told by two witnesses may be contradicted by four witnesses. The story told by one witness may be corroborated by a crowd of circumstances; the story told by two witnesses may have no such corroboration.) The one witness may be Tillotson or Ken, the two witnesses may be Oates and Bedfoe." (Cited in Wills on Circumstantial Evidence, 6th Edition, page 34.)

I have, therefore, to examine whether the story told by these eleven witnesses is a probable one, whether it is corroborated by the admitted facts and circumstances of the case or whether it is contradicted by testimony, direct and indirect, which is at least as unimpeachable as that furnished by these eleven witnesses. If the evidence furnished by the eleven witnesses stands the test, I am bound to act on it; if it does not, then the fact that eleven persons have sworn to the guilt of the appellants will not weigh with me.

Is the story then a probable one? The story is that the appellants had for days exacted forced labour from their tenants until the morning of the occurrence and that the tenants had rendered such services without protest. It is permissible then to enquire into the history of the relationship of the Parasia Baboos with their tenants for the purpose of finding out

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whether it is probable that the latter would render such services to the Baboos. Evidence discloses that there have been numerous proceedings in Civil and Revenue Courts between the Parasia Baboos and their tenants for the purpose of recovery of rents. In these proceedings most of the prosecution witnesses were parties and Daodhary, the deceased, was the leading spirit amongst the tenants. In other words, the tenants were refractory tenants. The learned Judge says in one place that the disputes regarding realisation of rents ceased in 1323 F. S. (1916) and in another place that they ceased in 1914. Neither of these findings is supported by the evidence on the record. Exhibit Q13 shows that there was an order for division of crops under section 69, Bengal Tenancy Act, against Daodhary and others in 1917, and there is absolutely no evidence that the tenants peacefully paid the rent in 1918. The question, therefore, arises whether Daodhary and others, who were fully alive to their interests as tenants and knew of every procedure by which they might defeat or delay the just claims of the landlords, would submit without any protest to the authorities to the exaction of forced labour from them. In my opinion the story is inherently improbable and the evidence must, therefore, be subjected to careful scrutiny before it can be acted upon to the detriment of any of the accused persons.

There is one aspect of the case which makes the story still more improbable.

The status of Daodhary and his brothers was not that of day labourers. They are Kashtkars and not Kamias, and it is from the class known as Kamias that labour is secured by the landlords. There is evidence that they were in a position to pay off Rs. 500 or Rs. 600 to remove the attachments of crops. They own 25 or 27 *bighas* of land, drive two ploughs, have bullocks and buffaloes and own two Kitis of tiled houses. The learned Assistant Government Advocate points out that they cannot be said to be substantial tenants, but the question whether they are substantial tenants or not is, in my opinion, irrelevant. The fact, the paramount fact, is that they are Kashtkars and not Kamias; it is, in my opinion, highly improbable

that they could be called upon to contribute labour free or otherwise to their landlords.

It seems to me that the whole case of the prosecution must depend upon the story of forced labour. The prosecution has examined four witnesses on this point, P. W. No. 1, P. W. No. 2, P. W. No. 3 and P. W. No. 7. They agree only in this that, though they received no wages for their labour, they received some Sattu every day. But they differ as to the quantity they received. P. W. No. 1 says that they received one seer of Sattu a day, P. W. No. 2 says that they received half a seer a day, P. W. No. 3 is silent on this point and P. W. No. 7 says that they received $1\frac{1}{2}$ seers a day. It will be seen, therefore, that it is not a consistent story which they tell. There is another matter which must be considered in this connection. I cannot believe that the prosecution did not know that the question of forced labour was the critical question in the case. That is the immediate cause which it put forward for the alleged occurrence.

If the cause is found to be absent, it must necessarily throw a great deal of discredit on the evidence of the alleged occurrence. Yet on this vital issue the prosecution examined only four witnesses, all of them being members of the family of Daodhary. The learned Judge says that P. W. No. 7, who is one of the witnesses on this point, is not a relative, but his finding on this point, as on many other points, is in the teeth of what the prosecution witnesses have themselves said. P. W. No. 1 on the question of relationship said: "My father had two brothers, Jhumak and Nemi. Lal Behari witness" (that is to say, P. W. No. 7) "is son of Jhumak." There cannot be any doubt, therefore, that P. W. No. 7 is a relative of the deceased, since it is admitted that the deceased was the uncle's son of P. W. No. 1. The other witnesses on this point are P. W. Nos. 1, 2 and 3. P. W. Nos. 2 and 3 are brothers of the deceased, who in his lifetime led the tenants against the landlords. So far as P. W. No. 1 is concerned, the learned Judge himself says of him that he had suffered more wrongs from the Parasia Baboos than any other tenants in the village. These are the only

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witnesses as to the exaction of forced labour by the Parasia Baboos, which is alleged to be the immediate cause of the occurrence. The learned Judge has recorded a finding that a large number of labourers was employed in the construction of the house for a considerable period. And the question that at once arises is, why has nobody been examined on this vital issue outside the family sphere of influence. The evidence of the investigating officer is important on this point. He said as follows:—"The complainants and the prosecution witness had stated before me that labourers from Karma used to go from Karma to Parasia for working on the new house. They neither named any person as going there or said that they had themselves been going there. Trilochan (that is to say, P. W. No. 1) did not say that he or his son work on the new house." Here is an important issue in the case which, as I hold, Trilochan and the others must have known to be of paramount importance in this case, and yet no opportunity was given to the Police to investigate the truth of that matter. The Police evidence must throw considerable doubt on the testimony of Trilochan himself, who says in Court that he and his son were among those from whom labour was exacted by the Parasia Baboos.

The falsity of the story is further demonstrated by a piece of evidence which has not been considered by the learned Judge at all. The story is that Deodhary was wanted on that fateful morning for working on the Chappar of the new house. Now, if the house was not ready for the Chappar, the story must necessarily be false. Here again the evidence of the investigating officer is conclusive on the point. He stated as follows: "I examined the house under construction in Parasia. One storey of it had been completed and the earthwork was going on. I found the roof of the ground storey was complete with beams, rafters and mud and the walls of the next storey was going on. When I saw the new house, I found only two layers above the wall of the first storey, that is below four feet." It is absurd to suggest that a Chappar would be wanted for walls which were below four feet. The learned Assistant Government Advocate does not

suggest that the house was ready for the Chhappar on that day, but he argues that there was nothing to prevent them from constructing the Chhappar before the walls were ready for it. The argument is an ingenious one, but is inadmissible on the evidence in the case. It is the case of the prosecution that the house was completely ready for the Chhappar, and the learned Judge himself complained of the attempt on the part of the defence to alter the character of the new house from a finished one to an unfinished one still in the process of construction. P. W. No. 1, who stopped work, according to his evidence, two or three days before the day of occurrence, says that the wall work was nearly complete when he left. P. W. No. 7 is more definite. According to his evidence he worked up to the day previous to the day of occurrence, and he says that when he left "the Dharan and Barahi were put on the wall of the new house and the bamboo structure was also placed." The learned Judge has ignored the evidence of the investigating officer and has relied on these witnesses for the conclusion that the house was a finished one, but I am unable to take that view myself. On a consideration of all these circumstances, I hold that the prosecution has not established that the Parasia Baboos were in the habit of exacting forced labour from their tenants or that on the morning of the date of occurrence, they or any of them went to Deodhary and called upon him to contribute labour for the construction of the house.

If this be so, then the prosecution has undoubtedly made a false case as to an essential part of its story, and the question is, can it secure the conviction of the accused persons on what remains of its evidence? In considering the rest of the evidence, the first point that strikes me is the undoubted delay that took place in lodging information at the Thana. Now, speaking for myself, I would not have, in the circumstances of the case, attached any importance to the delay in giving information, but for the explanation which the prosecution has offered for the delay.

When an explanation is offered, I must examine the explanation and if I find that it is unacceptable, I must necessarily view the delay with suspicion. Now what is the

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explanation? The explanation is that soon after the occurrence Jaggan, Chaukidar of Karma, came to the scene of occurrence and was taking the injured persons to the Thana, when they were met at village Askhan by the accused persons who forced them to return to Karma. I cannot accept this explanation. In the first place, this is not mentioned in the first information at all. In the second place, Jaggan Chaukidar who is admittedly alive has not been called to support this story. The learned Judge's comment on the failure to examine Jaggan Chaukidar is remarkable. He says: "If the story had been a concocted one, he would have in all probability been brought to assert it." I cannot assent to this proposition. I will not assume that Jaggan Chaukidar, if he had been called, would willingly have given false evidence in the case, but I will draw the only presumption which the law allows me, namely, that he would not have supported the case of the prosecution if he had been called as a witness in its behalf. In the third place, it is admitted that the appellants are the proprietors of village Askhan and have a Cutchery house there. At any rate it is within the sphere of influence of the appellants. It is also admitted that there was a shorter route to the Thana outside the sphere of influence of the appellants. It is incredible that the Chaukidar, with a man so injured that he had not uttered a single word since the blow was struck, should deliberately choose a route through the sphere of influence of the appellants when a shorter and a safer route was available to him. The comment on behalf of the appellants of course is that the whole incident is manufactured and that the prosecution was obliged to choose the longer route for the purpose of its evidence, as the essential part of the story is that the party was overtaken by the appellants and forced to return. The learned Assistant Government Advocate complained that the defence should have asked for an explanation from the witnesses why they chose a longer route and he argued that as it failed to do so, the argument founded on it is an inadmissible one. But the only person from whom the defence could have got an explanation is Jaggan Chaukidar who arranged the journey and was in the

charge of the party, and as the prosecution failed to call him, I do not think that the complaint of the Assistant Government Advocate is a just one. I hold that the explanation offered by the prosecution for the delay in giving information is an untrue one and cannot be accepted.

I have, therefore, to consider why a false story was deliberately set up by the prosecution in order to explain the delay in giving information. And in this connection it is necessary to examine the defence theory. The case of the appellants is that they know nothing of the alleged occurrence and had no share or part in it and that the institution of the criminal proceedings against them is the outcome of the hostility of the tenants who for years fought them in Civil, Criminal and Revenue Courts. This is the case of the appellants. Apart from this definite case which they set up, they have a theory as to the injuries found on the person of Deodhary. This will be found in the fifteenth paragraph of their written statement which runs as follows:—

"That these accused do not know anything about the injuries found on the person of Deodhary, but the rumour about the locality is that a day before the alleged date of occurrence there was a family quarrel among the brothers of Deodhary and others, in which their respective partisans also took part and words led to blows. The matter at that time appears to have been settled or tried to be hushed up. But next day when the condition of Deodhary became probably serious, they with the advice of Babu Lal Behari Lal and others, the enemies of these accused, concocted a case implicating all the male members of the different families of Parasia landlords, leaving out only small infants two or three years old. The rumour is strengthened by the fact that Fauzdar Ahir's defence before the Police was to this very effect and some witnesses also were examined by the Sub-Inspector who proved it affirmatively, but the Police, evidently in collusion with Lal Beharee Lal and others, suppressed these witnesses and Fauzdar being not tried in this Court, these accused are unable to examine the said witnesses, as they are on terms of very strong enmity with these accused and other Parasia landlords.

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If the Court will be so inclined, they may be examined as Court witnesses."

The learned Judge is of opinion that there is an inconsistency in the case set up by the defence. "Even the present defence," says the learned Judge, "is not without an inconsistency. The main defence of the accused now is that the story of the prosecution is a concoction and the outcome of hostile relations between themselves on the one hand and their seven co-sharer landlords, the informant, Trilochan Gope, the Goala tenants of Karma and Lal Behari Lal, on the other side. In stating their defence they add an allegation of a quarrel between Deodhary and his three brothers pretending to give it a minor position in the story."

With every desire to understand the learned Judge, I fail to see where the inconsistency is. I am bound to say that the whole judgment is vitiated by a special pleading on behalf of the prosecution which ought to find no place in a document so sacred as the judgment of the Court.

It is suggested by the appellants that the delay in giving information was due to the fact that they were unwilling to bring trouble on their brother, but when the condition of Deodhary became serious, they made up their minds to implicate their old enemies, the landlords, and implicate they did every adult member of the appellants' family. It is, therefore, material to consider whether there is any foundation for the theory put forward by the appellants. The Police undoubtedly thought it necessary to investigate the matter and the result of that investigation was that Fulman Ahir, the step-brother of the deceased, a person believed to have inflicted the injuries on Deodhary, could not be found in the village, though search was made for him. The investigating officer was informed that Fulman was a mad person roving about here and there and was not in the village for a long time and that his whereabouts were unknown.

This information completely satisfied the investigating officer. But the investigating officer admits that he examined various witnesses who completely supported the defence theory. His evidence on this point is of importance. He said as follows: "On the 21st June the accused produced the defence witnesses, but did not cite them. My diary does not show by whom the

defence witnesses were produced or if they were produced by any accused at all. None of the accused pointed out any of the witnesses as his. I took the statements of Sohorai, Huesani, Sheodhary, Sorablak, Sheobalak and Nemdhary. These witnesses supported the defence that there was a quarrel between brothers. These persons asserted themselves to be eye-witnesses." The result of this evidence is that no less than six persons supported the defence theory, although they were not produced by the accused persons. These witnesses said that they were eye-witnesses to the occurrence which was one between the brothers. The question at once arises why did not the Public Prosecutor examine them? The weighty words of Wilson, J., in the case of *Empress v. Dhunno Kazi* (1), may be cited in this connection. "The only legitimate object of a prosecution is to secure not a conviction, but that justice be done. The prosecutor is not therefore, free to choose how much evidence he will bring before the Court. He is bound to produce all the evidence in his favour directly bearing upon the charge. It is *prima facie* his duty, accordingly, to call those witnesses who prove their connection with the transactions in question, and also that must be able to give important information. The only thing that can relieve the prosecutor from calling such witnesses is the reasonable belief that, if called, they would not speak the truth. If such witnesses are not called without sufficient reason being shown (and the mere fact of their being summoned for the defence seems to us by no means necessarily a sufficient reason), the Court may properly draw an inference adverse to the prosecution." This decision disposes of the only argument that was advanced before me in support of the conduct of the prosecution in not calling them. It was urged that they were defence witnesses who, if called, would have supported the defence case and that it was no part of the duty of the prosecution to call them. I cannot assent to this proposition.

It is the duty of the prosecutor to call every witness who can throw any light on the inquiry, whether they support the prosecution theory or the defence theory. It is

(1) 8 O. 121 at p. 124; 10 O. L. R. 151.

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for the Court to choose which theory is correct, not for the prosecution. I strongly protest against a doctrine which would reduce criminal trials into a battle of tactics between the prosecution and the defence. As Sir Lawrence Jenkins said in the case of *Ram Ranjan Roy v. Emperor* (2), "that purpose", that is to say the purpose of criminal trial, "is not to support at all costs a theory, but to investigate the offence and to determine the guilt or innocence of the accused, and the duty of a Public Prosecutor is to represent not the Police, but the Crown, and his duty should be discharged by him fairly and fearlessly, and with a full sense of the responsibility that attaches to his position. The guilt or innocence of the accused is to be determined by the Tribunals appointed by law and not according to the tastes of any one else." I must not be understood, however, as suggesting that it is the duty of the prosecutors to call as witnesses persons who may support a particular case that the defence may set up, a case of *alibi*, for instance, or a case of right of private defence. There is, in the argument of the Assistant Government Advocate, a fundamental misconception of the meaning conveyed by the words "defence case." A defence case is that which is set up definitely and of the knowledge of the accused person as a ground of defence. The only defence which the accused persons set up in this case is that they knew nothing of the occurrence and had no part or share in it. They do indeed suggest that there was a fight between Deodhary and his brothers, in the course of which Deodhary received the injuries from which he ultimately died. But this is the theory which they advanced, not of their personal knowledge but as a result of what they had heard from others, and only to explain the injuries which were undoubtedly inflicted on Deodhary. I cannot assent to the argument that this was part of their case, which they had to establish to meet the criminal charges against them. The Police in the course of their investigation did examine persons who supported this theory and who definitely stated that they were eye-witnesses of the occurrence. I hold that it was the duty of the prosecution to

call these witnesses and as it has failed to do so, I am entitled to, and do in fact, draw an inference adverse to the prosecution.

It is, therefore, a heavy burden which the prosecution has taken on itself to establish the guilt of the accused persons, and in my opinion it has not discharged that burden by developing the case from time to time. An examination of the first Sahana, the second Sahana and the first information will make good my criticism. The first Sahana is a colourless document. It mentions only four persons as having been members of the party that assaulted Deodhary and his brothers, but assigns no definite part to any of them. The second Sahana is a little more definite, in that it adds certain other names to the list of accused persons furnished by Trilochan and assigns a definite part to Deonandan who was, however, discharged by the committing Magistrate, but none to Deepan Singha, who was the principal accused in the Court below and who is alleged to have dealt the fatal blow to Deodhary. The first information, however, assigns a leading part to Deepan Singha and gives the whole story in all its details. It is remarkable that Trilochan is the informant on whose information the first Sahana as well as the first information were drawn up. I find it difficult to reconcile the statements made in these documents, and I attach great importance to the fact that no definite part was assigned to Deepan Singha in the first two documents.

There is another important matter that must be considered in connection with the first information, and it is this: the names of the witnesses were not given in the first information. The actual statement in the first information is as follows:—"The names of witnesses will come to light in the course of investigation." Trilochan has sworn in Court that he did give the names of the witnesses to the Sub-Inspector who recorded the first information, and the learned Judge has believed this evidence. If there was nothing in the first information itself to indicate either that he did give the names of the witnesses or that he did not, I might have accepted the finding of the learned Judge on this point, but I cannot do so having regard to the definite statement made in the first information which was

(2) 27 Ind. Cas. 554; 42 C. 422 at p. 428; 19 C. W. N. 28; 116 Cr. L. J. 170.

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read over to Trilochan and admitted by him to be correct.

We are now in a position to estimate the value of the evidence given by the eleven eye-witnesses. Out of these eleven witnesses, nine are relatives of Deodbary the person who led the tenants against the landlords. Most of these witnesses have themselves been parties to the litigation between the landlords and the tenants. Those that remain, namely, P. W. Nos. 4, 8 and 11, have also figured as tenants in all the rent suits. The story told by them is undoubtedly false as regards many important particulars, and I find it impossible to convict the appellants on what remains of their evidence. To take the evidence of Trilochan, I disbelieve his evidence as regards the incident connected with Jaggan Chaukidar and, having regard to the Sahana Exhibit No. 1, I do not believe that he saw that Deepan struck the fatal blow on Deodbary. I do not believe that he gave the names of the witnesses to the Sub Inspector, and having regard to the evidence of the investigating officer, I do not believe that he ever contributed any labour for the construction of the new house at Parasia. It is, in my opinion, impossible to rely on evidence of this character.

There is just one more circumstance to which I must refer. The learned Judge has throughout assumed that the appellants absconded after the alleged occurrence, and he says that this suggests an inference in favour of the prosecution. It is quite clear that no inference can at all be drawn until it has been established that they were wanted for the crime. The only fact which I find established is that they were not in the village when the investigating officer conducted his enquiry in the village. This, in my opinion, is not evidence of absconding. But the learned Judge says in one part of his judgment: "From the statement of Mosahib Singha, D W. No. 2, it appears that the accused knew the death of Deodbary immediately after it occurred and also the fact that they were wanted." This would undoubtedly be evidence of absconding, but I have searched the evidence of Mosahib Singha in vain for this statement. But the investigating officer, in answer to questions put by the Court, said as follows: "I

met Mosahib Singha during the course of my enquiry. I enquired of him where the accused persons were and he informed me that the accused persons had absconded. I asked Mosahib who he was and he told me that he was the Gomasta of Deonandan Singh." This is hearsay evidence and is clearly inadmissible. It is a matter of great regret that the learned Judge should himself, by questions which he put, to which, therefore, no objection could be taken by anybody, have brought on the record a statement which cannot under any circumstances bind any of the appellants. The last question put by the learned Judge suggests that Mosahib, as the Gomasta of Deonandan Singh, could bind the appellants. The doctrine would be a remarkable one in a criminal trial. Without going, however, into the larger question, it is sufficient to say that Deonandan Singh was not an accused person before him and that it has not been established that Mosahib Singha was expressly or impliedly authorised to make the admission on behalf of the appellants. I find that the appellants surrendered as soon as the investigating officer received warrants for their arrest, and I am unable to agree with the learned Judge that they or any of them at all absconded.

Having examined the evidence in the case with great care and anxiety, I am unable to hold that the prosecution has established the guilt of any of the appellants. That being my opinion, I must allow these appeals, set aside the conviction and the sentences passed on the appellants and direct that the fines, if paid, be refunded.

Appeal allowed.

ODDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 47 OF 1919.

May 9, 1919.

Present:—Pandit Kanhaiya Lal, J. C.
BASHIR AHMAD KHAN—ACCUSED—
APPLICANT

versus

EMPEROR—COMPLAINANT—RESPONDENT.
Penal Code (Act XLV of 1860), s. 411—Proper

JAIN V. SANTUKDAS.

found in house occupied by several persons—Possession, determination of—Offence.

The mere fact that stolen property is found in a house in which the accused lived with his brothers, is not sufficient to establish that he retained such property in his possession or custody or to justify his conviction under section 411 of the Penal Code.

Where stolen property is found in a house occupied by several persons, it is not enough to show that the property was found in the house to convict a member of the family who may have had nothing to do with bringing or keeping it there.

Criminal application against the order of the Sessions Judge, Lucknow, dated the 12th April 1919, upholding the order of the Magistrate, 1st Class, Lucknow, dated the 19th March 1919.

Mr. R. F. Bahadurji, for the Applicant.

The Government Pleader, for the Crown.

JUDGMENT.—The applicant, Bashir Ahmad Khan, has been convicted of an offence under section 411 of the Indian Penal Code and sentenced to rigorous imprisonment for six months. It appears that a cash box was stolen from the room of a school building on the night of the 10th February last. It contained Rs. 31-4-6 and some papers. It was found that a person named Mohammad Mir Khan had visited the school the same evening. The Sub-Inspector went to search the house in which he was living. That house was occupied by him and his two brothers, Bashir Ahmad Khan and Nasir Ahmad Khan. The Sub-Inspector met Bashir Ahmad Khan outside the house. He asked him whether there was any box inside. He replied in the negative. He then said that he would search the house and went in and found the box in a room in the upper storey and a bundle containing some papers.

Mohammad Mir Khan made a confession, admitting that he and another person named Shafqat had stolen the box and taken it to a house, called Hamid Manzil, belonging to Mohammad Yusuf and removed the cash contained therein. He further admitted that he removed the box next morning to the house in which he himself lived with his brothers. The learned Magistrate who tried the case convicted Mohammad Mir Khan and Bashir Ahmad Khan.

The evidence against Bashir Ahmad Khan is, however, clearly insufficient to

prove that the property was retained by him or was in his possession. All that is said is that when the Sub-Inspector asked him, he denied that any box was inside the house and that when the Police went in to make a search, he called out that the Police were coming to search the house. Bashir Ahmad Khan does not deny that he had noticed the box in the morning. He states that he had asked Mohammad Mir Khan whose box it was and that Mohammad Mir Khan had told him that it had belonged to a friend of his. It does not, however, appear that Bashir Ahmad Khan took it in his charge. His denial before the Sub-Inspector that Mohammad Mir Khan had brought any box may have been due to a desire to screen him from exposure or to an uncertainty in his mind as to whether the box he had noticed in the morning was the one about which the Police were making the inquiry. The possession or custody of the box has not been brought home to him. The mere fact that the box was found in the house in which he lived with his brothers is not enough to establish that he retained it in his possession or custody. Where stolen property is found in a house occupied by several persons, it is not enough to show that the property was found in the house to convict a member of the family, who may have had nothing to do with bringing or keeping it there.

The application is, therefore, allowed and the applicant, Bashir Ahmad Khan, acquitted of the offence charged. He will be set at liberty.

Application allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 162 OF 1919.

July 29, 1919.

Present:—Mr. Findlay, A. J. C.

Musammatt JAINA—COMPLAINANT—APPLICANT
versus

SANTUKDAS AND OTHERS—ACCUSED
—NON-APPLICANTS.

Criminal Procedure Code (Act V of 1898), s. 250—

TULLA v. EMPEROR.

Complaint found to be false and frivolous or vexatious—Compensation, order for, legality of—"Frivolous", meaning of.

An order for the payment of compensation under section 250 of the Criminal Procedure Code can be made in a case which is false as well as frivolous or vexatious.

"Frivolous" means "trifling" "silly", or "without due foundation."

Criminal revision of the order of the Magistrate, First Class, Nagpur, dated the 31st March 1919, in Criminal Case No. 1 of 1919.

Mr. M. R. Bobde, for the Applicant.

ORDER.—The main ground urged on behalf of the present applicant is that the Magistrate having found the accusation made by the applicant to be a false one, it was not open to him to hold that it was frivolous and vexatious and that on the strength of the decisions in *Ram Singh v. Mathura* (1) and in *Parsi Hajra v. Bandhi Dhanuk* (2) as well as of the opinion of Prinsep, C. J., in the Full Bench case, *Beni Madhub Kurmi v. Kumud Kumar Biswas* (3), the present was a case where the order for compensation passed was illegal. I do not find it necessary, however, to admit this application for revision because I am in full agreement with the opinion of the majority of the Judges in *Beni Madhub Kurmi v. Kumud Kumar Biswas* (3), just quoted. It seems to me that the terms of the section are perfectly clear and that an order under section 250 for the payment of compensation can be made in a case which is false as well as frivolous or vexatious. I am unable to concur in the reasoning of Prinsep, C. J., in the case just quoted, and it seems to me that the four other Judges have taken a view which is unquestionably the right one. Moreover, it may be pointed out as regards *Ram Singh v. Mathura* (1), just quoted, that the facts of that case were very different. In it the complainant had alleged that he was kept in confinement for 3 days, while in the present case the charge was one of extortion on what would appear to have been a fantastic story that she had been put in fear that unless she paid Rs. 200, the corpse of her sister-in-law would not be allowed to be removed by any of the caste people. If the charge was found to be a false one,

it was to my mind patently both a vexatious and a frivolous one. Frivolous may be described as meaning "trifling," "silly" or "without due foundation", and the charge in question would certainly, in my opinion, come within that term if it were false. I may point out moreover that in *Emperor v. Bai Asha* (4) Chandavarkar and Aston, JJ., have followed the decision in *Beni Madhub Kurmi v. Kumud Kumar Biswas* (3) and equally dissented from the earlier decision in *Parsi Hajra v. Bandhi Dhanuk* (2), on which reliance has been placed by Counsel for the applicant. The other so-called grounds of revision are not such as in my opinion call for any detailed discussion. The inferences drawn by the Magistrate from the evidence produced were very reasonable ones and there was ample cause for his holding that the complaint made by Jaina Bai was a false one. As regards the allegation that the amount of compensation ordered was excessive, I entirely disagree in view of the serious and repulsive nature of the charge made against the accused. The Magistrate's order in this connection would appear to have been a very proper one. The application for revision is accordingly dismissed.

Application dismissed.

(4) 5 Bom. L. R. 128.

ALLAHABAD HIGH COURT.
CRIMINAL REFERENCE No. 14 OF 1919.

January 11, 1919.

Present :—Mr. Justice Lindsay.

TULLA AND OTHERS—APPLICANTS
versus

EMPEROR—OPPOSITE PARTY.

Public Gambling Act (III of 1867), ss. 3, 4, conviction under—Money found on persons of accused, whether can be confiscated.

The law does not contemplate the confiscation of money found on the persons of the accused in a case under sections 3 and 4 of the Public Gambling Act. [p. 252, col. 1.]

(1) 14 Ind. Cas. 599; 34 A. 354; 9 A. L. J. 308; 13 Cr. L. J. 247.

(2) 28 C. 251.

(3) 30 C. 123; 6 C. W. N. 799 (F. B.).

TULLA v. EMPEROR.

Criminal reference made by the Sessions Judge, Saharanpur.

FACTS appear from the following referring order :—

"Balloo, the applicant here, and Tulla, Mahabir and Shankar, the applicants in Revision No. 65, were convicted at the same trial. I, therefore, dispose of appeal and application together.

Balloo has been sentenced to six months under section 3 and two months under section 4 of the Gambling Act, eight months in all. The applicants have received non-appealable sentences under section 4.

The facts found in the case, which are proved by the evidence of Sub-Inspector Khuda Nur Khan, Muhammad Bakhsh, Mara and Imam-ud-din, are fully described in one of the opening paragraphs of the learned Magistrate's judgment. I concur in the learned Magistrate's findings.

There is no doubt that a dozen men were found gambling at 10 in the morning in the house of the appellant, Balloo. The appellant was sitting with the gamblers, and had beside him an earthen pot, in which were a quantity of pice aggregating Rs. 3-14-3 in value. Obviously, the odds are that this money represented the percentages so far accumulated for the benefit of the owner of the house. The assembly does not, on the face of it, appear to have been a mere friendly party of Balloo's assembled for a friendly gamble. The applicant's own Pleader indeed pointed out that one of his clients Mahabir has reason to be rather ill-disposed to Balloo than friendly with him. Had it been so, it was easy for any of the 12 accused persons to raise that plea. Not one, however, not even Balloo himself, made any such suggestion. Apart entirely, therefore, from the presumption which arises when a house is legally searched on a legal warrant issued under the Act, the circumstances leave, in my opinion, no reasonable doubt that the appellant's house was, under his own supervision, being used at the time when the Police raided it as a common gaming house.

The three applicants were obviously there for the purpose of gambling. No other possible reason for their presence appears;

and as gambling was going on in the room where they were found, I have no doubt that they were taking part in it.

There is no direct evidence that Balloo was gambling but Rs. 40 which were found in a heap of fuel, having evidently been thrown there when the Police rushed in, are claimed by him, and are not likely to have formed part of his percentage. I have, therefore, no doubt that he was gambling with this money and he has been rightly convicted under both sections. Nor do I consider that there was any illegality in trying him under both sections in one trial.

The plea that there being a Police Inspector in Saharanpur the search could not legally be made by a Sub-Inspector, is, if there would otherwise be force in it, disposed of by the amendment introduced into paragraph 295 of the new Police Regulations.

All the applicants have been previously convicted, and have, therefore, been properly sentenced to imprisonment. The appellant Balloo has many previous convictions, and is clearly an incorrigible nuisance to the community. The only matter which calls for interference is the order of the learned Magistrate that "the money found on the spot and on the accused's persons will be confiscated."

The case of *Maturwa v. Emperor* (1), reported from this district in March last and which followed *Emperor v. Tota* (2), is clear authority against such an order.

The case, therefore, after taking any explanation which the learned Magistrate may wish to submit, will be reported to the Hon'ble High Court with the recommendation that the above order of confiscation be set aside. With this exception, I dismiss the appeal and the application."

JUDGMENT.—This case has been referred by the Sessions Judge of Saharanpur for the purpose of having an order passed by a Magistrate set aside. The Magistrate was dealing with a case under

(1) 46 Ind. Cas. 156; 16 A. L. J. 428; 40 A. 617; 19 Cr. L. J. 700.

(2) 26 A. 270; A. W. N. (1904) 11; 1 Cr. L. J. 35.

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the Gambling Act and after convicting the persons who were accused before him, he made an order confiscating some of the money which was found in possession of the persons concerned. The Judge, I think, is right in saying that the law does not contemplate the confiscation of the money found on the person of the accused. He refers to a ruling of this Court, *Maturwa v. Emperor* (1). I accept the recommendation of the learned Judge and direct that the order of confiscation be set aside.

Order set aside.

PATNA HIGH COURT.

CRIMINAL REVISION No. 357 OF 1919.

October 21, 1919.

Present:—Mr. Justice Das.

Musammatt SHEORATNI—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 236, 237, applicability of—Penal Code (Act XLV of 1860), ss. 109, 363—Person charged with kidnapping, whether can be convicted of abetment of the offence.

Section 236, Criminal Procedure Code, which must control section 237 of the Code, only applies when from the evidence led by the prosecution it is doubtful which of the offences has been committed by the accused. But if the evidence which has been led by the prosecution leads to one result and one result only, it cannot possibly be said that it is doubtful which of the offences has been committed by the accused [p. 253, cols. 1 & 2]

A person charged with an offence under section 363 of the Penal Code cannot be convicted of an offence under that section read with section 109, where he was not charged with that offence. [p. 253, col. 2.]

Criminal application against an order passed by the Sessions Judge, Chapra, dated the 1st September 1919, confirming in appeal the order passed by the Deputy Magistrate, Chapra, dated the 31st July 1919.

FACTS of the case are shortly as follows:—

On the 15th April 1919 one Arjunia took Lachhminia, a minor girl aged 10, from the field of her father on the pretext of purchasing dolls for her. Arjunia took Lachhminia first of all to her own house, where Sheoradni, the petitioner, and Sheoradni's sister were waiting. Sheoradni and Arjunia then took her to another

place. Ultimately Sheoradni took her on Ekka and rail to different places where she was kept for some fifteen days. On these facts Sheoradni and Arjunia were put upon their trial before the Deputy Magistrate of Chapra for an offence under section 363, Indian Penal Code, who convicted Arjunia for the offence of having kidnapped Lachhminia and with regard to Sheoradni came to the following finding:—

"I am of opinion that Sheoradni was abetting the offence of kidnapping of this minor girl from the lawful guardianship of her father. Her presence at Arjunia's place, where her own sister Parbatia was waiting, goes to show that she (Sheoradni) was abetting the offence of kidnapping by instigation. I accordingly convict Sheoradni under sections 363/109, Indian Penal Code."

On appeal by Sheoradni the Session Judge held: "In my opinion it is clear from the subsequent conduct of the appellant in connection with the removal of the girl that there must have been a previous conspiracy between her and Arjunia for the purpose of this removal. Hence the appellant can be convicted of the offence of abetment of kidnapping. If the offence of kidnapping was completed before the girl was actually made over to Sheoradni by Arjunia, then Sheoradni cannot be convicted as a principal offender for the offence of kidnapping is not a continuing offence.

"After considering this point I have come to the conclusion that it must be held that the offence was completed by Arjunia before she actually made over the girl to Sheoradni.....

"Thus I do not think that Sheoradni can be convicted of the main offence of kidnapping."

Messrs. Varma and Negeswar Prasad, for the Petitioner.

The Assistant Government Advocate, for the Opposite Party.

JUDGMENT.—The petitioner was charged with having committed an offence under section 363, Indian Penal Code, but she has been convicted not under section 363 but under section 363 read with section 109 and has been sentenced to six months' rigorous imprisonment.

The first point that arises for my consideration is whether, although she was not

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charged with having abetted the committing of an offence under section 363, she could be convicted of abetment. Mr. Varma appearing on behalf of the petitioner has referred me to various cases. It is sufficient to say that so far back as 1874 the Bombay High Court held that when a man was charged with murder, he could not be convicted of abetment of it on the ground that abetment of murder could not be said to be a minor offence in relation to murder itself. That case has been followed in a series of cases in the Madras High Court, but the learned Assistant Government Advocate says that the conviction is perfectly correct under section 237 of the Code of Criminal Procedure. Section 237 provides that if, in the case mentioned in section 236, the accused is charged with one offence and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it.

It will be seen, therefore, that the operation of section 237 is by the express provision of that section limited only to the case mentioned in section 236. Section 236 provides that if a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be convicted of having committed all or any of such offences, or he may be charged in the alternative with having committed some one of the said offences. Therefore, reading section 236 it appears that the accused may be convicted of an offence although he was charged with another offence, if a single act or a series of acts with which he may be charged is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute.

Now, in this case is it doubtful upon the facts found by the Courts below which of the several offences has been committed by the petitioner? In my view section 236, which must control section 237, only applies when from the evidence led by the prosecution it is doubtful which of the offences has been committed by the petitioner. But if the evidence which has been led by the prosecution leads to one result and one

result only, it cannot possibly be said that it is doubtful which of the offences has been committed by the petitioner. That, I think, is the principle of section 237. In this case there is no doubt at all, if the witnesses examined on behalf of the prosecution are to be believed, that the petitioner has not committed the offence of kidnapping. Therefore, it cannot be said that it was doubtful which of the several offences was committed by the petitioner. In my opinion, therefore, section 237 has no application. That being so, the petitioner could not have been convicted under section 363 read with section 109, when she was not charged with that offence.

In the next place, I am of opinion that on the facts found by the Courts below she could not have been convicted of an offence under section 363 read with section 109. The facts found by the Courts below are these: (1) The girl was taken to the house of Arjuna where petitioner was waiting for her; (2) The petitioner then took the girl from place to place and concealed her in her own house for 15 days. Upon this the learned Sessions Judge records the following finding:— "I think there can be no doubt from the circumstances of the case that Sheoradni must have been privy to the transaction from before and must have conspired with Arjuna to kidnap the girl, as otherwise she would not have been waiting for the girl in Arjuna's house and would not have gone off with the girl immediately afterwards to Piprahia." I may draw the attention of the learned Judge to the case of *Rakhal Nikari v. Queen-Empress* (1). In that case the following facts were found. First, that the girl was taken to the house of a woman where Rakhal (the petitioner in that case) was present. Secondly, Rakhal for several days co-habited with her and took her from place to place concealing her to a great extent, and thirdly, when the woman was proceeded against Rakhal absconded. On these facts Trevelyan, J., a Judge of very great experience, came to the conclusion that he could not be convicted of an offence under section 363 read with section 109. In my view, the facts in this case cannot be distin-

(1) 2 C. W. N. 81.

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guished from the facts present in that case.

I accordingly allow this application and set aside the conviction and sentence passed on the petitioner.

Conviction set aside.

ODDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 13 OF 1919.

July 15, 1919.

Present:—Pandit Kanhaiya Lal, J. C.

EMPEROR—COMPLAINANT—APPLICANT

versus

MAIKU AHIR—ACCUSED—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 471—Lunatic accused—Court, power of, to issue direction for detention—Local Government, order of, whether necessary.

Section 471 of the Criminal Procedure Code, as amended by Act X of 1914, no longer requires a Court to report the case of an accused person suffering from mental derangement for the orders of Government. The Court can itself issue a direction for his detention in a lunatic asylum or, if there is no accommodation in it, in jail or some other place of safe custody in British India.

Revision on submission of the case by the District Judge, Lucknow, for orders of the Judicial Commissioner, on the direction of the Second Additional Sessions Judge, Lucknow, then on leave.

The Government Pleader, for the Crown.

JUDGMENT.—In this case the accused Maiku Ahir was found by the Court below to have been suffering at the time of the murder from a mental derangement, which rendered him incapable of realising in what injury his act would result or that what he was doing was unlawful. That Court accordingly directed that he should be kept in custody at the jail, pending the orders of the Local Government, to whom the case was to be reported under section 471 of the Code of Criminal Procedure.

Section 471, as amended by Act X of 1914, however, no longer requires that the Court should report the case for the orders of the Local Government. The Court can itself issue a direction for his detention in a lunatic asylum or, if there is no accommodation in it, in jail or some other place of safe custody in British India.

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The order of the Court below is, therefore, varied in so far that the accused will be kept in the lunatic asylum at Bareilly or if there is no accommodation in it, in any other lunatic asylum in the United Provinces, or in jail or such other place of safe custody as may be practicable. If the presiding Judge of the Court below is on leave, the Sessions Judge can take the necessary steps to have this done.

Order varied.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 631 OF 1919.

CRIMINAL REVISION PETITION No. 541 OF 1919.

November 12, 1919.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Moore.

K. C. SREEMANAVEDAVA RAJU—

PARTY No. 1—PETITIONER

versus

PARAPRAVAN NAIDU—PARTY No. 2—

RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 145, 435, 439—Possession, dispute as to, enquiry into—Refusal of Magistrate to examine witnesses—Irregularity—Revision by High Court, whether competent—Order based only on local inspection, validity of.

Where a Magistrate declines to receive oral evidence in an enquiry under section 145, Criminal Procedure Code, his proceedings can be revised by the High Court. [p. 256, col. 1.]

A decision as to possession based solely on local inspection is not what section 145 of the Criminal Procedure Code contemplates. [p. 256, col. 1.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure Code, 1898, and section 107 of the Government of India Act, praying the High Court to revise the order, dated the 20th September 1919, of the Court of the Joint Magistrate, Tellicherry Division, in Miscellaneous Civil No. 57 1919.

FACTS appear from the judgment.

Mr. Nugent Grant (with him Mr. K. S. Krishnaswamy Aiyar), for the Petitioner:—*Kamal Kutty v. Udayavarma Raja* (1) does not cover the case where the Magistrate has failed to exercise jurisdiction.

(1) 17 Ind. Cas. 65; 23 M. L. J. 499; 12 M. L. T. 439; (1912) M. W. N. 1154; 13 Cr. L. J. 753; 36 M. 275.

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Failure to take oral evidence is declining jurisdiction. *Palani Chetty v. Rathina Chetty* (2), *Velayuda Kone v. Narayana Kone* (3), *Arumuga Govindan v. Venkatasubbier* (4), *Kolha Koer v. Muneswar Tewari* (5), *Sakhayat Ali v. Alhadi Hazi* (6). See also *Sundar Nath v. Emperor* (7). The order should be taken as having been passed without jurisdiction.

Local inspection alone is not sufficient to justify the passing of an order under section 145, Criminal Procedure Code. See *Sahadat Khan v. Tajaddi Sheikh* (8).

Mr. K. B. Venkatachala Aiyar for Mr. C. V. Ananthakrishna Aiyar, for the Respondent.—*Kamal Kutty v. Udayavarma Raja* (1) and section 439 are express and no revision lies. See also *Krishnappa Naidu v. Alamelu Ammal* (9).

ORDER.—This is an application to revise an order passed by the Sub-Divisional Magistrate of Tellicherry under section 145, Criminal Procedure Code. Two rival Jenmis were disputing the right to possession in respect of a tract of forest land, 30 square miles in extent. In February 1919 the Inspector of Police reported to the Magistrate that there was a likelihood of a breach of the peace in respect of the possession of this property. Thereupon he initiated proceedings under section 145, Criminal Procedure Code. Meanwhile a suit was instituted in the District Munsif's Court in respect of the very same property. An injunction was issued by the District Munsif. In consequence of the issue of this injunction, the Magistrate stayed his hands for some time. Subsequently this injunction was dissolved by the District Judge in August 1919. The Magistrate revived the proceedings under section 145, Criminal Procedure Code. We are told that there was a fresh report from the Police Inspector informing the Magistrate

that there was a likelihood of a breach of the peace. After passing a preliminary order, the Magistrate proceeded to the disputed locality and inspected it. According to the affidavit filed the Magistrate remained in the locality for about 2 hours and travelled over about 11 miles of it. On the strength of this inspection the Magistrate in paragraph 2 of his judgment says: "That inspection completely satisfied me as to the point in issue, viz., the fact of actual possession of the disputed property. I find that nothing is to be gained by calling on the parties to produce further evidence, the value of which (whether oral or documentary) in a dispute of this kind is very doubtful." Then he discusses the documentary evidence which was filed in the case, and says in paragraph 6: "Then very strangely the Idam demised the very same land on *othi* to Kalliatathu Kutti Nambiar on 11th June 1918." Now if the learned Magistrate had taken evidence, the petitioners might have been able to show that there was nothing strange in this second lease to Chathukutti Nambiar. Mr. Grant, who appeared for K. C. Manavedava Raja, informed us that his client transferred his lease to the Nambiar because he was unable to pay the lease amount. Subsequently the Nambiar surrendered the lease to the Idam. The Idam re-granted the lease to Manavedava Raja. He subsequently transferred his newly acquired right to a company known "The Malabar Trading Company" but is working as its agent. It was because the Magistrate refused to take evidence that he found himself in the strange position he described. Then, in another place, in paragraph 6 of his judgment, the Magistrate says: "The Idam must have regarded the lease to him as void thereafter." We are unable to understand where he got this idea from that the lease became void. This again is the result of his shutting out the oral evidence in the case. Under these circumstances, the question for our decision is whether we have jurisdiction to revise the order of the Magistrate. The learned Counsel for the petitioner has quoted a large number of authorities to show that the refusal to take evidence will amount to a declining to exercise jurisdiction. One of the earliest cases in the Presidency decided by Mr. Justice

(2) 24 Ind. Cas. 597; 26 M. L. J. 203; (1914) M. W. N. 352; 15 Cr. L. J. 509.

(3) 31 Ind. Cas. 645; 2 L. W. 1208; 16 Cr. L. J. 789.

(4) 31 M. 82; 17 M. L. J. 535; 6 Cr. L. 384; 3 M. L. T. 108.

(5) 34 C. 840; 6 Cr. L. J. 452.

(6) 43 Ind. Cas. 332; 21 C. W. N. 928; 27 C. L. J. 88; 19 Cr. L. J. 108.

(7) 44 Ind. Cas. 673; 40 A. 364; 16 A. L. J. 189; 19 Cr. L. J. 369.

(8) 52 Ind. Cas. 608; 23 C. W. N. 750; 20 Cr. L. J. 688; 46 C. 1056.

(9) 36 Ind. Cas. 855; 5 L. W. 165; 18 Cr. L. J. 23.

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Wallis, as he then was, is reported in *Arumuga Govindan v. Venkatasubbier* (4). There the learned Judge points out that where a Magistrate did not take evidence himself but acted on the evidence taken by somebody whom he deputed for the purpose, the Magistrate acted without jurisdiction and the High Court had no power to interfere. That decision was followed in *Velayuda Kone v. Narayana Kone* (3). In Calcutta the view has been consistently held that where there has been a refusal by a Magistrate to examine witnesses, that would be tantamount to a refusal to exercise jurisdiction. The Magistrate in this case based his conclusion on documents showing the title to the property. As was pointed out by Miller, J., in *Pananganti Parthasarathy v. Venkatasawmi Reddi* (10), documentary evidence of this description should only be utilized for the purpose of elucidating oral evidence that may be admitted in this case. By themselves, the documents should not be used for concluding the question as to the possession. We are, therefore, of opinion that the procedure adopted by the Magistrate in declining to receive oral evidence is a matter which can be revised by the High Court. This view is not inconsistent with the decision in *Kamal Kutty v. Udayavarma Raja* (1).

The Magistrate refers often to the local inspection which he made. As was pointed out in *Sahadat Khan v. Tajaddi Sheikh* (8), a decision as to possession based solely upon local inspection is not what section 145, Criminal Procedure Code, contemplates. The Judicial Committee in *Kessowji Issur v. Great Indian Peninsula Railway Company* (11) held that when a civil suit was decided, not on testimony given at the trial as to what took place on the night of the accident, but by the Judge's observation of what he saw on another night altogether, the decision based on it must be set aside. For these reasons we are of opinion that the procedure adopted by the Magistrate was irregular and that as he acted without jurisdiction in refus-

ing to take evidence, his order should be set aside. With the setting aside of the order, the order passed by the learned Judge of this Court attaching the timber must necessarily go, because it is for the Magistrate to say whether there was such an emergency as would justify him in acting under section 145, clause (4), Criminal Procedure Code. This case is not covered by section 146, Criminal Procedure Code. *Reid v. Richardson* (12), to which the learned Counsel for the petitioner drew our attention, was a case in which the lower Court, having found that neither party was in possession, refused to make an order as to the attachment of the property. When the matter came up before the High Court, it was held that it had the same powers as the original Court had under section 146, Criminal Procedure Code, to direct the attachment of the property. We hold that the order as to the attachment, dated 10th October 1919 and made in Criminal Miscellaneous Petition No. 519 of 1919 on the file of this Court, must be vacated as a result of our setting aside the proceedings under section 145, Criminal Procedure Code.

The only question is whether this case should go back to Mr. Throne. We do not wish to cast the slightest doubt upon his impartiality or upon his capacity to dispose of this case. But having regard to the statement which he has made more than once that any oral evidence that might be let in will not influence his mind, we would not be justified in sending the case back to him. In these circumstances we think it is desirable that the case should be sent to the District Magistrate with directions either that he should dispose of the case himself or send it for disposal to any other First Class Magistrate.

M. C. P.

Order set aside.

(12) 14 C. 361.

(10) 6 Ind. Cas. 398; 34 M. 1138; 8 M. L. T. 104; (1910) M. W. N. 400; 11 Cr. L. J. 353.

(11) 31 B. 381; 9 Bom. L. R. 671; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 17 M. L. J. 347; 2 M. L. T. 435; 34 I. A. 115 (P. C.).

GAMEN SHAH v. JHANGI RAM.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 131 OF 1919,
January 17, 1919.*Present:—*Mr. Justice Wilberforce.GAMEN SHAH—JUDGMENT-DEBTOR—
PETITIONER*versus*JHANGI RAM—DECREE HOLDER—
RESPONDENT.*Civil Procedure Code (Act V of 1908), O. XXI, r. 2—Execution of decree—Satisfaction—Admission of part satisfaction by decree-holder, effect of—Certification of payment, form of—Admission of decree-holder recorded by Court, whether sufficient.*

Where a decree-holder admits part satisfaction of his decree, the Court is bound to recognise the fact, and in the absence of any explanation why his admission should not be considered as representing the facts, the judgment-debtor ought not to be put to proof of the alleged payment. [p. 257, col. 2; p. 258, col. 1.]

There is no particular form under rule 2 of Order XXI of the Civil Procedure Code in which a decree-holder must certify payment to the Court. A mere admission by him recorded by the Court is legally sufficient. [p. 258, col. 1.]

Petition for revision of the order of the District Judge, Mianwali, dated the 19th March 1918, reversing that of the Munsif, 1st Class, Mianwali, dated the 26th May 1916, and remanding the case to the Senior Subordinate Judge for execution in respect of Rs. 100 and costs, etc.

Mr. Pir Tar-ud-din, for the Petitioner.

Dr. Nand Lal, for the Respondent.

JUDGMENT.—In this case the respondent obtained a decree for Rs. 254.13.0 against the applicant in July 1913. On the 23rd of August of the same year the Court recorded a note that the decree holder admitted the receipt of Rs. 100. In the following October the decree holder put in a stamped receipt for another Rs. 150. In December 1915 the decree-holder applied again for execution of his decree and stated that he had only received Rs. 150 of which he had given a receipt and that he had not received the Rs. 100 mentioned in the Court's order of the 23rd August. On this the judgment-debtor put in two receipts for Rs. 100 each and one receipt for Rs. 50. These the decree-holder admitted on solemn affirmation to have been correct; he finished by saying that he did not understand how he could have made the application for execution. Shortly afterwards he transferred his rights to his brother, a peti-

tion writer, and put in a lengthy statement that he had made a mistake in admitting the first payment. No affidavit, however, or sworn statement of the decree-holder was ever made or put in before the Court. The Munsif, after a prolonged enquiry, in an able and exhaustive judgment held that the decree-holder had himself admitted the decree to have been satisfied to the extent of Rs. 250, and rejected his application. Against this decision an appeal was preferred to the District Judge who, in a somewhat extraordinary judgment, accepted the appeal. He held that the Munsif was right in his decision that the decree-holder had himself admitted before the Court first payment of Rs. 100. He held, however, that the subsequent admission of this payment by the decree-holder could be corrected by him, and that the moment the decree-holder retracted his certificate the alleged payment became one which an executing Court could not take into account, an extraordinary proposition of law. He then proceeded on the assumption that it was for the judgment-debtor to prove payment and held that his evidence of payment was insufficient. He finally held that the payment in dispute not having been certified could not be recognised in execution, and that the payment alleged was not proved to his satisfaction. Against this decision a second appeal was preferred and admitted, presumably, as an application for revision and I allowed it to be treated as such.

The facts which I have stated above are by themselves sufficient indication of the perverse attitude of mind with which the District Judge approached the case. He himself held that the decree-holder had stated in Court that the sum of Rs. 100 had been paid, that subsequently he made a similar admission, but he gave no reason whatever why these admissions should not be considered as representing the facts. No explanation whatever was given by the decree-holder for his alleged inaccurate admissions, nor was any explanation forthcoming why the decree had been transferred to his petition writer brother. As for the finding that the payment in dispute not having been certified could not be recognised, and that the moment the decree-holder retracted his admission the alleged payment became one which an executing Court could not take into account, this decision is in

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itself of a surprising character. Under Order XXI, rule 2, there is no particular form required in which a decree-holder must certify his payment to the Court. A mere admission by him recorded by the Court is legally sufficient. The first admission, moreover, it must be remembered, had been subsequently repeated to be correct by the decree holder, and I cannot understand the meaning of the lower Appellate Court that the admission having been withdrawn the decree holder's certificate was thereby cancelled. In these circumstances, it was not necessary to call on the judgment debtor for proof of payment.

I accept the application and restore the decision of the Munsif. The appellant will get his costs in all the Courts.

Revision accepted.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 7 OF 1907.

May 6, 1907.

Present:—Mr. Sanders, A. J. C., and
Mr. Greeven, A. J. C.

SHEO RATAN SINGH AND ANOTHER—
DEFENDANTS—APPELLANTS

versus

ROHAN SINGH AND ANOTHER—PLAINTIFFS
—RESPONDENTS.

*U. P. Land Revenue Act (III of 1901), s. 110—
Partition proceedings—"Date of issue of proclamation"
what is—Objection filed beyond time—Court, discretion
of, to entertain objection.*

Where there is a direction to fix a date as a matter of procedure, a Court is still at liberty, after expiration of that date, to entertain an objection and do justice between the parties if sufficient reason is shown for the delay. [p. 258, col. 2.]

The date of "issue" of a proclamation under section 110 of the U. P. Land Revenue Act is the day on which it is published in such a manner that the persons likely to be affected thereby can, with the exercise of reasonable prudence, obtain knowledge of its contents [p. 259, col. 1.]

Where such a proclamation assumes the shape of a notice to be served personally on the co-sharer, the date on which personal service is effected is the date of "issue" of the proclamation, and it is from this day that the period of thirty days for preferring objections must be reckoned. [p. 259, col. 1.]

Second appeal against the decree of the District Judge, Hardoi, dated [the 23rd

November 1906, reversing that of the Assistant Collector, Hardoi, dated the 11th April 1905.

Mr. Ishwari Prasad, for the Appellants.

Mr. Ali Ausat, for the Respondents.

JUDGMENT.

GREEVEN, A. J. C.—In the course of a partition proceeding, the present appellants preferred an objection to the effect that they were entitled to a larger proportion of the area to be divided, by reason of what is known as the right of the elder branch (*haqq-jethwansi*). This objection was tried as a question of title by the Assistant Collector who, sitting as a Civil Court under section 111, sub-section (2) of the United Provinces Land Revenue Act, 1901 (U. P. Act III of 1901), decided the point in the appellants' favour. The respondents appealed under section 112 to the District Judge who, so far as merits of the objection were concerned, affirmed the finding of the Assistant Collector; but he allowed the appeal and reversed the decree upon the ground that the objection should not be entertained inasmuch as it had been preferred after the date fixed in the proclamation issued under section 110.

The appellants challenge this decision on the grounds—

First, that the Assistant Collector was legally entitled, in proper cases, to entertain objections after the date fixed in the proclamation; and,

Secondly, that this was a proper case inasmuch as

(a) the proclamation "issued", for the purposes of section 110, at a time which did not allow the period of thirty days to elapse before the date for filing objections as that section requires, and

(b) the Assistant Collector, having proceeded into camp without notice to the appellants, was bound to allow them such time as was necessary for obtaining access to his Court.

Upon the first point, I should require no reported authority to induce me to hold that where there is a direction to fix a date as a matter of procedure, a Court is still at liberty, after expiration of that date, to entertain an objection and do justice between the parties, if sufficient reason is shown for the delay. As a matter of fact, the point is covered by express

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authority [*Tulsi Prasad v. Matru Mal* (1)]. This case was determined under the provision, somewhat differently worded, of the North Western Provinces Land Revenue Act, 1873 (XIX of 1873), since repealed; but for the purpose of the question now under consideration, there was no substantial variance of language.

In the present instance, I think that the Assistant Collector not merely exercised a wise discretion in allowing the appellants to prefer their objections after the date specified in the proclamation but acted in the manner expressly contemplated by section 110 of the United Provinces Land Revenue Act, 1901. That section entitles a recorded co-sharer, who has not joined in the application for partition, to a period of not less than thirty days, from the date of the issue of the proclamation, before he is required to prefer his objections. The date of issue of a proclamation means, in my opinion, the day on which it is published in such a manner that the persons likely to be affected thereby can, with the exercise of reasonable prudence, obtain knowledge of its contents. Where a proclamation is affixed upon the land or is published by beat of drum, there can be no question about the date of issue. In the present instance, however, the proclamation assumed the shape of notices to be served personally on the co-sharers. Orders for the issue of such notice were given on the 20th February 1915. From a memorandum on the record, it appears that the notices were actually written on the 24th following. On the 25th the *Sadr Qanungo* was directed to serve the process; but, as he was apparently engaged, the *Naib Qanungo* was, on the 23rd, ordered to perform this duty. On the 1st March personal service was effected. The date fixed in the proclamation for preferring the objections was the 24th March. Having regard to the form assumed by this particular proclamation, I am of opinion that it did not "issue" till the 1st March for the purpose of section 110 and that the appellants were accordingly entitled to a period of thirty days expiring on the 30th March for preferring their objections.

There was, however, a special reason for admitting the objections when they were preferred on the 25th March, one day after the date fixed in the proclamation. The record itself does not disclose the Assistant Collector's place of sitting on the day so fixed; but an affidavit, which has been presented to this Court by the appellants and is not disputed by the respondents, shows that the officer in question had proceeded on tour to a distance of fourteen miles from the headquarters of the district. The Assistant Collector allowed them a period of grace for ascertaining his place of sitting and admitted their objections on their arrival on the following morning. He appears to me to have acted as both the law and the circumstances of the case required.

For the foregoing reasons, I am clearly of opinion that the learned District Judge's finding that the present respondents' appeal must be allowed and the objections preferred by the respondents must be dismissed as time-barred, should be reversed. In considering, however, the form to be assumed by the appellate order of this Court, we found ourselves confronted with a difficulty, inasmuch as the Court of intermediate appeal adopted the somewhat unusual course of first finding the appeal to be bad on the merits of the objection in the partition and afterwards proceeding to allow the appeal and to dismiss the objection on account of the preliminary defect that, as he supposed, it had been preferred beyond the period of limitation prescribed by section 110. This Court hesitated, in allowing the appeal, to restore the decree of the Assistant Collector, because, though the learned District Judge's finding upon the merits is purely a matter of fact, he recorded, upon the conduct of the trial of the objection, certain observations which might, especially in so far as the evidence is stated to have been taken without the sanction of an oath, have laid a foundation for a second appeal. As, however, the decree of the Court of intermediate appeal was entirely in the respondents' favour, they might, it was apprehended, be deprived of a right of a second appeal, if we simply acted upon the learned District Judge's finding of fact. On a consideration of the record,

(1) 18 A. 210; A. W. N. (1896) 30.

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however, it is clear that no question of a second appeal arises on the merits of the objection. Quite apart from the oral evidence, the concurrent findings of fact in the two Courts below are supported by the overwhelming testimony of the documents adduced. An agreement, dated the 20th May 1864, for a reference to arbitration discloses that the dispute with respect to the unequal apportionment already existed; and a decision at settlement, given on the 21st May 1868, in accordance with the award of the arbitrators, assigned to the respondents a total area of 222 *bighas*, 19 *liswas* and 19 *biswansis* at a revenue of Rs. 319 as against a total area of 279 *bighas*, 16 *biswas* and 19 *biswansis* assigned to the appellants at a revenue of Rs. 339, while the area of the common land was 196 *bighas*, 9 *biswas* and 13 *biswansis*. The parties consented to maintain this difference of apportionment until the Government should intervene; and the *wajib-ul arz* of the former Settlement refers both to the custom and the arbitration assuring to the appellants, as the elder branch, a larger area. It appears that the partition has been completed in accordance with the Assistant Collector's decision which, as affirmed on the merits by the Court of intermediate appeal, should, in my opinion, be restored.

For these reasons, I would allow this appeal, reversing the decree of the learned District Judge and restoring that of the Assistant Collector, with costs in this Court and in the Court below.

SANDERS, A. J. C.—I agree with the decision of my learned colleague. The appeal is allowed, the decree of the District Judge is reversed and that of the Assistant Collector is restored. The appellants are allowed their costs of this Court and of the Courts below.

Appeal allowed.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 43 OF 1918.

May 1, 1919.

Present:—Sir John Wallis, Kt., Chief Justice,
and Mr. Justice Sadasiva Aiyar.

KUTHIRAVATTAM APPU THAMBAN—

PLAINTIFF—APPELLANT

versus

R. FOULKES—DEFENDANT—RESPONDENT.

*Civil Procedure Code (Act V of 1908), s. 20—
Contract, suit on—Offer, whether part of cause of
action—Forum, proper—Jurisdiction, determination of.*

In a case of contract the offer is part of the cause of action and an action founded on contract may be instituted in the Court which has jurisdiction over the place where the final offer was made, but not in a Court within whose jurisdiction part of the negotiations took place. [p. 261, col. 1.]

Appeal from the decree of Mr. Justice Bakewell, dated the 3rd April 1918, in the exercise of the Ordinary Original Civil Jurisdiction of this Court, in Civil Suit No. 282 of 1917.

Mr. V. V. Srinivasa Iyengar, for the Appellant.—In a suit on contract the offer is part of the cause of action. The offer must be deemed to have been made in Madras in the chambers of Mr. T. Rangachariar, High Court Vakil, where the parties met and made overtures. The fact that the negotiations subsequently culminated in Madura will not oust the jurisdiction where the first offer was made.

Mr. P. Ramanathan, for the Respondent.—Only certain preliminary negotiations took place in Madras. That will not be a cause of action. The final offer and acceptance was in Madura. The suit should have been instituted in the Madura Court.

JUDGMENT.

WALLIS, C. J.—This is an appeal from a judgment of Bakewell, J., dismissing a suit, brought with leave under section 12 of the Letters Patent for specific performance of a contract completed at Madura for the sale of land in Malabar, for want of jurisdiction on the ground that no part of the cause of action arose in Madras within the jurisdiction of the Original Side of this Court. For the appellants it is argued that the offer must be held to have been in Madras where the parties had an interview at the chambers of Mr. Rangachariar, who took down certain notes of terms. Bakewell, J., held that the contract was concluded at Madura, and that no part of the cause of action arose here.

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The cases of *Borthwick v. Walton* (1) and *Green v. Beach* (2) show that the offer is part of the cause of action and *Aris v. Orchard* (3) is not inconsistent, because it only decides that where certain terms were agreed on in one jurisdiction and the final contract was made with variations in another jurisdiction, no part of the cause of action arose in the first jurisdiction. In other words, what has to be looked at is where the final offer and acceptance took place. In the present case I think that from Mr. Foulkes' own evidence the inference is that the terms on which the plaintiff was prepared to sell were settled at the interview at Mr. Rangachariar's chambers in Madras. No contract, however, was then effected. The parties met again in Madura, when the plaintiff asked Mr. Foulkes what he intended to do and said if he did not purchase he would have to make other arrangements.

I think this amounts to a renewed and final offer in Madura, which was accepted there, and that assuming that in a case of contract the offer is part of the cause of action, we are only concerned with the place where the final offer which was accepted was made, and that the prior offer in Madras is immaterial. On this ground I would dismiss the appeal with costs.

SADASIVA AIYAR, J.—I agree.

M. C. P.

Appeal dismissed.

(1) (1855) 15 C. B. 501; 3 C. L. R. 364; 24 L. J. C. P. 83; 1 Jur. (N. S.) 142; 3 W. R. 203; 139 E. R. 519; 24 L. T. (O. S.) 271; 100 R. R. 463.

(2) (1873) 8 Ex. 208; 42 L. J. Ex. 151; 21 W. R. 850.

(3) (1860) 6 H. N. 160; 30 L. J. Ex. 21; 3 L. T. 443; 9 W. R. 106; 158 E. R. 66; 123 R. R. 423.

OUDE JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 455 OF 1917.
November 20, 1918.

Present :—Mr. Stuart, J. C.
Raja RAMESHWAR BAKSH
SINGH—PLAINTIFF—APPELLANT
versus

DWARKA—DEFENDANT—RESPONDENT.

Practice—Procedure—Evidence closed by both parties

—Fresh witness, whether can be summoned—Landlord and tenant—Licensee, position of—Adverse possession—Improvement of buildings by licensee, effect of.

When both parties to a suit have closed their evidence, permission ought not to be granted to call any further witness.

Where a *riaya* of a village obtains possession of land as a licensee, the terms of the license being that so long as he is a cultivator and resides in the village he has a right to occupy the land for his own use, to construct buildings upon it, to dwell therein, and to enjoy the user but with no right in the soil, there can be no question of adverse possession on his behalf as against the licensor. The fact that he has improved buildings on the land or has replaced erections would not confer such a title upon him.

Appeal against the order of the District Judge, Rae Bareilly, dated the 18th July 1917, upholding the decree of the Munsif, Rae Bareilly, dated the 23rd March 1917.

The Hon'ble Mr. Gokaran Nath Misra, for the Appellant.

Mr. Kismat Rai Jagdhari, for the Respondent.

JUDGMENT.—The first point raised in this appeal is that the learned Munsif should have granted permission to the appellant to call his manager as a witness, although the application to summon the manager was made at a late stage of the proceedings. I find that the application to summon the manager was made when both parties had closed their evidence and in these circumstances, I consider that the learned Munsif acted rightly in refusing permission to call the witness at that stage. He would, in my opinion, have been wrong to have acceded to such an application.

The second point raised is as to the finding of the learned District Judge, that the defendant-respondent is in adverse possession of the land. On the evidence it appears to me clear that the defendant-respondent is a *riaya* of the village. Such being the case, he has obtained possession of the land in question as a licensee. The plaintiff-appellant is in the position of a licensor. The nature of the license is that the defendant-respondent, so long as he is a cultivator, resident in the village, has a right to occupy the land for his own use, to construct building upon it, to dwell therein, and to enjoy the user. But he has no right to the soil, and there can be no question of adverse possession on his

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behalf as against the licensor. But on the finding of the lower Courts, he has been in possession of this land for a very large number of years, and the suggestion made by the plaintiff-appellant that he has a right to terminate the license at his own will, and to turn out his licensee for no fault when there has been no breach of the license, is one that cannot possibly be approved. I should have noted before that there is a suggestion that there has been a breach of license because the defendant-respondent, on his own showing, has made permanent certain portions of his house, but by so doing he has, in my opinion, committed no breach of the license. There is no justification in Oudh for a doctrine that, when a superior proprietor permits a tenant to occupy a certain portion of land for his residence, the tenant's right of user is restricted to replacement of erections no more numerous and no better than the erections originally made. I do not see that the superior proprietor has the slightest right to object to a tenant improving his residence. In these circumstances, there has been no breach of the license and the tenant has done nothing wrong in improving the structures. He had the soil before and according to the findings of the lower Courts, he holds it still. He has taken no more than what he was originally allowed to use and he is at liberty to improve the buildings upon the soil.

For the above reasons the plaintiff appellant's suit was bound to fail and has been rightly dismissed. I dismiss the appeal with costs.

Appeal dismissed.

LAHORE HIGH COURT.
MISCELLANEOUS SECOND CIVIL APPEAL NO. 1499
OF 1915.

April 3, 1919.

Present:—Mr. Justice Leslie Jones.

AHMAD KHAN AND OTHERS—JUDGMENT.

DEBTORS—APPELLANTS

versus

JHANDA RAM AND OTHERS—DECREE.

HOLDERS—RESPONDENTS.

Punjab Alienation of Land Act (XIII of 1900), s.

2 (3) (b)—*Trees standing on land belonging to agriculturist, whether liable to attachment.*

The protection afforded by clause (b) of sub-section (3) of section 2 of the Punjab Alienation of Land Act does not apply to things material, such as standing trees, but to incorporeal rights. Therefore, trees standing on land belonging to a member of an agricultural tribe are liable to attachment in execution of a decree.

Miscellaneous second appeal from the order of the Subordinate Judge, 1st Class, Muzaffargarh, dated the 15th February 1915, affirming that of the Munsif, 2nd Class, Karor, dated the 7th November 1914, disallowing the objections.

Dr. Nand Lal, for the Appellants.

Lala Bishan Nath, for the Respondents.

JUDGMENT.—Certain trees on land belonging to a member of an agricultural tribe have been attached in execution of a decree. The judgment-debtor objected that they were not liable to attachment and sale, on the ground that they are protected by the provisions of the Punjab Alienation of Land Act, XIII of 1900. The lower Courts have both found that trees do not come within the definition of land as given in section 2, sub-section (3) of the Act. The judgment-debtor has appealed to this Court.

Counsel for the appellant contends that trees are covered by clause (b) of sub-section (3). He is, however, unable to cite any authority in support of this proposition except *Bagga Mal v. Moti Ram* (1), which is irrelevant.

It has been held in *Nur Muhammad v. Tiloka Mal* (2) that clause (b) of sub-section (3) of the Alienation of Land Act refers not to things material but to incorporeal rights. In that view I concur and I dismiss the appeal with costs.

Appeal dismissed.

(1) 54 P. L. R. 1903; 32 P. R. 1903.

(2) 14 P. R. 1905; 130 P. L. R. 1904.

ANNASAMI AYYANGAR v. NARAYANAN CHETTIAR.

MADRAS HIGH COURT.

CIVIL APPEAL No. 253 OF 1917.

July 24, 1919.

Present:—Sir Abdur Rahim, Kt., Offg. Chief Justice, and Mr. Justice Moore.ANNASAMI AYYANGAR—DEFENDANT
No. 3—APPELLANT*versus*S. NARAYANAN CHETTIAR AND OTHERS
—PLAINTIFFS AND DEFENDANTS NOS. 1 TO 8—
RESPONDENTS.*Civil Procedure Code (Act V of 1908), s. 92—
Temple, management of—Scheme suit—Trustees,
additional, appointment of, validity of.*

Where in a scheme suit for the management of a temple it appears that the members of a community have contributed largely towards the temple, the appointment of one of the members thereof to represent the community on the board of trustees of the temple is not improper.

Appeal against the decree of the Court of the Subordinate Judge, Trichinopoly, in Original Suit No. 91 of 1915.

Messrs. T. V. Muthukrishna Aiyar and R. Rajagopal Aiyar, for the Appellant.

Messrs. V. O. Sessa Chariar and M. Raghava Chariar, for the Respondents.

JUDGMENT.—The only objection to be considered is as to the appointment of two members of Ayirathalawar community and of the residents of Jangamarajapuram or Mangammalpuram as trustees of the temple in addition to the representatives of the families of Ramu Aiyar and Ramu Iyengar. The learned Subordinate Judge stated in his judgment that the representatives of the plaintiffs' community made large additions to the temple at great cost, and it was admitted before him that they had purchased the properties for conducting the worship and festivals of the temple to the extent of Rs. 30,000. No evidence was apparently taken in this case, as the parties agreed that a scheme should be framed by the learned Subordinate Judge. And there is no affidavit before us to show that the statement in the judgment which is referred to is incorrect. We think, under the circumstances, that the Judge was justified in having the Ayirathalawar community represented on the board of trustees; and the appointment of members from the village officers or residents of the two villages mentioned above seems to be a proper thing.

The appeal is, therefore, dismissed with costs of respondents Nos. 1 to 4.

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The memorandum of objections is not pressed and is dismissed with costs of the appellant.

M. C. P.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1817 OF 1919.

November 17, 1919.

Present:—Mr. Justice Bevan Petman.KHEM SINGH AND OTHERS—PLAINTIFFS—
APPELLANTS*versus*ALI SHER, MINOR, THROUGH GHULAM
MOHAMMAD, AND ANOTHER—DEFENDANTS—
RESPONDENTS.

Landlord and tenant—Denial of landlord's title, effect of—Forfeiture of tenancy—Alternative plea, whether saves forfeiture—Pleadings—Allegation in plaint not traversed in written statement—Plaintiff, whether bound to produce evidence—Practice.

A denial by a tenant of his landlord's title causes forfeiture of the tenancy. [p. 264, col. 1.]

Plaintiffs-landlords sued for ejectment of the defendants on the allegation that they were tenants-at-will denying the plaintiffs' title as owners. The defendants pleaded that they were the owners and, in the alternative, that even if they were tenants they were not liable to ejectment so long as they served the *takia*:

Held, (1) that inasmuch as the defendants had denied their landlords' title, they had forfeited their tenancy and were liable to ejectment; [p. 264, col. 1.]

(2) that the alternative plea of the defendants did not affect the question of forfeiture of tenancy; [p. 264, col. 1.]

(3) that inasmuch as the plaintiffs' allegation that the defendants were denying their title as owners had not been traversed in the statement of defence, it was not necessary for the plaintiffs to give evidence in support of their allegation. [p. 264, col. 1.]

Second appeal from the decree of the District Judge, Hoshiarpur, dated the 4th March 1919, reversing that of the Munsif, 1st Class, Hoshiarpur, dated the 26th January 1918, decreeing plaintiffs' claim with costs.

Lala Faqir Chand, for the Appellants.
Mr. Abdul Razaq, for the Respondents.

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JUDGMENT.—Lala Fakir Chand gives up the first ground of appeal. In my opinion this appeal must be accepted. The plaintiffs, who are admittedly the owners, sued for ejectment of the defendants on the very definite allegation that the defendants, who were tenants-at-will, were denying their title as owners. They also sued for a declaration in the alternative, but it is not necessary to go into this latter matter. The allegation that the defendants were denying the plaintiffs' title was not traversed in the statement of defence and it was not necessary, therefore, for the plaintiffs to give evidence in support of their allegation. On the contrary the defendants persisted that they and not the plaintiffs were the owners. This position cannot be affected by the fact that in the alternative the defendants pleaded that if it was found that they were not the owners but were tenants, they were not entitled to ejectment so long as they served the *takia*. It is not a case of a denial only in the suit itself.

On the well-known legal principle that a denial by a tenant of his landlord's title causes forfeiture of the tenancy, I hold that the plaintiffs are entitled to eject the defendants.

I, therefore, accept the appeal with costs throughout.

Appeal accepted.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEALS NOS. 135 AND 143 OF 1916.

July 17, 1919.

Present:—Mr. Lyle, A. J. C., and

Mr. Ashworth, A. J. C.

FARZAND ALI (AFTER HIS DEATH KANIZ FATIMA AND OTHERS)—PLAINTIFFS—

APPELLANTS

versus

Mirza SADIQ HUSAIN KHAN—

DEFENDANT—RESPONDENT.

Evidence Act (I of 1872), s. 96—Mortgage deed

providing for payment of revenue by mortgagee—Revenue, enhancement of—Intention of parties—Oral evidence, admissibility of—Transfer of Property Act (IV of 1882), ss. 72, 76—Mortgage—Mortgagee, liability of, to pay revenue—"Contract to the contrary" in s. 72, what is.

Where a usufructuary mortgage deed provides for the payment of revenue by the mortgagee, but fails to indicate whether the parties meant the revenue as assessed at the date of the deed or as it might be re-assessed from time to time, evidence may be given under section 96 of the Evidence Act of facts to show what was meant. An express declaration of the parties subsequent to the execution of the mortgage deed, as to what they meant when the deed was executed, is admissible as such evidence. [p. 268, col. 1.]

Section 76 (c) of the Transfer of Property Act imposes on the mortgagee an obligation to pay the revenue and Government charges when they can be paid out of the income. If they can be so paid, he cannot recover them under section 72 (b) of the Act, since the permission given by section 72 (b) must be read subject to the obligation imposed by section 76 (c). If they cannot be so paid, then in the absence of a contract to the contrary a mortgagee who has paid them out of his own pocket can recover them under section 72 (b). An agreement by the mortgagor to be personally liable for such charges is, however, a contract to the contrary within the meaning of section 72 (b). [p. 267, col. 1.]

Appeal against the decree of the Subordinate Judge, Bara Banki, dated the 31st July 1916.

Messrs. M. Wasim and Haidar Husain, for the Appellants.

The Hon'ble Mr. Wazir Hasan and Mr. Niamat-ul-lah, for the Respondent.

JUDGMENT.—This judgment will cover Appeals Nos. 135 and 143 of 1916.

On the 15th of May 1869 Zamin Ali, the father of Sheikh Farzand Ali, the plaintiff in this case, executed a usufructuary mortgage of the entire village of Pindra in favour of Mirza Agha Hasan Khan, the father of Mirza Sadiq Husain Khan, the defendant, for a sum of Rs. 14,000. On the 24th of June 1878 Zamin Ali executed a second mortgage deed on the same village for the sum of Rs. 28,700. Subsequently the defendant Mirza Sadiq Husain Khan became the owner of a 4-annas share in the village. The present suit was brought to redeem the remaining 12 annas on payment of Rs. 30,325, that is $\frac{3}{4}$ ths of Rs. 14,000 and Rs. 28,700 less a sum of Rs. 1,700 which the defendant had

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already received from one Janki Prasad, who had purchased an area of 96 bighas, 2 biswas at a sale in execution of a decree.

The defendant pleaded that in order to redeem the property, the plaintiff was bound to pay him a sum of Rs 84,959 10 10. This sum is composed of several items in addition to those admitted by the plaintiff, but in these appeals we are concerned only with a sum of Rs. 50,027-2 10. The defendant pleaded that at the time of the mortgage the Government revenue on the village was only Rs. 1,300, but in 1302 F. at the new settlement the revenue was enhanced to Rs. 1,600 for five years and after that to Rs. 1,900, which he had paid, and he was entitled to recover from the plaintiff the amount which he had to pay in excess of the revenue payable at the time when the mortgage deed was executed, with interest thereon. He also pleaded that he had had to pay cesses which were imposed subsequent to the execution of the mortgage and that he was entitled to recover the amount so paid with interest from the plaintiff before redemption.

The learned Subordinate Judge held that the defendant was not entitled to claim the enhanced revenue paid by him but was entitled to claim the amount paid as cesses with interest thereon at the rate of 9 per cent. per annum.

In Appeal No. 135 of 1916, the plaintiff attacks the finding of the learned Subordinate Judge with regard to cesses and in Appeal No. 143 of 1916, the defendant attacks the finding with regard to the enhanced revenue. It may be noted that ground No. 4 of the plaintiff's appeal with regard to the rate of interest allowed by the lower Court has not been argued.

The only question, therefore, which we have to decide in these appeals is whether the mortgagee is entitled to recover the enhanced revenue and the cesses paid by him from the mortgagor before redemption.

Both the mortgage deeds in suit were executed before the Transfer of Property Act (IV of 1882) was passed, but it is admitted by the parties that sections 72 and 76 of that Act merely embody and reproduce the law as it existed prior to the passing of that Act, and if authority for this be needed reference may be made to the

cases: *Girdhar Lal v. Bhola Nath* (1) and *Jaijit Rai v. Gobind Tiwari* (2). The case may, therefore, be dealt with as if sections 72 and 76 of that Act had been in force at the time of the execution of the mortgage deed. Section 76 (c) of that Act, *inter alia*, provides that when during the continuance of the mortgage the mortgagee takes possession of the mortgaged property, he must, in the absence of a contract to the contrary, out of the income of the property pay the Government revenue, and all other charges of a public nature accruing due in respect thereof during such possession. Any doubt that might arise as to the applicability of this provision to a usufructuary mortgage like the one in suit is removed by section 77, which excludes the operation of certain other provisions of the section in the case of such a mortgage. Section 72 gives the mortgagee in possession the right if he spends money, (a) for the due management of the property, or (b) for its preservation from destruction, forfeiture, or sale, in the absence of a contract to the contrary, to add any money so spent to the principal money.

According to the terms of the mortgage deed of the 15th May 1869 the mortgagor engages to obtain mutation of names in favour of the mortgagee. It is also stipulated that when revenue is paid, the *dakhilas* shall be issued to the mortgagee and that until redemption the profits of the villages including the Zamindari rights shall be lawfully appropriated by the mortgagee. The mortgagee is to have all the rights of management. He is not to be entitled to anything for increase in cultivation or produce, nor is the mortgagor to be entitled to claim any mesne profits or damages. Redemption is not to be allowed for 25 years. There can be no doubt that this mortgage was intended to be an ordinary usufructuary mortgage, the mortgagee paying the revenue. Now it is a question material to this suit whether the revenue contemplated as being paid by the mortgagee was the revenue as assessed at the date of the mortgage or the revenue as it might from time to

(1) 10 A. 611 at p 614; A. W. N. (1983) 233.
(2) 6 A. 303 at p. 302, A. W. N. (1984) 92.

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time be assessed. It is clear that it was within the competence of the parties to contract that it should be either of these. Section 96 of the Evidence Act is, therefore, applicable and, as the language of the deed might have been meant to apply to revenue in one sense or the other but not in both, evidence may be given of facts to show to which it was intended to apply. The Counsel for the plaintiff mortgagor has argued that, in view of the certainty of a new settlement taking place within the period of 25 years and also in view of the provision now enacted in section 76 (c) of the Transfer of Property Act but in force even before that Act, which requires the mortgagee in the absence of a contract to the contrary to pay the revenue accruing due in respect of the property during possession, the parties must be deemed to have meant that the revenue to be paid by the mortgagee was the revenue as it might be assessed from time to time. In this case the mortgagee would be liable to pay the revenue notwithstanding enhancement and would not be entitled to add the excess to the principal money. If the case merely stood thus, we concur that the liability of the mortgagee to pay the whole revenue before and after enhancement would stand beyond all doubt.

At the beginning of the hearing of this appeal, however, the learned Advocate for the defendant produced a document, dated the 6th of July 1871, executed by the mortgagor in favour of the mortgagee and asked that it should be received in evidence. This document refers to the mortgage deed of the 15th of May 1869 and states that as the mortgage transaction had been entered into on the basis of present profits or whatever the mortgagee might add to them by his own efforts and on payment of Rs. 1,300 Government revenue, it is agreed that if there be any enhancement in the revenue the mortgagor shall pay any such enhancement out of his own pocket up to the time of redemption and the mortgagee shall not be liable to pay any other charges than the land revenue payable at the time of the execution of the mortgage deed. The learned Counsel for the plaintiff strenuously opposes the application to have this docu-

ment in evidence at this stage, and has questioned the truth of the defendant's affidavit to the effect that the document was accidentally found among the estate papers after the suit had been decided in the lower Court. He has urged that this document was deliberately suppressed as under it only a personal liability for the payment of enhanced revenue and other charges has been accepted, and that the defendant has now produced it only because he failed to have the enhanced revenue added to the principal mortgage money. In the view which we take of this document it is immaterial whether it is on the record or not, for we are of opinion that it can in no way help the defendant in the present case. This agreement indicates that the intention of the parties at the time of executing the mortgage deed of the 15th May 1869 was that the revenue to be paid by the mortgagee was the revenue as assessed at the date of the deed, and not the revenue as it might be assessed in the future after a fresh settlement. The express declaration by the parties of their intention, even though it took place two years after the deed, must outweigh any inference as to that intention derived merely from the circumstances existing at the date of the deed, to which reference has been made above, namely, the existence of a rule of law that, in the absence of a contract to the contrary, the mortgagee would pay the revenue as assessed from time to time and the certainty of a revision of revenue within the 25 years specified in the mortgage deed. Assuming then that the deed meant that the mortgagee was not liable for any extra revenue assessed subsequent to the date of the mortgage, it has to be considered whether under section 72 the mortgagee may add such excess to the principal money. Now this agreement provides, not that the mortgagee shall be entitled to add the extra revenue to the mortgage money, but that the mortgagor shall be liable to pay that extra revenue out of his own pocket and that the mortgagee shall have a right to sue him personally to recover the excess, if he fails to do so. This is quite clear from the passage in the agreement: "If the said mortgagee will have to pay the enhanced amount in any year, then he shall realise

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the said money with interest at 2 per cent. from me by instituting a suit in Court." This provision is incompatible with the mortgagee having a right to add the excess money to the mortgage money. The mortgagee cannot, therefore, plead section 72 of the Transfer of Property Act as enabling him to add any revenue, paid to save the property from attachment, to the principal, because there was a contract in existence to the contrary, namely, a contract that he should recover personally from the mortgagor. The agreement, therefore, does not assist the mortgagee.

As to cesses if we exclude the agreement of 1871 from consideration, there being nothing in the mortgage deed to relieve the mortgagee of his statutory liability under section 76 (c) to pay out of the income of the property "all charges of a public nature accruing in respect of the property during possession," he must be deemed liable to pay these cesses notwithstanding the fact that their imposition may not have occurred until subsequent to the mortgage deed. We cannot concur with the Subordinate Judge in finding any expression in the mortgage deed of an intention that the cesses should be paid by the mortgagor. Indeed it follows from the Subordinate Judge's finding that no cess was in contemplation at the time of the execution of the mortgage deed, that the parties cannot have intended that the mortgagor should pay them. On behalf of the mortgagee it has been argued that, although bound initially to pay these unanticipated cesses to Government out of the income under section 76 (c), he is entitled under section 72 (b) to re-imburse himself by adding the amount so paid to the principal money. It is to be noted that the obligation imposed by section 76 (c) only extends to paying the Government dues out of the income. If this income does not permit of this, section 72 (b) will be applicable. In this case it is admitted that the income was sufficient. No authority is quoted by the mortgagee's Counsel for the proposition that, even when paid out of the income under section 76 (c), Government dues can be recovered under section 72 (b). Had this been the intention of the Legislature, it must have been expressly so stated. In our opinion the permission given to the mortgagee by section 72 (b) must be read subject to the

obligation imposed on him by section 76 (c). If we take the agreement of 1871 into consideration, the case as to cesses stands on the same footing as the case as to revenue. In that agreement the mortgagor states that he will be liable for anything outside the original revenue such as taxes (which are specifically mentioned), but his liability is to pay them out of his own pocket. The agreement does not provide for them being added to the mortgage money. Section 72 is, therefore, inapplicable, as an agreement of the mortgagor to pay the cesses out of his own pocket and to be liable to suit for them is inconsistent with the mortgagee having a right to add them to the mortgage money.

There is a further reason why the mortgagee defendant is not entitled to require that the excess revenue and the cesses paid by him should be added to the principal mortgage money before redemption by the plaintiff mortgagor. This case was argued before us as if the second deed of the 24th June 1878 were a deed of further charge. At the close of argument, however, the appellant's Counsel stated that, although he had not made a ground of appeal, the fact that the lower Court had ordered the property to be sold on the assumption that the deed to be redeemed was the first deed, that is to say, a usufructuary mortgage deed, the decree should really be one for foreclosure, as the later deed of the 24th June 1878 was a conditional sale-deed. The respondent's Counsel admitted that the decree should be for foreclosure. An examination of the second deed indicates that it was the intention of the parties that the second deed should take the place of the first deed, although incorporating the mortgage money payable under the first deed by reference. The second deed indeed states that, although possession at the time of the execution of the deed was with the mortgagee under the first deed, yet the mortgagee was again put in possession under the second deed. Now the second deed cannot be deemed in any way to be affected by the agreement of the 6th July 1871. The second deed is absolutely silent as to the extra revenue or cesses. It is, therefore, governed by section 76 (c) of the Act.

The result is that the defendant's Appeal No. 143 of 1916 is dismissed. The plaintiff's Appeal No. 135 of 1916 is allowed to the following extent. He will be given a decree

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entitling him to redeem his three-fourths share on payment of the following items:—

	Rs.	A.	P.
(1) Principal money due on the deed dated the 15th of May 1869 ...	=10,500	0	0
(2) Principal money due on the deed dated the 24th June 1878 ...	=21,525	0	0
(3) Cost of Wells, $\frac{3}{4}$ ths of Rs. 578 ...	= 433	8	0

In all ... 32,458 8 0
 From which total will be deducted $\frac{3}{4}$ ths of Rs. 1,700, already paid (see issue No. 6 of the lower Court's judgment) = 1,275 0 0

leaving a balance of... 31,183 8 0

If the plaintiff pays up the redemption money together with the defendant's costs in the lower Court (rightly awarded to the defendant by the lower Court for the reasons stated in its judgment), the defendant will pay costs of both appeals in this Court. A decree under Order XXXIV, rule 7, of the Code of Civil Procedure will be prepared and six months will be allowed for payment. If the plaintiff pay into Court the amount due within the time allowed, the mortgages shall be redeemed and the plaintiff shall be put in possession of the property in suit, excluding the Thana building and the trees standing on Nos. 1064, 1548 and 1146. If such payment is not made within the time allowed, the plaintiff shall be debarred from all right to redeem the property and will be liable for the total costs throughout.

Appeal No. 135 allowed.

Appeal No. 143 dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1281 OF 1919.

October 30, 1919.

Present:—Mr. Justice Martineau.

PARAS RAM—PLAINTIFF—APPELLANT

versus

DALPAT RAI—DEFENDANT—RESPONDENT.

Punjab Pre-emption Act (I of 1913), s. 22 (5) (a)

—Pre-emption suit—Withdrawal of deposit money, effect of—Dismissal of suit.

Where in a pre-emption suit the money deposited by the plaintiff is withdrawn, the suit is liable to be dismissed.

Second appeal from the decree of the District Judge, Hoshiarpur, dated the 6th March 1919, reversing that of the Munsif, 1st Class, Hoshiarpur, dated the 26th August 1918, decreeing the claim with half costs.

Lala Faqir Chand, for the Appellant.

Lala Jagan Nath, for the Respondent.

JUDGMENT.—The plaintiff in this case sued for a declaration that a sale-deed executed by his brother Prabhu in 1916 in favour of Dalpat Rai was invalid as having been executed without necessity, and in the alternative asked for a decree for pre-emption. The first Court passed a decree declaring the alienation, which was for Rs. 400, to be valid only to the extent of Rs. 76 but on appeal the District Judge has dismissed the suit, finding that the sale was for necessity. The plaintiff has filed a second appeal in this Court.

The consideration for the sale was made up of debts due to Munshi Ram. A book debt had been incurred, and there was also a bond, the last of a series of bonds, the first of which had been executed in favour of Munshi Ram's father by Prabhu's father. These debts have been discharged by the vendee. The necessity for the sale is apparent, and I cannot agree with the contention that the sale was a *benami* transaction, the real purchaser being Munshi Ram.

The only other point is that raised in the first ground, namely, that the alternative claim for pre-emption has been ignored by the lower Appellate Court. This contention is correct, but the claim for pre-emption must also fail, as the money deposited by the plaintiff under section 22 of the Pre-emption Act was withdrawn by him on the 11th November 1918. Sub-section 5 (a) of that section provides that if the sum deposited is withdrawn by the plaintiff, the suit or appeal shall be dismissed.

I accordingly dismiss this appeal with costs.

Appeal dismissed.

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ODDH JUDICIAL COMMISSIONER'S
COURT.

FIRST CIVIL APPEAL NO. 6 OF 1919.

July 22, 1919.

Present:—Mr. Ashworth, A. J. C.

LACHMI NARAYAN AND OTHERS—

DEFENDANTS—APPELLANTS

versus

RAJ NARAYAN—PLAINTIFF—

RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 36
—Execution of decree—Property in possession of mortgagee—Delivery of possession, effect of—Mortgage by several mortgagors—Redemption by one co-mortgagor—Redeeming co-mortgagor, rights of—Remedies of mortgagee, whether can be used—Contribution, liability of co-mortgagors for.

The language of Order XXI, rule 36, of the Civil Procedure Code is wide enough to include delivery to a person while the property is in the rightful possession of a mortgagee, but such delivery is in fact no delivery at all and has no effect beyond being a notice to the mortgagee that the decree-holder is entitled to redeem. [p. 271, col. 1.]

A co-mortgagor paying off a mortgage is not the successor-in-interest of the mortgagee in every respect, but for the purpose of enforcing his right of contribution against his co-mortgagors he is entitled to all the securities of the mortgagee. He can take advantage of a decree in favour of the mortgagee that the mortgage was good and existed, and he is not precluded from doing so by the fact that he does not admit the decree to be a right decree. [p. 272, cols. 1 & 2.]

Under section 95 of the Transfer of Property Act, where one of several mortgagors redeems the mortgaged property and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors for his proportion of the expenses incurred in redeeming the mortgage. The section contemplates that the entire share of each co-mortgagor must be treated as one unit for the purposes of contribution, so that a co-mortgagor cannot ask to redeem separate fractions of his share. [p. 272, col. 2; p. 273, col. 1.]

Appeal against the decree of the Subordinate Judge, Bahraich, dated the 19th December 1918.

Mr. Bisheshwar Nath Srivastava, for the Appellants.

The Hon'ble Mr. Wazir Hasan, for the Respondent.

JUDGMENT.—This appeal arises out of a claim for possession and mesne profits by the plaintiff-respondent against his three cousins and the widowed daughter-in-law of another cousin in respect of a six-annas share in the village of Harharpur. For the relationship between the parties the genealo-

gical tree* given at the beginning of the lower Court's judgment may be consulted. To make that genealogical tree correct, however, the parties agree that the name of Lalta Prasad Kanungo, son of Lakhat Rai, should be Sital Prasad Kanungo and Musammat Rajrani defendant No. 4 should be shown not as a daughter but as the daughter-in-law of Harihar Saran Das. These inaccuracies do not, however, affect the present case. It is common ground that in the year 1808 Chandraka Prasad, the father of the first three defendants, was entered as holding a four annas share in the village and Raj Narayan plaintiff another four annas share. The remaining eight annas at that date were recorded in the name of Musammat Batash Kunwar, the widow of Gaya Prasad, a great uncle of Chandraka Prasad. On the 3rd November 1892 Chandraka Prasad for himself and as guardian of the plaintiff (then a minor), along with Batash Kunwar and Hulas Kunwar, another lady of the family, executed a deed of mortgage in respect of the whole village of Harharpur in favour of one Janki Prasad for a sum of Rs. 15,000. In 1908 Chandraka Prasad died leaving the three sons, defendants Nos. 1, 2 and 3. His son Harihar Saran Das had apparently predeceased him leaving the defendant No. 4, his daughter-in-law. Janki Prasad mortgagee having died, his heirs brought a suit for possession on the mortgage and on 23rd May 1908 got a decree for possession and profits against the plaintiff, the defendants and Musammat Batash Kunwar. In February 1910 Musammat Batash Kunwar died. On her death disputes arose between the plaintiff and the defendants in respect of the eight-annas share which had been recorded in her name. On the 11th May 1911 the plaintiff obtained a decree against the present defendants for possession of two annas out of eight annas recorded in Musammat Batash Kunwar's name up to the date of her death. It may be mentioned that he got this two annas share as a co-reversioner, it being held in that suit that Musammat Batash Kunwar had held the eight annas as a widow's estate. Janki Prasad's heirs were parties to that suit. On the 17th

*Genealogical tree is printed at the end of the judgment.—Ed.

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June 1913 the present defendants redeemed the whole sixteen annas from the heirs of Janki Prasad. On the 20th January 1916 the plaintiff in execution of his decree of the 11th May 1911 obtained formal possession of the two-annas share under Order XXI, rule 36, of the Code of Civil Procedure. On the 22nd February 1917 the plaintiff brought a suit against the defendants under the Rent Act for his share of profits collected by the defendants in respect of this two-annas share. That suit was thrown out on the ground that the plaintiff had not got such possession of the two-annas share as entitled him to be regarded as a co-sharer. On the 9th June 1917 the plaintiff deposited a sum of Rs. 3,628-1-9 under section 83 of the Transfer of Property Act for redeeming from his co-mortgagors the four-annas share in the property. The defendants refused to accept this. As a result of the defendants' refusal to accept this money and release the four-annas share and as a result of the plaintiff's failure to get a decree for profits in the Revenue Court, he has brought this suit claiming possession of the four-annas share on payment of the contribution money found due and for mesne profits and also asking for possession without paying anything and for mesne profits of the two-annas share. The main defence was that the plaintiff was not entitled to a decree unless he paid up the contribution money in respect of the two-annas share as well as the four-annas share and that he was not entitled to mesne profits either in respect of the four annas share or the two-annas share.

The lower Court held that the plaintiff was not liable to pay any contribution money in respect of the two-annas share, rejecting the defendants' contention that by redeeming this two annas share from the mortgagees they obtained a charge over it for a contribution. It consequently also found that no mesne profits could be claimed in respect of this two annas share. The claim for recovery of the four-annas share had only been contested by the defendants on the ground that they must be paid the contribution money in respect of the whole six annas before being called on to give up the four annas. The lower Court, therefore, by reason of the decision just mentioned,

held that the four-annas share could be recovered by the plaintiff on payment merely of contribution money proportionate to this four annas. It also allowed the plaintiff to deduct from the contribution money payable in respect of the four-annas share mesne profits, on the ground that the defendants had no right to refuse the contribution money tendered. These findings are impugned in appeal.

The questions for decision by this Court are

(1) Was the lower Court right in holding that no contribution could be required from the plaintiff in respect of the two-annas share?

(2) Was the plaintiff's tender in respect of the four-annas share a good tender or was he bound to tender the contribution money due in respect of the whole six annas?

As to question (1), the learned Subordinate Judge has held that no contribution could be required from the plaintiff in respect of the two-annas share because in respect of that share, to which the plaintiff became entitled as a reversioner of *Musammât Batash Kunwar*, the mortgagees' right to security as against this two-annas share came to an end on the death of *Musammât Batash Kunwar*. It is held that the mortgage of her share by *Musammât Batash Kunwar* has not been proved to be for necessity and, therefore, would not operate beyond her lifetime. He has also found that the decree obtained by the mortgagees on the 23rd May 1908 against the plaintiff, the defendants and *Musammât Batash Kunwar* could not be pleaded by the defendant as *res judicata* so as to enable the defendants to take advantage of that decree against the plaintiff. The first objection taken on these findings is that it was never the case of the plaintiff that the mortgage by *Musammât Batash Kunwar* would not operate beyond her lifetime owing to the absence of legal necessity and that, therefore, the Subordinate Judge has set up a new case for the plaintiff. This objection must be admitted. The plaintiff in his plaint has set forth that the mortgagees held a decree against *Musammât Batash Kunwar* and were in possession in pursuance of that decree and that the defendants redeemed the mortgage. It was, therefore, for the plaintiff to show

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some reason why he should not be liable to contribution. Nowhere is there any allegation in the plaint that he was not liable to contribution because the mortgagees had no right against *Musammatt Batash Kunwar's* share after her death as the deed was not executed for legal necessity. The plaintiff's case which has been ignored by the Subordinate Judge is quite different. It is this. Inasmuch as the plaintiff got a decree for recovery of the two-annas share against the defendants and in that suit had made the mortgagees parties, he must be deemed to have recovered a right to possession of the two-annas share from the date when that decree was executed, that is in January 1916, after the defendants redeemed the whole sixteen annas, which was in 1913. The plaintiff's Counsel in appeal admits that the possession given to the plaintiff was only formal possession under Order XXI, rule 36. But he maintains that the possession should have been given and must be deemed to have been given under Order XXI, rule 35. The defendant's Counsel has made little attempt to support this case, which was the case made out in the plaint. It is obvious that it cannot be supported. In the suit by the plaintiff for the two-annas share against the defendants the mortgagees were only added as formal defendants. Indeed it does not appear to me that it was necessary to add them at all. That decree could not operate in any way to put an end to mortgagees' right to retain possession until the mortgage money was paid. The decree could not be executed by giving possession under Order XXI, rule 35. Order XXI, rule 36, runs: "Where a decree is for the delivery of any immovable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy, the Court shall order delivery to be made by affixing a copy of the warrant, etc." Now this is wide enough to include delivery to a person while the property is in the rightful possession of a mortgagee, but such delivery is in fact no delivery at all and has no effect beyond being a notice to the mortgagee that the decree-holder is entitled to redeem. All that the plaintiff got by that decree was a right of reversion or redemption. You cannot deliver possession

of a mere right of reversion or redemption. The rule really only applies to a case where the actual possession by a person in occupation is deemed to be possession on behalf of the judgment-debtor. In English Law this will be called delivery of seisin in deed as opposed to seisin in law. In this case there was no change of possession effected by delivery under rule 36. Consequently the plaintiff's decree for recovery of the two annas share and the execution proceedings in pursuance of that decree in no way relieve the plaintiff from the liability to contribution arising out of the redemption of the whole mortgage by the defendants.

Assuming, however, that the lower Court was justified by reason of the oral pleadings of the parties in entering into the consideration whether the mortgagees' right to the two-annas share had come to an end by reason of *Musammatt Batash Kunwar's* death, its decision is impugned by the appellants on three grounds, and in my opinion successfully impugned on each of them. In the first place, as the plaintiff was bringing a suit for possession of the two-annas share without contribution, it was for him to prove his case. The initial burden of proof, therefore, that the mortgage ceased to affect the two-annas share on *Musammatt Batash Kunwar's* death was on him and it was for him to prove that the transfer by *Musammatt Batash Kunwar* was not for legal necessity. This was not a case where the mortgagee could be expected to be more cognisant of the facts attending the execution of the mortgage than the plaintiff. In the second place, the defendants rely on the fact that when the deed of 1892 was executed, it was executed not only by *Musammatt Batash Kunwar* but also by *Musammad Hulas Kunwar*, another lady of the family, and by *Chandraka Prasad* for himself and as guardian of the plaintiff. If *Musammatt Batash Kunwar* was only recorded as holding the eight-annas share by way of consolation or maintenance, then the transfer was really made by the plaintiff and *Chandraka Prasad*, in which case no question of legal necessity was involved. If, however, it be held that *Musammatt Batash Kunwar* was a divided widow, then *Chandraka Prasad* and the plaintiff being parties to the deed, it must be inferred from their consent that there

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was legal necessity for the transfer by *Musammatt Batash Kunwar*. It is urged that they were only parties to the deed in this case in respect of their separate share. The deed, however, does not indicate any such limitation of the position of *Chandraka Prasad* and the plaintiff. Indeed it is clear from the deed that the mortgagors were executing the mortgage as a joint family and not as a divided family, as was held in the suit by the mortgagees on the basis of it. In the third place, the defendants can take advantage of the mortgagees' decree for possession, dated the 23rd May 1903. This decree for possession by the mortgagees was based on the allegation that the mortgaging family was a joint family. The plaintiff of that case clearly shows allegations to this effect. The judgment, which I have permitted to be filed in this Court by consent of both parties, clearly shows that the question was in issue whether the family was joint or not. The decree was to the effect that the mortgagees should remain in possession of the whole property until repayment of the mortgage money of Rs. 15,000. Reading this decree along with the judgment, it is clear that the Court advisedly inserted this provision, instead of giving a decree merely for possession irrespective of its duration. From the date of this decree as against the mortgagees all the members of the family were debarred from raising the contention that the mortgage, so far as it affected the share recorded in *Musammatt Batash Kunwar's* name, would cease to operate on her death. The defendants by redeeming the mortgage have a charge over the property as against the plaintiff co-mortgagor for his share of the redemption money. They can certainly take advantage of this decree in favour of the mortgagees. They can, therefore, urge that the plaintiff cannot deny their liability to retain possession pending contribution as long as the mortgagees could have done. It is not necessary to hold that a co-mortgagor paying off a mortgage is a successor-in-interest of the mortgagee in every respect, but he certainly is entitled to all the securities of the mortgagee. He can take advantage of a decree in favour of the mortgagee that the mortgage was good and existed. It has been urged by the plaintiff's Counsel

that in this suit the pleadings show that the defendants accepted the allegation of the plaintiff in the plaint that the family was a divided one at the date of the mortgage. This is not admitted by the appellants' Counsel. Be this however as it may, the defendants are not precluded from relying on the judgment and decree in favour of the mortgagees by the fact that those judgment and decree were based on findings of fact inconsistent with the present pleadings. It is open to the defendants to say that the judgment and decree were wrong but that nevertheless as they were not appealed against, they stand good in favour of the mortgagees and that they, the defendants, are entitled to take advantage of this decree in favour of the mortgagees. They are not bound to admit that it was a right decree. The learned Subordinate Judge has held that that suit cannot be deemed to operate as *res judicata* in favour of the defendants, because the plaintiff as next reversioner of *Musammatt Batash Kunwar* could not call in question the mortgage executed by her. Hence there was no such issue in that suit as in the present suit and it was not the time for the raising of such an issue. The lower Court, for reasons stated above, is wrong in thinking that there was no issue in that suit as to whether the family was joint or divided. Again, the Court found that the family was joint and its decree was based on this finding. The plaintiff cannot, therefore, plead that in that case he was a party merely as next reversioner. Nor again can it be pleaded that that judgment does not operate as *res judicata* as between the defendants to that suit. In the present suit, so far as contribution is involved, the defendants are the representatives in interest of the mortgagees and can plead that decree against the plaintiff.

As regards question No. 2, under section 95 of the Transfer of Property Act where one of several mortgagors redeems the mortgaged property and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors for his proportion of the expenses incurred in redeeming. This section clearly contemplates that the entire share of the co-mortgagor must be treated as one unit for the purpose of contribution. It will be absurd to suppose

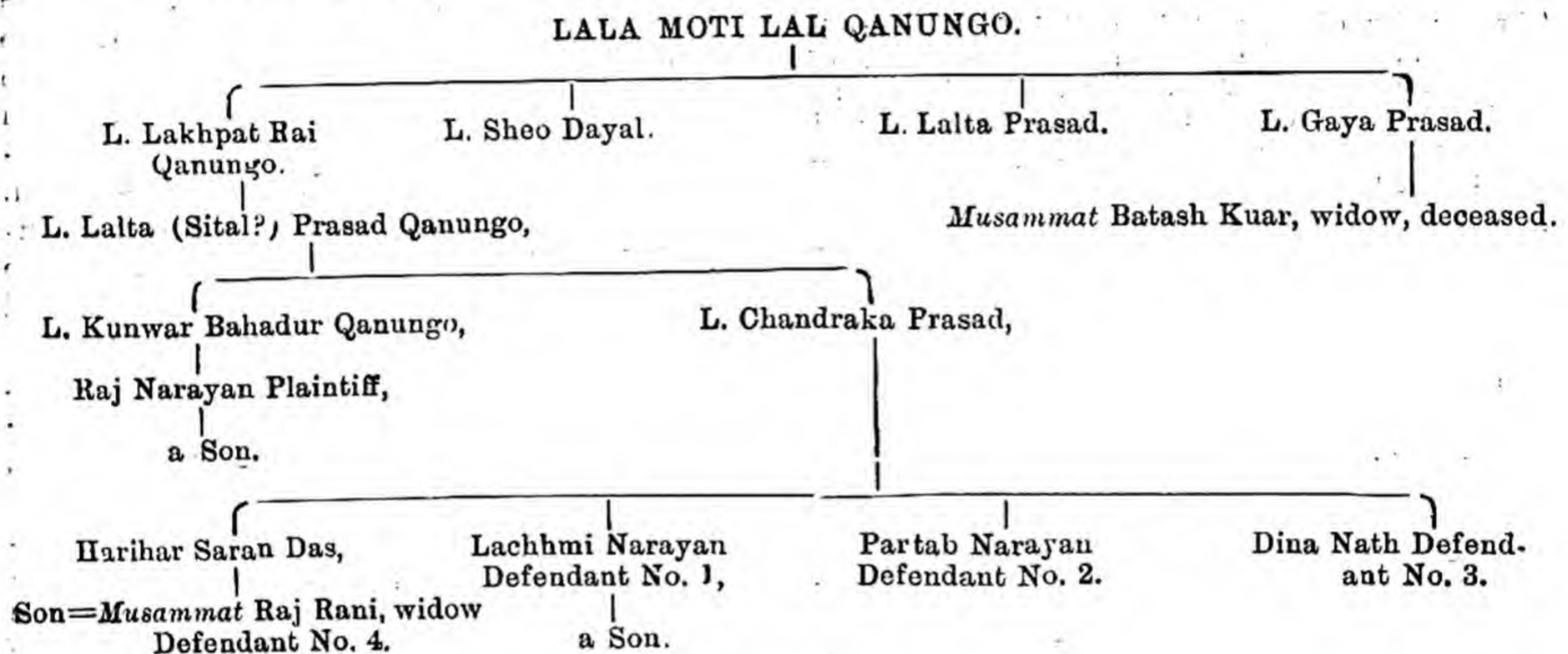
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that the co-mortgagor could ask to redeem separate fractions of his share. It is not a question of the integrity of the mortgage being broken up. The mortgage has ceased by redemption to exist, but a charge has arisen under operation of the section in respect of the whole of the co-mortgagors' share and the integrity of the charge on the whole of that share has not been broken up.

I, therefore, hold that the plaintiff should only get a decree for possession of the six-annas share on payment of the full proportionate amount of the redemption money paid by the defendants, that is to say 6 16ths of Rs. 14,512-7, i.e., Rs. 5,442-2. The appeal is allowed with costs to the defendants in both Courts.

Appeal allowed.

The following is the genealogical tree referred to on page 269:—



LAHORE HIGH COURT.

CIVIL REVISION No. 782 OF 1918.

October 15, 1919.

Present:—Sir Henry Rattigan, Kt., Chief Justice.

HODI—DEFENDANT—PETITIONER

versus

NIDHA AND ANOTHER—PLAINTIFFS

AND SUKHIA—DEFENDANT—RESPONDENTS.

Partnership—Debt due to firm—Payment to one partner, whether dissolves liability.

Defendant bought goods from a firm jointly owned by plaintiff and one S. and paid the purchase-money to S. Plaintiff sued for recovery of the money;

Held, that the defendant's liability had been discharged by payment of the debt to S. and that the plaintiff was not entitled to recover the amount.

Application, under section 25 of Act IX of 1887, for revision of the decree of the Judge, Small Cause Court, Kangra, at Dharmasala, dated the 9th July 1918, decreeing the claim in part with proportionate costs.

Lala Fakir Ohand, for the Petitioner.

Lala Jagan Nath, for Nidha Respondent.

JUDGMENT.—It is not easy to construe the judgment of the lower Court but reading it as a whole, it appears to me that the facts which the learned Judge intended to find are that defendant Hodi had taken goods of the value of Rs. 75 from the firm jointly owned by plaintiffs and Sukhia, defendant No. 2; that Hodi had actually paid the said sum of Rs. 75 to Sukhia, but that plaintiff was nevertheless entitled to recover the amount from Hodi inasmuch as the latter was not entitled by law to pay a debt to one of two partners. This is obviously an erroneous statement of the law, and the result is that I accept this petition and dismiss plaintiffs' suit with costs.

Petition accepted.

TIKARAM v. TEJRAM.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 2 OF 1917.

September 29, 1919.

Present:— Mr. Prideaux, A. J. C.

TIKARAM AND OTHERS—DEFENDANTS

—APPELLANTS

versus

TEJRAM—PLAINTIFF—RESPONDENT.

C. P. Land Revenue Act (XVIII of 1881), s. 65-A (4)
 (a)—Thekadari tenure, whether transferable—Award directing sale of thekadari tenure, legality of.

The transfer of interest in a *thekadari* tenure is prohibited under section 65-A, sub-section 4 (a), of the C. P. Land Revenue Act and an arbitration award directing a sale of such an interest is illegal and unenforceable and no decree can be passed on such an award. [p. 275, col. 2.]

Appeal against the decree of the District Judge, Hoshangabad, in Civil Appeal No. 87 of 1916, decided on the 25th September 1916, arising out of Civil Suit No. 135 of 1914, in the Court of the Munsif, Hoshangabad, decided on the 23rd March 1916.

Mr. D. W. Kathale, for the Appellants.

Mr. M. V. Joshi, for the Respondent.

JUDGMENT.—The plaint on which this suit commenced recites that the plaintiff is a Malguzar and Sadar Lambardar of Mouza Thikwada, Tahsil Sohagpur. R. B. Seth Jiandas was occupancy tenant of field old No. 20 K, 203KH current No. 194 of that village. He executed in favour of the plaintiff a surrender with respect of the said land for Rs. 100 on the 25th September 1913. The land had been leased out that year to the defendants and plaintiff was to take possession in Baisakh Sambat 1970. Defendants, however, refuse to vacate and plaintiff, therefore, asks for possession. Defendants Nos. 2 and 3 are sons of the 1st defendant Tikaram. The 3rd defendant Dalip Singh pleaded that the land had been leased to him by plaintiff under a *patta* dated the 3rd April 1914. He at the instigation of plaintiff separated from his father and brother and they have nothing to do with the land in suit.

Defendants Nos. 1 and 2 denied that they had taken wrongful possession of the land in suit. They have no concern with it, it having been given by the plaintiff to Dalip Singh.

Plaintiff denied the lease to Dalip Singh and the case went to trial on the following issues:—

1. Whether the plaintiff sublet the land in suit to defendant No. 3 for one year as alleged?

2. Whether defendant No. 3 has thus become an ordinary tenant of the land in suit?

3. Are defendants Nos. 1 and 2 in possession of the land, as alleged?

The trial Court held the *patta* under which Dalip Singh professes to hold the land to be a forgery and decreed plaintiff's claim for possession with costs; and the decision was confirmed in appeal. On the 4th October 1915, when the case was in the first Court, defendants Nos. 1 and 2 filed an application stating that the matter in dispute had been concluded by arbitration. The award itself was filed on the 6th January 1916. On the 27th January 1916, the Judge held that the award relied upon fell within the definition of an instrument of partition. He held that the award directed a partition. The document was held inadmissible in evidence for want of a stamp, and as defendant did not pay stamp and penalty the document was impounded and sent to the Collector; and defendant's application setting up an adjustment was dismissed. The document has since been validated. In the lower Appellate Court the ground relating to the award was advanced late. It was here argued that the *ikrarnama*, Exhibit D-3, dated the 27th July 1915, concluded this suit, while for plaintiff it was submitted that the matter in dispute here was not submitted to arbitration. In my remand order I wrote:—

"It seems to me that it must be determined in the present suit whether the land in suit and the dispute regarding it was referred to the arbitrators and whether their award adjusts this dispute."

The following issue was remitted for trial:—

"Whether the subject-matter in this suit was referred to the arbitration of the Panchas and whether the land in suit passed with Mouza Thikwada under the terms of the award to the defendants."

The first Court found that the Panchas were called upon to decide all the disputes, including the dispute relating to the land in suit, and under the award the 1st defendant was to get it with the village of Thikwada. The Judge held that the parties

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in suit had signed the award. The plaintiff, when examined in the lower Appellate Court, made the following statement:—

"This document (Exhibit D-4a) is in my handwriting, but this document (Exhibit D-7) is not in my handwriting. The land in dispute in Thikwadi is called Jiwandaswale. Another land in the village is also called Jiwandaswale. The expenses given in Exhibit D-4 (a) relate to the land in dispute. As the Panchas were informed to transfer the village along with this land from our party to the other, I gave them an account of the expenses incurred in connection with this land."

The lower Appellate Court confirmed the finding. Despite the above statement objections have been filed to the concurrent findings of the Courts below and the validity of the award is questioned on various grounds. It rests on the plaintiff to show that under Order XXIII, rule 3, of the Civil Procedure Code there is no lawful adjustment. The objections are these:—

1. The Panchas have ordered the village of Piparia to go to the plaintiff. This is a protected Thekadari and under section 65-A (4) (a) of the C. P. Land Revenue Code, incapable of being transferred.

2. The Panchas have failed to decide about the money-lending of the parties in the different villages. There being no joint money-lending, this was part of the reference and they have not settled it.

3. That the award has not been signed by two of the Panchas and this invalidates it.

4. Rs. 8,300 had to be paid in Vaishakh and has not been paid. Plaintiff has since spent some Rs. 4,000 in payment of Towji and the erection of small buildings.

The reply to this is that the question of the protected village does not arise and the award is merely in the nature of a partition and not a partition, that there is no banking business in existence, and nothing to be realized. All Panchas not having signed the award is a mere irregularity, not invalidating it. Defendants have always been willing to pay, but that is a matter to be gone into when the award is enforced by suit. It is admitted that if the award is valid and the land in suit was referred to the arbitrators, the plaintiff's suit must be dismissed. There is no reason-

able doubt from the evidence on record and the plaintiff's statement above quoted that the present dispute was referred to arbitration. In fact it is not seriously contended that it was not. It is not denied that Piparia is a Thekadari village and section 65-A (4) (a) states that "the incidence of the tenure of a Thekadar is that the tenure shall be heritable but not transferable by sale, gift, mortgage or dower; it shall not be saleable in execution of any decree, nor shall a decree be passed for the sale thereof and save in so far as any arrangements to the contrary are in force at the time of the declaration, it shall not be partitioned and shall devolve on one member only of the Thekadar's family." It is clear that the transfer of interest in a Thekadari village is prohibited, and it seems to me that the Piparia village or any portion of it could not be exchanged. The award states that the "four anna *patta* of Piparia of Tikaram Patel, with all rights, *sir*, *khudkasht*, garden, well and houses-3, has been given to Chhotilal Tejiram, etc., for a price of Rs. 9,500." This is practically a sale. For this reason it seems to me that the award is illegal on the face of it and as such not legally enforceable.

A suit can be adjusted wholly or in part by a lawful agreement or compromise and no Court has jurisdiction to pass a decree on a compromise unless it is a lawful compromise. Here the compromise was evidenced by the award and if that is illegal, no decree can pass thereon. The award in my opinion is invalid and a nullity.

In this view of the case it is unnecessary to consider the other points raised against the validity of the award. It is true that the question of the Sowkari business of the parties referred to in the reference to arbitration has not been decided by the award. The fact that two of the Panchas failed to sign the award would not vitiate it: see *Ram Narain Ram v. Pati Ram Tewari* (1); and the fact that the money mentioned in the award had not been paid would be a matter for the suit in which the award was sought to be enforced. As the suit has not been adjusted, the findings of the two lower Courts as to plaintiff's

(1) 34 Ind. Cas. 105; 1 P. L. J. 90; 12 P. L. W. 411.

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claim, which are findings of fact, must be accepted. The story of the lease from the plaintiff has failed and plaintiff has rightly been given possession. This appeal fails and is dismissed with costs.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE,
UNITED PROVINCES.

[SECOND APPEAL PETITION NO. 22 OF 1918-19.

February 5, 1919.

Present:—Mr. Ferard, S. M., and
Mr. Hopkins, J. M.

KHUMAN SINGH—APPELLANT

versus

RAM SARUP—RESPONDENT.

Landlord and tenant—Joint tenancy—Co-tenant becoming co-sharer in mahal, effect of—Devolution of tenancy—Survivorship—Succession.

Where two brothers are recorded as occupancy tenants, the mere fact that one of them acquires a share in the *mahal* would not affect the occupancy right which he holds jointly with his brother, notwithstanding that at a subsequent settlement, owing to his becoming one of the proprietors of the *mahal*, his name is not recorded along with that of his brother as occupancy tenant. In such a case on the death of one of them the other is entitled to the whole of the occupancy holding by survivorship, and not by succession.

Second appeal from the order of the Commissioner, Allahabad Division, dated the 9th October 1918, in the case of ejection.

JUDGMENT.

FERARD, S. M.—Even if the Commissioner's decision were otherwise correct, he has omitted to notice that he could not in appeal decree the plaintiff-respondent's claim to eject the appellant from all the land without a decision on the second issue as to whether 3 fields were *grove* and, therefore, not subject to the ejection section of the Tenancy Act. The Assistant Collector had not found it necessary to decide this point as he had dismissed the plaintiff-respondent's, the landholder's suit *in toto* in the first issue.

But I am clearly of opinion that the Commissioner's decision is incorrect and that of the Assistant Collector was correct. The appellant Khuman Singh and his

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brother Jodha Singh were recorded occupancy tenants in 1872 Settlement, and again in 1890 revision of Settlement, and again in 1305 Fasli papers. In the 1306 Settlement Jodha Singh alone was recorded, it is true, but that was because Khuman Singh had acquired a share in the *mahal*. The entry of Jodha Singh alone was undoubtedly a mistake—the brothers were joint and the mere fact that Khuman Singh had become one of the proprietors in the *mahal* would not, in any way, affect the occupancy right which he had jointly with his brother in the *mahal*. He and Jodha Singh remained occupancy tenants of this parcel of land in a *mahal* owned by Khuman Singh and other co-sharers. The Commissioner is wrong in thinking that when Jodha Singh died in 1315, Khuman Singh succeeded to Jodha Singh's occupancy right by inheritance as Jodha Singh's brother. He did not—he was entitled by survivorship to the old occupancy rights which he and Jodha Singh had possessed ever since 1872 and earlier. If the Commissioner had looked into the case as deeply as the Assistant Collector did, he would not have come to the conclusion he did. He starts on the erroneous basis that Khuman Singh had no share in the occupancy rights in 1306. Khuman Singh is undoubtedly an occupancy tenant as now recorded, since the muddle which the supervisor Kanungo made in 1908 was set right in the correction of papers case in 1915.

I would allow the appeal, set aside the Commissioner's appellate order and restore the finding of the Assistant Collector with costs to the appellant throughout.

HOPKINS, J. M.—I agree.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S
COURT.

SECOND CIVIL APPEAL NO. 93-B OF 1917.

July 26, 1917.

Present:—Mr. Mittra, A. J. C.

BALIRAM—PLAINTIFF—APPELLANT

versus

NARAYAN AND OTHERS—DEFENDANTS—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11,

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Expl. IV, O. XXI, rr. 101, 103—Res judicata—Ejectment, suit for, against puisne mortgagee—Failure to plead right of redemption, effect of—Redemption, suit for, whether barred—Claim proceedings—Order, whether affects right of redemption.

A right to possession upon redemption is not a right to the present possession of the property. [p. 277, col. 2.]

An order passed under rule 101 of Order XXI of the Civil Procedure Code becomes conclusive under rule 103 of the Order only so far as the present right to possession of the property is concerned. It does not affect a party's right to possession upon redemption. [p. 278, col. 1.]

A puisne mortgagee is not bound to set up his right of redemption in a suit against him for ejectment and his failure to do so does not preclude him from relying upon this right in a subsequent suit for possession upon redemption. [p. 278, col. 2.]

Appeal against the decree of the Second Additional District Judge, East Berar, Amraoti, in Civil Appeal No. 153 of 1916, dated the 20th December 1916, arising out of Civil Suit No. 163 of 1916, dated the 29th September 1916, before the Munsif, Morsi.

Mr. M. Bhowanishankar, for the Appellant.

Mr. V. V. Ohitale, for the Respondents.

JUDGMENT.—One Shrawan Mali was the owner of the house in dispute. By an unregistered instrument he mortgaged it on the 3rd May 1905 to the defendant No. 2, Sakarsa, and he again mortgaged the same property to defendant No. 3, Bhagwant, by an unregistered instrument on the 21st May 1905. In Civil Suit No. 362 of 1907, Bhagwant Rao obtained a foreclosure decree against Shrawan Mali, which was made absolute on the 10th December 1908. Thereafter he sold the house to the plaintiff Bali Ram on the 30th June 1913. In the meanwhile defendant No. 2, Sakarsa, sued on his mortgage Shrawan Mali and one Sheoratan Das in Civil Suit No. 352 of 1909 and obtained a final decree for foreclosure on the 7th October 1910 and got possession of the house on the 7th January 1911. Sakarsa sold the house by a registered instrument to the defendant No. 1, Narayan, on 13th March 1912. In Suit No. 973 of 1909 Bhagwant sued one Sheoratan Das for foreclosure and eventually obtained a decree in the Appellate Court on the 20th March 1911. In execution of this decree Bhagwant dispossessed the defendant Narayan on 6th January 1913, whereupon on 28th January 1913 Narayan applied for restoration of posses-

sion under Order XXI, rule 100, Civil Procedure Code, (Miscellaneous Case No. 11 of 1913). The proceedings terminated on the 17th January 1914 by an order in favour of defendant No. 1, Narayan. During the pendency of these proceedings the sale by Bhagwant to the plaintiff took place. Defendant No. 1, Narayan, being again dispossessed, instituted Suit No. 253 of 1914 in which the present plaintiff, who was the contesting defendant, figured as defendant No. 3. A decree for ejectment was passed in favour of Narayan and was upheld in first appeal. A copy of the appellate judgment has been filed and is Exhibit D-1.

The present suit has been instituted by Bali Ram for redemption of the mortgage in favour of Sakarsa who is to all intents and purposes represented in this suit by defendant No. 1. It is not questioned that the sale to the plaintiff had the effect of conveying Bhagwant's right, as a mortgagee. The plaintiff and his predecessors were never parties to the foreclosure decree obtained by defendant No. 2. The plaintiff, therefore, as a representative of the second mortgage has a right to redeem the prior mortgage, both mortgages being unregistered. But the defendant No. 1 pleaded *lis pendens* and *res judicata* and the plea has been successful in the Courts below.

Now the plaintiff's sale took place when Miscellaneous Case No. 11 of 1913 was pending. The effect of section 52 of the Transfer of Property Act is that the sale cannot affect the rights of Narayan under the order passed under rule 101 of Order XXI. As no suit was filed within one year to contest that order, it became conclusive under rule 103 as to the right to the present possession of the property. It does not affect the plaintiff's right to possession after redemption, provided his right to redeem has not been otherwise lost. I am unable to agree with the respondents' contention that a right to possession upon redemption is a right to the present possession of the property. I see, therefore, no force in the argument based upon section 52.

The next point which requires a decision is whether the plaintiff was bound to set up his right of redemption in Suit No. 253 of 1914 where he was joined as defendant No. 3. The lower Courts have held that

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explanation IV to section 11 of the Civil Procedure Code governs this case. Explanation IV says :—

"Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

If the former suit had been one under Order XXXIV, the plaintiff was bound to enforce his right of redemption. But the suit was one in ejectment based on prior possession. Might the plaintiff have raised his right of redemption by way of defence? And further ought he to have raised it? Unless both these conditions are fulfilled, there is no constructive *res judicata*. My answers to both the questions are in the negative, though not without some hesitation with regard to the first. In *Ganesh Das v. Khumansingh* (1) Stevens, J. C., doubts whether there can be any entering into accounts between mortgagor and mortgagee except in a suit for foreclosure or redemption, and he refers to an earlier case where a defendant who set up a right of redemption was told to bring a suit for redemption. Assuming, however, that a defendant can in a suit for possession obtain relief by way of redemption, I am certainly not prepared to say that the present plaintiff was bound to do so in Suit No. 253. He had made no tender nor had he deposited the money. Accounts had not been settled. Whilst in a suit for foreclosure, a subsequent mortgagee must be prepared to pay the money or be foreclosed, he need not seek to redeem when he is not called upon to do so and may select his own time for redemption. The mere existence of a right to redeem is not a defence to a suit for ejectment. It is the exercise of that right by satisfying the conditions required by law which might be a good defence. In my opinion the plaintiff was not bound to exercise that right in the previous suit. Therefore, the right to redeem was not a defence of which we can say that he "ought" to have raised.

A right of pre-emption stands on a different footing, as such a right must be exercised immediately after the pre-emptor hears of the sale.

(1) 7 C. P. L. R. 3 at p. 5.

After the above judgment was dictated, the appellant's learned Pleader drew my attention to a case reported as *Mahomed Ibrahim v. Hamja Mahomed Ally* (2). The observations made at page 899* support my view.

It is urged that there was an express decision in the former suit that the plaintiff's sale was absolutely void. The word "absolutely" does not occur in the appellate judgment (D-1). All that was held was that the present plaintiff could not set up the sale deed to shew a title to possession. His right to redeem the prior mortgage was not in dispute then, nor was there a decision regarding it.

It is agreed that the plaintiff has to pay Rs. 150 as the price of redemption.

The decrees of the Courts below are set aside and the usual decree for redemption will be passed. The plaintiff will pay the costs of defendant No. 1 in the first Court and bear his own costs in that Court. The respondents will pay the appellant's costs in the two Appellate Courts.

Decrees set aside

(2) 12 Ind. Cas. 387; 13 Bom. L. R. 895; 35 B. 507.

*Page of 13 Bom. L. R.—Ed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND APPEAL PETITION No. 9 OF 1918-19.

March 14, 1919.

Present:—Mr. Ferard, S. M., and
Mr. Hopkins, J. M.

DWARKA PRASAD—APPELLANT

versus

SHRI KANT PANDEY AND ANOTHER—
RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 11—U. P. Land Revenue Act (III of 1901), s. 131—Partition, when comes into effect—Khudkasht holding allotted to mahal in which holder is not proprietor—Tenancy, commencement of—Occupancy rights, accrual of.

Under section 131 of the U. P. Land Revenue Act, a partition takes effect on the 1st of July, following the date of confirmation of the partition. Consequently, where a *mahal* is partitioned and the land of a *khudkasht* holder is allotted to a new *mahal* in which he is not a proprietor, such holder can only count occupation from that date towards the accrual of occupancy rights. [p. 279, col. 2.]

Second appeal from the order of the Commissioner, Gorakhpur Division, dated the 15th July 1918, in the case of ejectment.

GOVINDA v. UMRAO SINGH.

JUDGMENT.—There is no dispute as to facts. The appellant Ramnath was *khudkasht* holder of the land in suit in a joint *mahal*. In 1903—5, a partition took place. The partition proceeding was confirmed on 30th July 1903, lots were filed by the Amin on 4th July 1904, this land being allotted thereby to respondents' *mahal*; the partition was confirmed by the Collector on 6th April 1905, to take effect on 1st July 1905, as provided by section 131, Land Revenue Act. The Commissioner has held that appellant's position as a tenant in the respondents' *mahal* commences from the latter date; if either that date, 1st July 1905, or date of confirmation, 7th April 1905, be taken, the appellant has less than 12 years' tenancy to his credit on 2nd September 1916, date of institution of the present suit, which the respondent has brought to eject him as a non-occupancy tenant. The appellant's contention is that, as held by the Assistant Collector, he is entitled to count his period of tenancy from 4th July 1904, the date of allotment by the Amin of the land to the respondent's lot. He relies on *Swami Mukand Lal v. Ram Sarup* (1).

I am in entire agreement with the Commissioner in holding that *Swami Mukand Lal v. Ram Sarup* (1) is not applicable. It has no reference to the question of when tenancy begins in such cases. It merely lays down, for reasons of practical necessity chiefly, that land which is *khudkasht* not carrying exproprietary right on the date of its allotment in partition to the *kurra* of another co-sharer cannot become *khudkasht* carrying exproprietary right in the period between that date and the date the partition is confirmed. It does not say, either definitely or by implication, that the *khudkasht* holder becomes a tenant from that date, in the *kurra* to which the Amin allots the land. Nor can it be so. The constitution of the proprietary body of the joint *mahal* is unaltered till the partition takes effect under section 131 on the 1st of July following the Collector's order confirming the Amin's proposals. The proprietors of the new lots have their status from that date only, and even then it does not come into effective being till 1st July following. It is quite immaterial that under *Gopi Nath v. Abdul Aziz* (2)

they are allowed to file suits against existing tenants when once the Collector has confirmed the partition, in advance of the date on which the partition takes effect. That is quite a different matter, which does not enter into the present consideration. The important fact is that no rent is payable to the new proprietors or to anyone else by the *khudkasht* holder in the joint *mahal*, whose land has been allotted to a new *mahal* in which he is not a proprietor, until the 1st July following the date of confirmation of partition. Up to that date he is a *khudkasht* holder; from that date he is a tenant and can only count occupation from that date towards accrual of occupancy right.

The Commissioner is right. The appellant is a tenant since 1st July 1905 only and had not completed 12 years when the suit to eject him was filed on 2nd September 1916. He is liable to ejectment and I dismiss the appeal with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 224-B OF 1918.

November 27, 1919.

Present:—Mr. Mittra, A. J. C.

GOVINDA—JUDGMENT-DEBTOR—APPELLANT
versus

UMRAO SINGH—DECREE-HOLDER
—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 48—Limitation Act (IX of 1908), s. 15—Execution of decree—Limitation period fixed by s. 48, whether can be extended—Stay of execution, effect of—Force or fraud, effect of.

Section 48 of the Civil Procedure Code does not contemplate a deduction of any particular period from the prescribed period of twelve years. Where, however, force or fraud is proved, that gives a fresh starting point of limitation under sub-section (2), clause (a), of the section. [p. 281, col. 1.]

The period during which execution proceedings have been stayed cannot be deducted from the period of twelve years prescribed by section 48 of the Civil Procedure Code. [p. 281, col. 1.]

Appeal against the decree of the District Judge, Amraoti, in Civil Appeal No. 3 of 1918, dated the 20th March 1918, confirm-

(1) Sel. Dec. No. 9 of 1909.

(2) Sel. Dec. No. 10 of 1910.

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ing the order of the Subordinate Judge, Amraoti, dated the 23rd November 1917.

Mr. M. R. Bobde, for the Appellant.

Mr. G. V. Deshmukh, for the Respondent.

JUDGMENT.—The lower Appellate Court has held that the appeal to that Court was not properly presented. The petition of appeal was accompanied by a certified copy of the order complained of. The order embodied a finding that the application for execution is not barred by section 48 of the Civil Procedure Code. The District Judge, on the authority of *Qasim Ali Khan v. Bhagwanta Kuar* (1), accepted the contention that a copy of the formal order to be found in the order sheet, should have been filed as a copy of the decree. The entry in the order-sheet is to the following effect: 'Order passed, application is not time-barred.' I cannot regard this as a decree. Unlike the Allahabad High Court, this Court does not insist on the Subordinate Court drawing up a formal decree in execution proceedings, nor is it the practice here to do so. The entry in the order-sheet merely shows what the Judge has been doing and is not treated here as a decree. I prefer to follow *Khirode Sundari Debi v. Jnanendra Nath Pal* (2). I hold that the appeal was properly filed in the Court of the District Judge.

The decree sought to be executed was passed on the 24th June 1905 and the present application for execution was made on the 29th August 1917, that is, more than twelve years after the date of the decree. *Frima facie* the execution is barred under section 48 of the Civil Procedure Code. But the lower Appellate Court finds that there was fraud on the part of the judgment-debtor which prevented the execution of the decree on two occasions and hence the case comes under section 48 (2) (a). The fact that the father of the judgment-debtor raised a frivolous objection to the attachment of the house on the allegation that it was his exclusive property, cannot be regarded as fraud on the part of the judgment-debtor, who is not shown to have taken any part in the proceedings and, moreover, lives separate from his father.

The other occasion referred to by the lower Appellate Court requires a more detailed statement of the facts and if the learned District Judge had carefully read the findings of his predecessor in Miscellaneous Appeal No. 138 of 1913, he would have come to a different conclusion as regards the alleged obstructive tactics said to have been resorted to by the judgment-debtor in delaying proceedings. The original decree-holder was a minor Narayansingh under the guardianship of his mother *Musammatt Renuka*. This decree in a partition suit came to the share of the present decree-holder. The judgment-debtor alleged that there was an adjustment of the decree and prayed that the decree be certified as adjusted. He succeeded in the first Court. But on appeal (Miscellaneous Appeal No. 138 of 1913) the District Judge held that there was a compromise of the decree as alleged but without the sanction of the Court. It was found that the judgment-debtor had not notice that the decree had since been assigned to the present respondent. The District Judge recorded a finding that Rs. 1,350 was paid to *Musammatt Renuka* in full satisfaction of the claim, but the appeal succeeded on the ground that the application to have the adjustment certified was barred by time, having been made after ninety days. Upon the above statement of the facts, it is obviously impossible to hold that there was fraud on the part of the judgment-debtor with intent to delay the proceedings. On the contrary the judgment-debtor had a *bona fide* claim, which though recognised by the first Court failed in the Court of Appeal on the sole ground that it was barred by limitation. The view taken by the lower Appellate Court cannot, therefore, be upheld.

The respondent tries to support the decree on the ground that there was a stay of execution and that under section 15 of the Limitation Act, he is entitled to a deduction of time which would bring the application within time. I am not prepared to accept this contention in the absence of any authority in support of it. The case relied upon *Peary Mohun Aich v. Anunda Oharan Biswas* (3) did not decide that section 5

(1) 42 Ind. Cas. 888; 40 A. 12; 15 A. L. J. 801.

(2) 6 C. W. N. 283.

(3) 18 C. 631.

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of the Limitation Act, 1877, applied to section 230 of the Civil Procedure Code, 1882, but that the decree holder was entitled to the benefit of the rule laid down in that section on the broad principle that when the parties are prevented from doing a thing on a particular day, not by any act of their own, but by the act of the Court itself, they are entitled to do it at the first subsequent opportunity. It will be an undue extension of the maxim "*actus curiæ neminem gravabit*" to deduct the whole of the period during which the proceedings were stayed, in the absence of a specific statutory rule applicable to the case, especially as section 48 of the Civil Procedure Code allows the long period of twelve years. The maxim does not lay down a rule for the computation of time and has, so far as I know, never been so applied.

It would appear that where force or fraud is proved, that gives a fresh starting point, but there is no deduction of any particular period from the prescribed period of twelve years [*Venkayya v. Raghava Charlu* (4), *Mohsin Ali v. Masoom Ali* (5)]. The section does not seem to contemplate a deduction from the period fixed. I, therefore, hold that the present application is barred by section 48.

The result is that the appeal succeeds and the decrees, of the Courts below are set aside and the application for execution is dismissed with costs in all Courts. I fix ten rupees as Pleader's fee in this Court.

Appeal allowed.

(4) 22 M. 320; 8 M. L. J. 79.

(5) 11 Ind. Cas. 672; 34 A. 20; 8 A. L. J. 1020.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1087 OF 1918.

August 19, 1919.

Present:—Mr. Justice Bakewell and
Mr. Justice Odgers.

NILI RANGASAMI MUDALIAR —
DEFENDANT No. 1—APPELLANT

versus

KARI KRISHNA BATTACHARIAR —
PLAINTIFF—RESPONDENT.

Religious Endowments Act (XX of 1833), ss. 12, 13

—*Temple committee and trustee, nature of relations between—Archaka, duty of, to obey trustee in preference to committee—Archaka, rights and duties of—Trustee, power of, to dismiss archaka.*

A temple committee constituted under the Religious Endowments Act has no business to interfere in the internal management of the temple or in mere matters of ritual or ceremonial. They should not interfere with the trustee, except where interference is necessary in discharge of the secular duties which the Act imposes on the committee. The committee's functions are primarily to see that the funds of the endowment are preserved and not wasted. [p. 283, col. 2.]

Seshadri Ayyangar v. Nataraja Ayyar, 21 M. 179 at p. 181 and *Tiruvengadath Ayyangar v. Srinivasa Thathachariar*, 22 M. 361 at p. 363, followed.

An archaka is bound to obey the trustee in preference to the committee in the matter of the distribution of honours and the trustee has power to dismiss even a hereditary archaka. [p. 283, col. 2.]

An archaka cannot withhold the honours due to the ubayakars of the temple on the ground that his perquisites have been withheld and such conduct would entail his dismissal. [p. 283, col. 2; p. 284, col. 1.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Chingleput, in Appeal Suit No. 107 of 1917, (Appeal Suit No. 29 of 1917 on the file of the District Court, Chingleput,) preferred against the decree of the Court of the District Munsif, Tiruvellore, in Original Suit No. 304 of 1915.

FACTS —An Archaka in a temple, having failed to show the usual honours to the trustee and two devotees and disobeyed an express order of the trustee on the ground that the temple committee had passed a different rule, was dismissed by the trustee. Hence the present suit by the Archaka. The lower Appellate Court found that the temple was within the purview of Act XX of 1863 subject to the superintendence of the temple committee and that the rule passed by the temple committee was competent and reasonable and so decreed the suit. The lower Court also found that the Archaka *bona fide* believed that the committee was an authority superior to the trustee.

Mr. A. Krishnaswami Aiyar with him Mr. Sankara Sastri, for the Appellant.—The display of honours to devotees and others in the temple is a matter of pure ritual. A temple committee has no power to interfere with the trustee in matters of ritual. *Tiruvengadath Ayyangar v. Srinivasa*

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Thathachariar (1). Its functions are confined to seeing that the endowments are utilised for their legitimate purpose and are not wasted. See *Seshadri Ayyangar v. Nataraja Ayyar* (2). So the rule passed by the committee in this case is not legally binding on the trustee whose order is the only valid order. The Archaka is only a temple servant, liable to be dealt with by the trustee as he may see reason to do whether by way of dismissal or by suspension. He has no excuse for setting up a rule of the committee in defiance of the trustee's orders. That is clear disobedience. See *Seshadri Aiyongar v. Ranga Bhattar* (3). See also Second Appeal No. 226 of 1911 (unreported), which clearly says that Archakas are not to set up their judgment against that of the trustee who can dismiss them for good reasons. It won't matter even if they are hereditary Archakas. See also *Sundararama Sastri v. Anantha Krishna Naidu* (4), *Ramanathan Ohettiar v. Swaminatha Aiyar* (5), *Subba Naidu v. Gopalaswamy Naidu* (6).

As regards *bona fides* there is none. It was the Archaka who moved the committee to pass the rule in question. The rule is *ultra vires* of the committee and the Archaka is guilty of wilful disobedience and misconduct.

Mr. T. R. Venkatrama Sastri, for the Respondent.—The temple committee has certain visitatorial powers included in their power of superintendence, and in the exercise of such powers they can say that certain things should be done in a certain manner in the interests of the temple. *Sitharam Ohetty v. Subramania Aiyar* (7). The powers of the committee ought to be construed liberally. See also *Kristnasamy Tatachary v. Gomatum Rangacharry* (8).

In this case the Archaka felt a *bona fide*

doubt as to who was entitled to the honour in question known as the 'Sirkar' honour. The trustee claimed it for himself. Hence the reference to the temple committee. The trustee also deferred to the arbitration of the committee.

[ODGERS, J.—He was sent for.]

And the committee passed an order. The Archaka was entitled to certain emoluments when the honour had to be shown. The trustee, by order, took them away. The Archaka *bona fide* appealed to the committee who were the trustee's superiors. It was quite against the usage of the temple for a trustee to pass such an order.

In any event I submit that no case has been made out for a dismissal.

At any rate, the Archaka, having been really aggrieved, acted under a *bona fide* doubt and he is not liable on the ground of disobedience for any act done in consequence of the proceedings of the committee.

JUDGMENT.—In this case the plaintiff (respondent) is the hereditary Archaka for performing certain Poojas in the Sri Krishna Perumal Devasthanam. He was dismissed from his office by the 1st defendant (appellant before us), the Trustee of the Devasthanam since 1909, and brought his suit to declare that his dismissal was improper and for an injunction to restrain, *inter alia*, 1st defendant from excluding him (plaintiff) from his rights and for Rs. 343-80 damages respecting the value of honours detained from the plaintiff by 1st defendant.

The District Munsif decreed that, upon plaintiff filing in Court an undertaking that he will faithfully obey the orders of the trustee or his deputy for the time being in all the matters pertaining to the Archakaship, including the showing of temporal honours by garland, Theertham and the like to Ubayakars, and generally to conduct himself in subordination to the trustee in respect of his duties, the order of dismissal should be set aside and the plaintiff restored to office. He also granted an injunction, but found against plaintiff on the subject of emoluments. The Temporary Subordinate Judge confirmed this decree, but awarded the plaintiff emoluments as claimed by him. The 1st defend-

(1) 22 M. 361 at p. 363.

(2) 21 M. 179 at p. 181.

(3) 10 Ind. Cas. 548; 35 M. 631; 21 M. L. J. 580; 10 M. L. T. 14.

(4) 38 Ind. Cas. 695; 5 L. W. 672.

(5) 14 Ind. Cas. 520; 23 M. L. J. 278; 12 M. L. T. 155.

(6) 15 M. L. J. 185.

(7) 32 Ind. Cas. 211; 39 M. 700 at p. 703; 30 M. L. J. 29; 19 M. L. T. 25; 3 L. W. 43.

(8) 4 M. H. C. R. 63.

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ant appealed. The charges against the plaintiff were set out at length and two sets of these were dealt with in argument before us, viz., charges IV, VI, and IX together and charges VIII and X together. The first set of charges relates to non-observance on plaintiff's part of garland honours due to the 1st defendant; the second set relates to the non-observance of honours to certain Ubayakars. The plaintiff's answer to the first set of charges is that the orders of the 1st defendant were contrary to the Mamul of the temple; his answer to the second set is that his Swathanthrams were not paid to him.

The real fact seems to be that this is a contest between the temple committee on the one hand and the trustee on the other. The temple committee issued orders relating to the garland honours in Exhibit III dated June 1913. It is stated that the Amin, who was the 1st defendant's deputy, was refused garland honours subsequently to this by plaintiff, in consequence of Exhibit III. First defendant thereupon issued Exhibit I in January 1914, laying down the procedure as to these honours. All these relate to charges IV, VI and IX. As before stated, the answer to the charges VIII and X was that 1st defendant withheld the perquisites due to plaintiff. The question really is whose authority the plaintiff is bound to obey—can he set up the authority of the temple committee as against the trustee? Mr. T. R. Venkatarama Sastri has argued that the temple committee can intervene to see that the Mamul of the temple is carried out. The Subordinate Judge found that there was nothing to show what the Mamul was and that Exhibit III was an illegal document. He seems to think, however, that the plaintiff might be justified in regarding the committee as having the authority of overriding that of 1st defendant in these matters. Both Courts found the charges proved against plaintiff. We had a long discussion as to the effect of certain provisions of Madras Regulation VII of 1817 Endowments and Escheats, and the Religious Endowments Act (XX of 1863) in order to support the contention of the plaintiff as to the authority of the temple committee, but on a consideration of these enactments we are satisfied that it could never have been intended that the

Government as represented by the Board of Revenue or the temple committee, as the successor of the Board, should intervene on a question of the kind before us, viz., purely temporal honours to certain definite persons. Section 15 of the Regulation and section 12 of the Act seem to us to be perfectly clear to exclude such matters as those in suit entirely.

As to the respective powers of the temple committee and the trustee, reference may be made to *Seshadri Ayyangar v. Nataraja Ayyar* (2), where at page 189 it is stated: "The question was much discussed whether the matters mentioned in the order relating to the conduct of the festival were within the scope of the committee's authority, the committee being primarily concerned to see only to the preservation and proper disposition of the temple property. In our opinion, having regard to the language of the Act the committee have no business to interfere in the internal management of the temple or in mere matters of ritual or ceremonial. Their interference with the trustee is unauthorised and improper, save so far as it can be justified as necessary in discharge of the secular duties which the Act imposes on the committee." In *Tiruvengadath Ayyangar v. Srinivasa Thathachariar* (1) the learned Judges say that "it is not part of the duty of the committee to interfere with the trustees in matters of ritual. The business of the committee is primarily to see that the endowments are appropriated to their legitimate purposes and are not wasted." Reference may also be made to *Sundarama Sastri v. Anantha Krishna Naidu* (4). There also appears to us to be ample authority to show that the Archaka is bound to obey the trustee and that the trustee has power to dismiss the Archaka, even though hereditary. See *Seshadri Ayyangar v. Ranga Bhuttar* (3) and *Krishnasamy Tatachary v. Gomatum Rangacharry* (8). It is, therefore, our opinion that the plaintiff was bound to obey the orders of the trustee and not those of the committee in the matters complained of. We also think that the answer on the second set of charges must fail. It was clearly the duty of the plaintiff to pay the honours and to recover his perquisites if withheld *abunde*. He was not justified in refusing to carry out the orders of the 1st defendant in the matter of these honours on

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the ground that his perquisites were withheld.

Reference was made by Mr. T. R. Venkatarama Sastri to the opinion of Wallis, C. J., in *Sitharam Chetty v. Subramania Aiyar* (7), viz., that, in his Lordship's view, some of the earlier decisions had unduly fettered the discretion of temple committees. The case in question was a scheme suit, and it does not appear to us that what is said there can affect the present case which is one between the trustee and a temple servant. In our opinion the case is clearly proved against plaintiff and what he did would have justified his dismissal by the 1st defendant, but as there is no appeal as to this, the order as to his restoration on an undertaking will stand. With regard to the emoluments, we think, the learned Subordinate Judge was wrong. In decreeing emoluments to the plaintiff the latter was placed in the position of drawing pay for the interval between his dismissal and his suit and consequently suffered not at all for his acts of disobedience to the order of the trustee for which, in our opinion, he deserves punishment, and we adopt the view of the District Munsif on this question.

In the result the decree of the lower Appellate Court will be set aside and that of the Munsif restored. The plaintiff will pay 1st defendant's costs throughout. Respondent's (plaintiff's) memorandum of objections is dismissed with costs.

M. C. P.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 210 OF 1918.

August 20, 1919.

Present:—Mr. Prideaux, A. J. C.

GANGADHAR AND OTHERS—APPLICANTS
versusJAGANNATH alias DHUNNI AND OTHERS—
NON-APPLICANTS.

Civil Procedure Code (Act V of 1908), s. 151,

applicability of—Appeal heard after death of respondent—Application to set aside proceedings—Inherent power of Court—Remedy, proper.

Section 151 of the Civil Procedure Code cannot be invoked in aid of an application to an Appellate Court, asking that proceedings before it in an appeal be set aside as a nullity on the ground that on the date of hearing of the appeal the respondent was not living. The correct procedure is to apply, within the period of limitation, for a review of the judgment passed in the appeal. [p. 285, col. 1.]

Application for revision of the order of the District Judge, Wardha, dated the 11th May 1918.

Mr. B. R. Pendharkar, for the Applicants.

Mr. D. N. Khare, R. B., for the Non-Applicants.

ORDER.—The applicant filed a suit, Civil Suit No. 156 of 1914, against one Sheoprasad, father of the non-applicants, in the Court of the Junior Sub-Judge, Wardha, on 14th February 1916. It was decided in his favour. Sheoprasad appealed to the Court of the Divisional Judge, Nagpur, Civil Appeal No. 43 of 1916, on 9th September 1916. That appeal was heard on 28th August 1916, and judgment delivered on 9th September 1916. Applicant then filed a second appeal in this Court, No. 14 of 1917; that was disposed of on the 22nd January 1918 by the following order:—

"Mr. B. R. Pendharkar, Pleader, appears for the appellant and says the respondent died on 21st July 1916, before this appeal was filed and before the decree appealed was passed, and even before the appeal was heard. In the circumstances the appeal abates and is dismissed as abated."

Applicant then on 8th April 1918 applied to the District Court, Wardha, under section 151 of the Civil Procedure Code, asking that as Sheoprasad, appellant, was not living on the date of hearing or the date of decision by the Divisional Judge his proceedings were a nullity and asked for an order to that effect. The District Judge was of opinion that the case was not one under section 151 of the Civil Procedure Code and dismissed the application. Against that order the present application for revision is filed.

It seems to me that the circumstances complained of do not bring the case within the four corners of section 151.

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That section is not meant to apply to these cases. It was defendant's business within the period of limitation to apply to the Divisional Judge for review of the judgment passed. This he failed to do. He did not come here in revision. He is as much to blame as Sheoprasad's heirs in not informing the Divisional Judge that the appellant was dead at the date of the hearing. I find it difficult to believe that the applicant was not in possession of information regarding Sheoprasad's death, considering that Sheoprasad lived at Malod, a village of which the applicant is admittedly the *malguzar*, and though he does not live there he has servants there. The applicant has misconceived his remedy. The road he should have taken, as I have pointed out, was to have applied in revision to the Divisional Judge's Court. I see no reason to interfere and as the case obviously cannot be dealt with under section 151 of the Civil Procedure Code, I dismiss this application with costs. I fix Pleader's fees at Rs. 15.

Application dismissed.

COURT OF THE BOARD OF REVENUE,
UNITED PROVINCES.

SECOND APPEAL PETITION No. 40 OF 1918-19.

May 9, 1919.

Present:—Mr. Ferard, S. M., and
Mr. Hopkins, J. M.

BANSI RAM—APPELLANT

versus

KUNJ BEHARI AND ANOTHER—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 22—"Sharing in cultivation," what is—Boy of 8 or 10 doing petty work for relative, whether sharer in cultivation.

A boy aged between 8 to 10 or 11 years, who lives with an agricultural relative and does such petty work as is usually done by boys of that age, cannot be said to be "sharing in cultivation" with his relative within the meaning of section 22 of the Agra Tenancy Act.

Second appeal from the order of the Commissioner, Gorakhpur Division, dated the 9th October 1918, in the case of ejection.
JUDGMENT.

FERARD, S. M.—(April 15, 1919.)—The holding was Ramphal's occupancy. His

widow, Musammat Sheomani, mortgaged it with possession in 1303. Respondent Kunjbehari is his daughter's son. The main point argued is whether Kunjbehari was old enough to share in cultivation with Ramphal at his death put before 1303. There is no doubt that he lived with his grandparent, but this is not enough.

The first Court put Kunjbehari's age at 26. The Commissioner puts him down at a bit over 30, possibly even 35. He is at present in Court and I age him at 30 to 32. If Ramphal died only the year before his widow mortgaged the holding, i. e., in 1302, Kunjbehari could only have been about eight years old. I do not hold that the petty jobs which boys of 8 to 10 or 11 can do for their agricultural relatives can amount to "sharing in cultivation" with their agricultural relatives.

The Commissioner says that in a miscellaneous correction of records case, the appellant's *karinda* said that Kunjbehari shared in cultivation with his grandfather. This is not accurate. He only said he was "*shamil sharik*" with him which does not go further than that he lived with him. It cannot be taken as an admission that this small boy co-shared in cultivation with him within the meaning of section 22.

I would allow the appeal and, setting aside the Commissioner's appellate order, would restore that of the Assistant Collector, with costs to appellant throughout.

HOPKINS, J. M. (May 9, 1919)—I agree.

Appeal allowed.

CALCUTTA HIGH COURT.
ORDINARY ORIGINAL CIVIL JURISDICTION,
SUIT No. 203 OF 1918.

January 15, 1919.

Present:—Mr. Justice Rankin.
In the matter of ARBITRATION BETWEEN
UTTAM CHAND SALIGRAM

versus

MAHMOOD JEWAMAAMOOJI.
Arbitration—Dispute, existence of, whether necessary—Interest, award of, whether invalidates award—

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Contract Act (IX of 1872), s. 62—Settlement contract, whether discharges original contract.

It is an essential condition for an arbitrator's jurisdiction that when his arbitration is demanded there shall be in existence a dispute between the parties. [p. 286, col. 2.]

On 27th April petitioner agreed to sell to the respondent a certain quantity of Hessian cloth at Rs. 30. Delivery of one-half was to be made in May and of the other half in June. Delivery not having been made in May and not being proposed to be made in June, two settlement contracts were entered into on the 31st May and the 6th June respectively and the same goods were re-sold by the respondent to the petitioner at Rs. 35. The respondent duly sent in bills but the petitioner, although admitting liability for the amount of respondent's bills, withheld payment by claiming to set it off against a larger sum than would be due to the petitioner from the respondent on other accounts. According to the terms of the contracts between the parties the respondent referred the dispute to arbitration and the arbitrators, appointed by the Bengal Chamber of Commerce, gave their award in favour of the respondent and allowed interest on the claim. On an application by the petitioner to set aside the award:

Held, (1) that as the petitioner was withholding payment under a claim of right to do so, there was a 'dispute' between the parties, and this gave the arbitrators jurisdiction in the matter; [p. 288, col. 1.]

(2) that after the settlement contract was made the original contract was not utterly discharged by virtue of section 62 of the Contract Act; [p. 288, col. 2.]

(3) that the award was not bad because it awarded interest as it was for the arbitrators to decide this, and they had jurisdiction to decide it. [p. 289, cols. 1 & 2.]

When a settlement contract is made re-selling the goods back again from the original buyer, the intention is not that after the settlement contract the first contract should be discharged: the intention is that the two contracts should stand together. [p. 288, col. 2.]

Mr. M. N. Basu, for the Petitioner.

Mr. P. N. Chatterjee, for the Respondent.

JUDGMENT.—This is an application to set aside an award made by the arbitrators appointed by the Bengal Chamber of Commerce. In this case the original contract No. 59B made on the 27th April of last year was for sale of one lac of yards of Hessian cloth, the price was Rs. 30, delivery of one-half was to be made in May, and the other half in June. On that contract the petitioner was the seller, and the respondent the buyer. Delivery not having been made in May, and not being proposed to be made in June, two settlement contracts were entered into on the 31st May and the 6th June respectively. These are

numbered 67 B and 70B, and the price at which the same number of yards, the same goods, was re-sold by the respondent to the petitioner was Rs. 35.

Now the first matter which the petitioner alleges as a reason for having this award set aside is that at the time the arbitration was called there was no dispute, and I am quite satisfied that it is an essential condition for the arbitrator's jurisdiction that at the time the arbitration is demanded there shall be in existence a dispute; at all events unless the petitioner here has done something to submit to jurisdiction afterwards upon a dispute subsequently arising, that must be a condition of the validity of the award. Now the arbitration here was called or demanded on the 2nd August 1918, and the petitioner's case is that he admitted his liability. He says that the mere fact that he did not pay does not amount to a dispute. On that I have to examine how the facts stand. Under the settlement contracts the delivery was not overdue until after the 31st May and the 30th June respectively, and the money difference was payable by the terms of those contracts by the 1st June and 1st July respectively. On the 31st May and on the 26th June the respondent sent in bills for the correct amount, of course at that time including no claim for interest. Those bills and the petitioner's receipts, therefore, have been produced before me.

Now these parties had various other dealings with each other upon entirely different contracts. Taking these other dealings together as a whole, there is a dispute on the evidence before me, a dispute as to which I cannot possibly now decide, whether they result or will result in a balance due from the petitioner to respondent or from respondent to petitioner. What is certain is that with the possible exception of a sum of Rs. 1,200 incidentally referred to in the letter of the 15th August and as to which I am not given a scrap of information, it is not even alleged by the petitioner that any item entering into the account upon which such balance would have to be struck was due to him at or even about the 1st July 1918. There is no award as regards any item in the petitioner's favour. In that state of affairs the petitioner admitted liability for the amount

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of respondent's bills in the matter now in question. Having done that, he contends now, and has all along contended, that there could not possibly exist any dispute. In my opinion this is a *non sequitur*, and the petition discloses an excellent illustration of its falsity. In paragraph 7 of the petition the petitioner says this:—

"That your petitioner has always admitted the claims of the said Uttam Chand Saligram for Rs. 2,500 and Rs. 2,000 mentioned above and in fact offered to credit him with the said amount in their account with your petitioner. That this offer was made by your petitioner prior to the submission to the arbitration hereinafter mentioned and that there was no dispute whatsoever in connection with the said settlement contracts or as to the amount payable by your petitioner. That on the 24th July 1918 your petitioner wrote to the said Uttam Chand Saligram accepting their bills for Rs. 2,500 and Rs. 2,000 and offering to credit them in their account with the same. The following is a true copy of the said letter:—

"Calcutta, 24th July 1918.

"Babu Uttam Chand Saligram.

"Dear Sir,

"I have received your two letters of even date re your bills for Rs. 2,500 and Rs. 2,000. In reply as there will be a big outstanding against you of mine commencing from this month, say over Rs. 12,000, I keep the above amount as margin against same crediting your account, which note."

Now I am of opinion that the effect of the letter of 24th July is that it is a claim to set off the amount in question against the big outstanding. It is quite clever to describe it as an offer, but it is quite absurd. In the face of the demand for payment the suggestion of set-off is not a proposal for the advantage of the respondent, but a decision of the petitioner for his own advantage. It is not only a claim, but it is put forward in the letter as a reasonable claim. The letter that follows of 15th August, though written after the arbitration had been called, throws light on the meaning of the letter of 24th July. The same claim is put forward as regards the question of set-off. In fact it shows that the position at all material times was this. Two people, each arguing as and when it suited him that

accrued debts due from him should not be paid, and each resisting the same claim as and when it suited him on the ground that it was absurd. Now that is a dispute. It has often been pointed out that there are two elements or aspects of every debt, the *debitum* and the *solvendum*. A dispute as to the latter would be just as much a dispute as would a dispute as to the former. So, too, the Law Reports are full of questions as to the right of set-off, and the Courts have taken much time and pains in deciding them. If they give ample room for *litis contestatio* in the Courts, I do not see why, when parties are at loggerheads about them, it can be held there is no dispute. To take this point with any chance of success the petitioner would have to satisfy me that what he calls his offer, and what I will call his proposal, was one made without claim of right at all. He would have to show that the attitude he took was this: "I owe the money and am bound to pay it at once, but I am simply not going to do so." If this position was maintained exactly and consistently, it may be that there was no room for an arbitration. Such a position, however, is one of unstable equilibrium. It is like the position of the extreme sceptic in philosophy who affirms there is no true knowledge. This is quite unanswerable until you assert it; when you do you contradict yourself. Certainly any person who is desirous of evading arbitration by taking up this position would be well advised not to write letters to explain and justify his conduct. The better the letter the worse his chance. I do not read the letter of 24th July as a statement that petitioner is not going to pay at once contrary to or in despite of his obligations. His attitude, whatever it may have been, was not put forward as one of cynical disregard of obligation. Recently the case of *Chandan Mall v. Donald Campbell & Co.*, decided in the House of Lords on 4th December 1916 was brought to my notice. It is not, I understand, in the Law Reports, but a report* will be found in the paper book in the Appeal in this Court, No. 42 of 1917. In that case Lord Sumner disposed of the very

*The judgment of the House of Lords is printed Appendix to this judgment at p. 289.—Ed.

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same sort of point as arises here in these words: "The real point is this. It is suggested that the appellant really disputed nothing, but simply could not, or would not pay; in other words, he lacked either money or honesty. My Lords, I cannot assume in Mr. Chandanmull's favour that he was wanting in either. If it be the case that no further dispute arises out of the contract when nothing capable of being disputed is to be found, and nothing is alleged to be disputable, I still think that if the appellant's attitude can be explained consistently with any recognition of his business obligations, this should be done." I think this reasoning directly applicable to the letter of July 14th and to the petitioner's conduct, if there be any doubt as to their true meaning, but in truth the petitioner's later letters to the Chamber, his petition itself in paragraphs 5, 6 and 12, paragraph 6 of the affidavit filed in his behalf in reply, all show conclusively that he was withholding payment under a claim of right so to do. That the claim had little substance makes his case so much the worse. In the cases to which I have been referred as having been decided by my brother Greaves and my brother Chaudhuri—*Gordhan Das Benarasi Lal v. B. Nathumal & Co.* and *Narendra Nath Bavu v. Ramanaran Jailal*, I do not gather from their judgments that there was any question of a dispute about right of set-off. Whatever the facts may have been, it is clear that the cases as ultimately presented to the Court in these actions required the Court to decide nothing, and that it decided nothing, which assists me in dealing with the particular facts in the present case.

So far I have left out all reference to any dispute about interest. By his letter of the 2nd August demanding arbitration, of which a copy is not before me, but which is referred to in the petition, the respondent put into writing a claim for interest. It is not contended that the petitioner has at any time admitted that respondent had any right to this, and petitioner still maintains that any claim for interest is bad. I have, therefore, to see whether this claim was put forward in the letter of 2nd August for the first time. Now, I have no previous letter from the respondent in which this claim is alleged, but

then I have no letters from the respondent in evidence before me at all, save one of 9th September. What is certain is that while the date of the first claim for interest is nowhere specifically dealt with in the petition, the affidavit of Mulraj asserts that the plaintiff had refused to pay interest, and the affidavit of Ismaile does not challenge the respondent's statement as to this at all. In face of the petitioner's conduct in claiming a set-off against future debts, and delay in making payment, I think that a demand for interest was almost inevitable. As it has appeared to two commercial gentlemen to be well founded, I should be in favour of the respondent on this point, in view of the petitioner's attitude, even if I thought that the demand was made and persisted in partly for the purpose of forcing the petitioner from a nicely balanced attitude of disputing nothing and doing nothing.

The next point that was taken by the petitioner was this. He said that not only was there no dispute but that there was no submission. He said that the award was made upon the original contract No. 59B, and that after the settlement contracts that contract was gone by virtue of section 62 of the Indian Contract Act. This is a point not taken in the petition and if it be a matter of discretion on my part, as I think it is, in view of the unmeritorious nature of the point, I should not give to the petitioner any indulgence by way of allowing him to take it. At the same time as it is a matter of importance, I would like to say that in my view the point is bad. In a case like this one has to attend not only to the substance of the contracts between the parties, but to the form. When a settlement contract is made re-selling the goods back again from the original buyer, the intention is not that after the settlement contract the first contract should be gone. The intention is that the two contracts should stand together. That being so, there can be a set-off as regards delivery, and there can be a set-off as regards price for every thing except the difference. It seems to me to be abusing section 62 of the Contract Act to say that after a settlement contract the original contract is utterly discharged. Curiously enough in the case which the petitioner relied upon before me, decided by Mr. Justice Greaves, the objection taken there was all the other way. There the

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objection was that "the contract on which the award was founded was only a settlement contract, i. e., a contract which merely fixes the amount of the liability between the parties, and that even although it is made on a form containing an arbitration clause, any such clause cannot in fact be applicable," and with regard to that Mr. Justice Greaves said:—"I think that this fact, having regard to the fact that it was made on a form which contained the arbitration clause, does not by itself oust the jurisdiction of the Chamber to arbitrate as regards that." But I gather that Mr. Justice Greaves' view was so far in agreement with the view that was being put before him that he thought it would be safer and better that the arbitration had been called on the original contract. In the case cited to me decided by Mr. Justice Chaudhuri, there the award which was upheld was on the original contract and if there had been anything unusual or improper about that, I think that the learned Judge, even if the parties had not taken the point, would have been sure to comment on it. In any case my view is that whether the award is called on the original contract or on the settlement contracts, it is perfectly good, that it is open to the parties to found on any submission contained in either, that in any case it cannot be wrong to found upon the submission contained in the original contract. This dispute was undoubtedly a dispute arising out of the original contract, and I think there is nothing in the point taken by the petitioner. Even if I thought there was, the petitioner would still have to get over the facts that accidental slips can be corrected by arbitrators, and that apart from accidental slips it is in my power under the Indian arbitration Act to refer the matter back to the arbitrators so that this purely formal defect can be cured.

The last point taken was that the award was bad by reason that it contained an award as to interest. In my opinion in view of the case of *Produce Broker's Co. v. Olympia Oil and Cake Co.* (1), whether it was claimed by custom or otherwise it was entirely for the arbitrators to decide as to this, and that they had jurisdiction to decide it wrongly as well

as rightly. It is always difficult to ensure complete correctness when one party refuses to appear and present his case; but notwithstanding this I have every confidence that the award as to interest was as right in law as it was just in substance.

The Rule is discharged with costs.

Rule discharged.

APPENDIX A.

The judgment of the House of Lords referred to on page 287 of 54 Ind. Cas. is as follows:—

EARL LOREBURN.—My Lords, this is a peculiar case, and, therefore, I will say a little more than I think might in other circumstances perhaps be really necessary.

It is an appeal to procure the setting aside of the second of the two awards which were made in regard to certain contracts between the appellant and the respondents. The contracts were for the sale by the appellant to the respondents of bales of jute. The jute was not delivered in time according to the contract, and indeed the bales, I am not quite sure whether all, but many of them, were not delivered at all, and the ground put forward by the seller was that there had been strikes preventing the delivery, as to which also the parties were not at one.

These contracts contain an arbitration clause for any dispute arising in relation to the contracts, their construction or fulfilment, and there were undoubtedly in fact differences between the parties because of non-delivery, and also there was obviously not an agreement, but a difference, as regards the validity of the excuse set forward in regard to strikes. Thereupon the buyers, who are now the respondents, demanded arbitration and they appointed an arbitrator. The seller did not do so and, therefore, according to the contract the arbitrator for the buyers acted alone and he made award No. 1.

Now, my Lords, I think that award No. 1, although, if I may say so, clumsily expressed, or rather expressed as a business man might express himself, taking things for granted instead of directly stating them, decided two things; in the first place, that there was default by the seller which was a matter of difference between the parties, for it recites that as a fact. It is admitted that the bales were not in fact delivered. It is admitted that the appellant did not appear before the arbitrator to give evidence with regard to strikes or other excuse and also unless the arbitrator was satisfied that there had been default, he could not possibly have found as he did find, and fix as he did fix, the prices upon the 32nd day after it. In my opinion the award also decided that the prices on that 32nd day were so and so—I need not elaborate what they were. It was not disputed that this award was valid as regards prices, but it was said by the learned counsel for the appellant that it was not admitted to be valid as regards default, and indeed at some stages in the argument it was contended that that was never referred to the arbitrator at all and it has always been maintained that that has not been decided by the arbitrator. But their contention really was

(1) (1916) 1 A. C. 314; 85 L. J. K. B. 160; 114 L. T. 94; 21 Com. Cas. 320; 60 S. J. 74; 32 T. L. R. 115.

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that either way the 2nd award was bad for reasons which I will state.

My Lords, I now come, therefore, to the second award. When the buyers sent to the seller their claim calculated under award No. 1, the seller said that that award was bad and that he was not liable to pay anything at all. Upon that the buyers were in some difficulty for the frame of the award No. 1 might be disputable and it was possible that the seller might say that there was in fact no award that a certain sum was due and that on the construction of the award under the arbitration conditions, which are very express, an award for a sum certain was a condition precedent to bringing an action for any sum calculated as due on the footing of the first award. The buyers asked the seller if he would pay and in fact drew on him for the calculated figure and the seller repudiated all liability; and to my mind I must say that the seller throughout seems to have trifled with this business and sought for delay. The buyers were entitled to take precautions that they might not under these circumstances be confronted by that kind of technical difficulties and objections, and the action of the appellant certainly gave them ample ground for expecting that they would be met in that spirit. There thus arose in my opinion a difference under the contract which was arbitrable, namely, were the buyers entitled or not entitled to a definite and formal award for the sum due so as to avoid technicalities? Accordingly the buyers appointed a second arbitrator and referred to him the question. Did the seller owe £4,000 odd and had he disobeyed the first award? The seller repeated his former tactics, professed that he did not owe anything and that he did not even understand what the dispute might be. Upon this the arbitrator duly made the second award, in which he stated that the first award was good as to default and awarded the sum of £4,000 odd to be paid by the seller to the buyers.

My Lords, this is the award which the Divisional Court set aside and which the Court of Appeal decided to be valid, and I agree with the Court of Appeal. In my opinion the first award was valid as to default, and also was valid as to prices. There was a subsequent difference whether or not this sum, calculated on the basis of the first award, was due, which involved not only the validity of the first award but also whether there was a right in the buyers to have it ascertained as a definite figure so as to avoid technical objections in the future.

The second arbitrator decided that the amount was due, and he did so on the ground that the first award was right and that the first award had decided liability. I agree with him that the first award had decided liability, or rather had decided default; and the second arbitrator was entitled to make a definite award and to put it on that ground.

Sir John Simon pointed out the danger of allowing arbitrations upon arbitrations, and so *ad infinitum*, each arbitration being upon the validity of the previous award. The answer to this ingenious but unconvincing argument is that when an award assumes a shape which makes it available for a judgment enforcing it in a

Court of law, the process of infinitesimal repetition is at once arrested, because there is nothing left for an arbitrator when the Court of law becomes entitled to give effect to the award. But when there is a doubt upon that subject, this submission is wide enough to entitle the parties to treat not the construction of the earlier award, but the disputable right to have the liability placed upon an indisputable footing by the ascertainment of a sum certain, and by the ascertainment of a duty to pay as a different arbitration, always provided that there is a dispute as to the liability to pay. Each case stands upon its own legs. This is a case in which the buyers were right as to that liability and duty to pay, but there was room for doubt or at least for technical difficulties of a formidable character being raised, and there was danger of a protracted litigation if the doubt were not set at rest.

My Lords, I should feel no hesitation in saying that the arbitration clause is wide enough to cover a difference of this kind. I think the first award would, after litigation, have proved watertight, but I do not think it can be said that there was no difference to arbitrate upon when there was in fact a plausible case, which some might think a well-founded case, for defeating the action on the award by reason of defects in form. In every difference one party is in the right and the other is in the wrong, and it is only when there has been an effective adjudication that the right to arbitrate under a clause like this ceases to exist.

My Lords, the learned Counsel for the appellant have simply done their professional duty in presenting this case quite properly to the House, but the action and conduct in this matter of the appellant have not been such, I think, as to commend themselves to the judgment of the House.

LORD ATKINSON.—My Lords, I concur.

LORD SHAW OF DUNFERMLINE.—My Lords, I concur.

LORD SUMNER.—My Lords, I concur, but I desire to add a few words.

Most mercantile awards held under Trade Association Rules present features of importance and this case, so far as concerns Mr. Nevill's award, is no exception. As to Mr. Ritchie's award, the Court of Appeal has held that in fact he decided the question of the appellant's default, and for my part I entirely agree. The criticisms made on Mr. Pollak's affidavits would have been more cogent if he had been cross-examined upon it; as it is, they do not amount to much. It was Mr. Ritchie's duty not to award a market value in favour of the respondents unless he was satisfied that the appellant really had broken his contract. He was not to take it from the respondents, but I make no doubt that he did his duty. The thing was simple enough. On the face of the documents the appellant had not shipped the jute as his bargain required, on the face of the correspondence he alleged that he had an excuse—an excuse, he it said, not easy to make good—but he put in no evidence of it, and the documents do not show

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that the strike in question in fact did, or would prevent or delay shipment. In a sense, may be, the question of default has been treated as automatic and has never been tried, but whose doing is that? It has been decided in the only sense in which the course taken by the appellant permitted it to be decided on the material before Mr. Ritchie. I cannot doubt that on and before the 2nd November Mr. Ritchie was authorised by the respondents to decide the default question so far as it might arise at any time before him. There was no reservation made by them against the appellant on his case. I am not surprised that Mr. Ritchie cabled shortly to India that he was arbitrator to fix default prices or that in his award he recited the default but awarded the market value—for that is the principal thing, namely, to arrange a settling price. Nonetheless I think that his award involved a finding of the appellant's default and that he did in fact decide it.

As to Mr. Nevill, it is said that he was called in to decide the meaning of Mr. Ritchie's award (which I think is clearly not the question) and that he made an award upon an award as if that were something altogether impossible. The phrase is [more specious than sound. Incidentally, the effect of a prior award might come into question in an arbitration upon a dispute arising out of a contract if the defendants alleged and the claimant denied that the award already made had decided the matter in dispute. Possibly the effect of an award might directly be arbitrable matter as itself involving a dispute arising out of the contract, if, for instance, it directed how something should be done in performance of it or in satisfaction of the object of it. This, however, we need not now decide. The important thing here is whether Mr. Nevill had before him a dispute arising out of the contract. If he had, the contract still stood as a binding obligation to submit and he was validly appointed to decide it. Mr. Lords, I think this was so. It is true that Mr. Chandanmull, when required to pay in accordance with the first award, preserved a Sphinx-like silence. It is true also that it takes two to make a quarrel. But a dispute may perfectly well arise when only one disputant is articulate and the other stands mute when called upon to plead. What is required is that one party should affirm and the other deny, and conduct will do this as well as words. The respondents said in effect: "You owe the money and have no excuse for not paying it." The appellant to my mind in effect retorted nonetheless eloquently, though he held his tongue: "I owe you nothing. I have a defence under the contract." But the point in dispute came to be whether he had an excuse under the contract or not.

My Lords, it is true that no one had disputed the calculation of £3,779 5s. 0d. and £175 13s. 0d., for I think the point made by Mr. Roche as to the costs of the first award really does not constitute any separate argument in the matter. The amount is based on the contract stipulation as to weight, and though in the case of three contracts the calculation brings in

a rate of commission and brokerage exceeding that named in those contracts, and this difference has not been accounted for, as the amount is relatively small, we may perhaps pass it by. The real point is this. It is suggested that the appellant really disputed nothing but simply could not or would not pay, in other words, he lacked either money or honesty. Mr. Lords, I cannot assume in Mr. Chandanmull's favour that he was wanting in either. If it be the case that no further dispute arises out of the contract when nothing capable of being disputed is to be found and nothing is alleged to be disputable, I think still that if the appellant's attitude can be explained consistently with any recognition of his business obligation, this should be done. One explanation and, I am inclined to think, one only can be found for the fact that a merchant seemingly in good credit should refuse to honour bills drawn on him on the footing of the first award, and certainly one not unfair to Mr. Chandanmull is that there was a dispute intimated upon the clause in the contract relating to the condition: and I assume this explanation to be the true one in the absence of all evidence to the contrary. I think that he disputed his liability to meet the bills on the legal ground that no award had been obtained such as would satisfy the stipulated condition precedent to his being sued on the contract, further on the ground that the respondents were not entitled to obtain one. For myself I think there was much to be said for his point, but it is enough to say it was an arguable point and raised a dispute under the contract whether or not he need pay any damages although he had not shipped any jute, and if so, what amount. I agree with the learned members of the Court of Appeal in thinking that in substance this was a dispute which Mr. Nevill was appointed to settle, and that being so, the award which he made was within the submission. The argument is that instead of a new dispute justifying a new award being disclosed by these considerations, they only disclose a defect vitiating the old award. Mr. Nevill's award is said to be bad because there was nothing to submit to him, and Mr. Ritchie's because it did not decide all that was submitted to him: a happy sequence for Mr. Chandanmull for the moment, although I suppose when he had time, and money had been wasted and both awards had been set aside, a third to decide the effect of both might still be duly obtained. I think, however, the argument fails.

The question how much Mr. Chandanmull should pay was not submitted to Mr. Ritchie; as is usual in trade, he was only asked to fix default and the market value as the basis, if default, of a calculation for damages. The clerks were left to do the rest. Mr. Ritchie's award was valid, but in view of the appellant's attitude towards it a second dispute arose and a second award was needed to resolve the first. That second award of Mr. Nevill was duly made and I think the appeal fails.

BABU KHAN v. BHAIRON PRASAD.
COURT OF THE BOARD OF REVENUE,
UNITED PROVINCES.
SECOND APPEAL PETITION No. 23 OF 1918-19.
March 22, 1919.

Present:—Mr. Ferard, S. M.
BABU KHAN—APPELLANT

versus

BHAIRON PRASAD—RESPONDENT.

Landlord and tenant—Ejectment, order for—Partition—Possession delivered to landlord other than one to whom plot had been allotted, effect of—Ejectment, whether effective as against tenant.

Where an order for ejectment has been carried out and formal possession delivered to the landlord, the fact that shortly before the order was carried out a partition had taken place and the particular plot from which ejectment had been effected had fallen to the lot of another co-sharer landlord, would not make the ejectment less effective as against the tenant.

Second appeal from the order of the Commissioner, Rohilkhand Division, dated the 6th November 1918, in the case of declaration of rights.

JUDGMENT.—The appellant's case rests on a very bare technicality. The Lambardar Dr. Baldeo Singh of the joint *mahal* obtained decree for his ejectment and then applied for, and obtained order for execution on 31st May 1917. Nothing remained except for the Amin to carry out that order, which he did on 10th July. The appellant was thus actually ejected on 10th July, and it is immaterial that accidentally owing to a partition coming into effect on 1st July, the Amin delivered possession to the Lambardar of the former joint *mahal*, Dr. Baldeo Singh, instead of to the respondent, a co-sharer of the former joint *mahal* and now sole-proprietor of the *mahal* into which the land has come by the partition.

I agree with the Commissioner that the ejectment is effective against appellant. There is no doubt that he is not now holding the land by the landholder's, respondent's consent. He is, in fact, a trespasser.

Appeal dismissed with costs.

Appeal dismissed.

J. N. Das

Advocate High Court

Jammu & Kashmir

Srinagar

KONDA SIDDHIA CHETTY v. VENKATAROYA CHETTY.

MADRAS HIGH COURT.
CIVIL MISCELLANEOUS PETITION No. 832
OF 1919.

August 8, 1919.

Present:—Mr. Justice Seshagiri Aiyar and
Mr. Justice Moore.

KONDA SIDDHIA CHETTY—RESPONDENT
—PETITIONER

versus

M. VENKATAROYA CHETTY AND ANOTHER,
—APPELLANTS—RESPONDENTS.

Madras High Court Appellate Side Rules, App. II, rr. 35, 36, 38—Probate appeal—Pleader's fees, computation of—Probate proceedings, right in dispute in, what is—'Ad valorem fee' in rr. 35, 36, meaning of.

The graduated scale of fees paid on the amount for which Probate is granted cannot come under the expression *ad valorem fee* used in rules 35 and 36 of the Madras High Court Appellate Side Rules. [p. 293, col. 2.]

The right in dispute in Probate proceedings is not so much a right to property as it is a right to manage and administer the estate by the person applying. [p. 293, col. 2.]

The subject-matter, therefore, of a Probate appeal is not capable of valuation and the proper rule applicable for determining Pleader's fees therein is rule 38 of the Appellate Side Rules. [p. 293, col. 2.]

Petition praying that, in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to amend the order in Civil Miscellaneous Appeal No. 125 of 1918, preferred against the decree of the District Court, North Arcot in Original Suit No. 1 of 1917, by allowing, in place of the sum of Rs. 75 as Pleader's fees for the respondents in the said Civil Miscellaneous Appeal No. 125 of 1918, the proper fee prescribed by either rule 33 or rule 34 of the Fees Rules, viz., Rs. 532.12 or Rs. 145 4.

FACTS appear from the judgment.

Mr. N. Chandrasekhara Aiyar, for the Petitioner.—An application for grant of Probate is not a "suit" in the ordinary acceptance of the term. A Probate is not a decree of Court. See *Bayabai v. Sarasvatibai* (1); *Dawubai, In the matter of the Will of* (2). But see *Umrao Chand v. Bindrabai Chand* (3), where the order was treated as equivalent to a decree for the purpose of appeal. The fact that an *ad valorem* stamp duty is paid is also material. But there are no decided cases in this Court to regulate the practitioner's fees. In Bombay the long standing

(1) 17 B. 636.

(2) 18 B. 237.

(3) 17 A. 475; A. W. N. (1895), 104.

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practice is said to be to fix the fee at Rs 30. See *Sundrabai Saheb v. Collector of Belgaum* (4). As regards Calcutta see *Pratap Chandra Shaha v. Kali Bhanjan Shaha* (5), *Ameer Chand v. Mohanund Bibi* (6), *Baijnath Prasad Singh v. Sham Sunder Kuer* (7). See also *Rodrigues v. Mathias* (8), where the point is referred to.

[SESHAGIRI AIYAR, J., referred to land acquisition cases].

There the Pleader's fee is an *ad valorem* fee of $1\frac{1}{4}$ per cent. See also rules 33 and 31 of the fees rules of the High Court.

Mr. N. C. Vijayaraghavachariar, for the Respondents, dealt with the rules.

ORDER.—Mr. Chandrasekhara Aiyar has raised an interesting question as to the fee payable to practitioners in appeals from orders, granting or refusing Probate or Letters of Administration. The Taxing Officer has informed us that there is no settled practice in this Court on the subject. Sometimes he fixes a reasonable fee. Sometimes *ad valorem* fee as in a regular appeal is fixed. In Bombay according to a long standing practice, only a fee of Rs. 30 is decreed. See *Sundrabai Saheb v. Collector of Belgaum* (4). In Calcutta sometimes the Judges fix the fee at the hearing. If that is not done, the Taxing Officer fixes Rs. 80 as the fee. See *Baijnath Prasad Singh v. Sham Sunder Kuer* (7). It is not denied that in the Mofussil the Pleader's fee is on the *ad valorem* scale as in a suit. In the Original Side of our High Court also, the same practice is alleged to exist. In this state of the authorities we have been asked to settle the rule of practice. Mr. Chandrasekhara Aiyar contended that rule 36 of the Appellate Side Rules read with rule 35 should govern these matters. Although in sections 19 A and B in the table to the Court Fees Act, the duty payable on grant of Probate or Letters is referred as Court-fee, that expression has reference to the machinery which collects the fee, and to nothing else. In essence, it is duty which the Crown levies on that party who benefits by the testator's property. There-

fore, in our opinion, the graduated scale of fee paid on the amount for which Probate is granted cannot come under the expression *ad valorem* fee used in rules 35 and 36. It was pointed out in *Rodrigues v. Mathias* (8) that the right in dispute in Probate proceedings is not so much a right to property as it is a right to manage and administer the estate by the person applying. It is that right that the Court adjudicates on before granting Probate. That right may refer to any extent of property, large or small. But that is not what the Court has to consider. It is only the personal right. Consequently it seems to us that the subject-matter of a Probate appeal is not capable of valuation and the proper rule applicable is rule 36. In this view, the order of the Taxing Officer is right.

M. C. P.

Petition dismissed.

Advocate High Court
Jammu & Kashmir

COURT OF THE BOARD OF REVENUE,
UNITED PROVINCES.

SECOND APPEAL PETITION No. 80 OF 1917-18.

March 26, 1919.

Present:—Mr. Hopkins, J. M.

RAM NARAIN—APPELLANT

versus

MUHAMMAD HASHIM ALI KHAN

—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 79—Mortgage of fixed rate tenancy—Dispossession of mortgagee—Mortgagor, right of suit of—Cause of action, accrual of, date of.

When the mortgagee of a fixed rate tenancy is dispossessed otherwise than in accordance with the provisions of the Agra Tenancy Act, the mortgagor's cause of action against the land-holder under section 79 of that Act arises, not from the date on which he may redeem the mortgage, but from the date of the dispossession of the mortgagee. [p. 294, col. 1.]

Second appeal from the order of the Commissioner, Benares Division, dated the 14th May 1918, in the case of recovery of possession.

JUDGMENT.—The facts of the case as set out in the Commissioner's judgment are not disputed. The contention is that when

(4) 2 Ind. Cas. 283; 33 B. 256; 10 Bom. L. R. 1197.

(5) 4 C. W. N. 600.

(6) 6 O. L. J. 453.

(7) 22 Ind. Cas. 402; 18 C. L. J. 643; 41 C. 637.

(8) 9 Ind. Cas. 538; 21 M. L. J. 481; (1911) 1 M. W. N. 237; 9 M. L. T. 314.

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the mortgagee of a fixed rate tenancy is dispossessed otherwise than in accordance with the provisions of the Tenancy Act, the mortgagor's cause of action against the land holder under section 79 of the Act arises from the date on which he may redeem the mortgage, and not from the date of the dispossession of the mortgagee. No authority is cited in support of this contention. In my opinion the Commissioner was right in holding that the cause of action, whether by mortgagor or mortgagee, arose from the date of the dispossession of the latter.

The appeal is dismissed with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 7 OF 1918.

September 30, 1919.

Present:—Mr. Mittra, A. J. C.

DOMARSINGH AND ANOTHER—PLAINTIFFS—
APPELLANTS

versus

HIRONDIBAI AND ANOTHER—DEFENDANTS—
RESPONDENTS.

Hindu Law—Marriage—Nandvansi Ahirs, whether Sudras—Churi marriage, whether recognised—Inter-marriage between Sudras of different sub-castes, whether permissible.

Ahirs, whether of the Nandvansi or any other sub-caste, are Sudras and the Dauwa Ahirs are a lower caste than the pure Ahirs and the *churi* form of marriage is in vogue among them. [p. 297, col. 2; p. 299, col. 1.]

There is nothing in Hindu Law prohibiting marriages between persons belonging to different sections or sub-divisions of the Sudra caste [p. 299, col. 1.]

Upoma Kuchain v. Bholaram Dhubi, 15 C. 708, followed.

Appeal against the decree of the Additional District Judge, Raipur, in Civil Suit No. 32 of 1916, decided on the 4th December 1917.

Messrs. M. V. Joshi and D. N. Chaudhri, R. B., for the Appellants.

Dr. H. S. Gour, for the Respondents.

JUDGMENT.—The present claim is brought by Domarsingh and his brother Rai Bahadur Singh, sons of Jalamsingh, for possession of four villages, namely, Sihawa,

Chhara, Ghhotagaon and Amdi in the Dhamtari Tahsil of the Raipur District. They sue as heirs of their brother Bhaiyalal.

Jalamsingh, the son of Jodhasingh, had four sons, Bhaiyalal and Chhotelal from his senior wife and the two plaintiffs from his junior wife Sugandhibai. The plaintiffs' story is that after Jalamsingh's death there was a partition at which the villages and the moveable property in suit fell with other property to the share of Bhaiyalal who lived in Mauza Sihawa. At that partition the plaintiffs remained joint. Bhaiyalal had married some 24 or 25 years ago, but his wife left him shortly afterwards. He then, the plaintiffs allege, kept as his mistress Musammatt Hirondebai, a Kurmi, the 1st defendant. From her he got a daughter defendant No. 2, Bhagwatibai, now married to Fulsingh. Hirondebai is said to have a husband, one Kulanjan Kurmi, still alive. Bhaiyalal died in June 1915 and according to Hindu Law the plaintiffs alone are his heirs. But his mistress and illegitimate daughter have taken possession of Bhaiyalal's property. The villages have been mutated in the names of the defendants. Plaintiffs claim to be Nandvansi Ahirs.

Defendants denied that Jodhasingh was a Nandvansi Ahir at his death. He came from Bundelkhand and like other Nandvansi Ahirs who settled in Chhattisgarh was outcasted and was out of caste till his death. He like other Bundelkhandi Ahirs in Chhattisgarh took a Rajputin woman for his wife, Jalamsingh being born of that union, and his sons are not real Nandvansi Ahirs, though they call themselves so. The wives of Jalamsingh were not Ahirs. It was denied that the sons and daughters of Jalamsingh married into pure Nandvansi Ahir families but into families which, though reputed to be Nandvansi Ahirs, were really not so on account of their being outcaste Ahirs who married women of various castes. Defendant No. 1 was not the mistress of Bhaiyalal but his wife married to him in the *churi* form, such a marriage being legal among the Chhattisgarh Nandvansi Ahirs. It was contended that if it be true that Bhaiyalal was married as alleged by the plaintiffs, plaintiffs have no right to sue so long as the alleged first wife is not dead or her marriage with Bhaiyalal dissolved. It was stated that defendants do not know how

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far the allegations as regards *Musammāt* Hirondebai being a Kurmi by caste or her marriage with Kulanjan Kurmi are true, because her father died while defendant No. 1 was an infant. She was married to Bhaiyalal at the age of 13 and has since lived with him as his lawful wife. She was not the wife of anybody else at the time of the marriage. It was denied that plaintiffs were legal heirs of Bhaiyalal but defendants are. It was contended *inter alia* that the plaintiffs are Sudras of mixed blood chiefly governed by their caste customs and generally by the Hindu Law applicable to the Sudra class. They filed four Wills said to have been executed from time to time by Bhaiyalal in their favour.

Plaintiffs denied that Jodhasingh had lost his caste or had married a Rajputin woman. He brought his wife from Bundelkhand. Jalamsingh's wives belonged to his caste and all his children are married in Ahir families. The story of being mixed blood was denied.

The lower Court has found that Hirondebai was a Kurmi. She had been married to one Kulanjan Kurmi and then eloped with Bhaiyalal. Her husband divorced her before she went through the *churi* marriage with Bhaiyalal. *Churi* marriages are in vogue among Ahirs who have settled down in Chhattisgarh and adopted the customs of their new domicile. The union between Bhaiyalal and Hirondebai, both Sudras, was held valid.

As to the Wills, four were produced: Exhibits D-3, D-4, D-1 and D-5. These, the lower Court finds, have not been proved to have been executed by Bhaiyalal and there was no evidence to establish an oral Will alleged to have been made just before his death by Bhaiyalal. The plaintiffs' case was dismissed; hence the present appeal.

The first ground raised in argument is that there should have been a specific issue as to plaintiffs being Vaishyas and the case was remanded to the first Court for a finding on the following issues:—

1. Whether the Nandvansi Ahirs of Bundelkhand are Vaishyas or Sudras?

2. Whether this particular family of Nandvansi Ahirs are Sudras by reason of the allegations mentioned in the defendants' written statement?

We also directed that further evidence

could be called on the second half of the 5th issue which runs:—

Whether defendant No. 1 was the wife of Kulanjan Kurmi when she married Bhaiyalal: if so, is her marriage valid?

The lower Court now finds that Nandvansi Ahirs of Bundelkhand are Sudras and not Vaishyas and that the marriage of Hirondebai with Bhaiyalal was valid.

Domarsingh has been examined and his story is that the family are Nandvansi Ahirs. He states that he is the son of an Ahirin. The male members of the family either go to Bundelkhand or send for girls from there for marriages. He denies that the family intermarry with Chhattisgarh Ahirs, or that widows re-marry or there is any custom of *churi* marriage in the caste. He admits that he went to the Ganges with *Musammāt* Hirondebai to throw the ashes of Bhaiyalal in the river. He can quote no authority for his assertion that he is a Vaishya. He denies that his elder brother Chotelal's widow Rukhminibai was married in the *churi* form to Rai Bahadur, but admits that one Maina, sister of Behari, a caste-fellow, has married one Kodu by the *churi* ceremony. He states he does not know if the illegitimate children of Behari are married to Ahirs or not, but admits that Hirondebai's daughter was married to Fulsingh son of Budhsingh at Sihawa. He attended that marriage. He states that the title *Dauwa* was given in ancient days to their ancestors by the Bundelkhandi Rajas for valour. He admits that one Chandulal son of Gumanabai has married his niece but says the couple are out of caste. He admits that Rai Bahadur was married during the pendency of this litigation.

Plaintiffs endeavour to show that Nandvansi Ahirs are one of the twice-born castes, but in this they have not been successful. Domarsingh can give no good reasons for thinking that the caste are Vaishyas. P. W. No. 4 Nilkanth, who lives in the Drug District, merely repeats that the plaintiffs in the case are Vaishyas and P. W. No. 14 Gajrajsing, a relative and tenant of the plaintiffs, says the same thing. P. W. No. 17 Ramnath, a Brahmin of Dhamtari who comes from the Banda District, infers from certain books that Nandvansi Ahirs are descended from Nand and they are twice-born. He states that there is no widow re-marriage in the

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caste and that their marriage rites and customs, the naming and other ceremonies are performed as in the case of Brahmins and Kshatriyas. He makes the curious statement that neither Kshatriyas nor Vaishyas in Bundelkhand wear the sacred thread. We are not satisfied that witness, a Brahmin, knows enough of the caste he is speaking of, to make his evidence of any value. Reliance is placed on the evidence of Nathooji, a Maratha of Dhamtari P. W. No. 18, but we find the same objection applies to his evidence. He really knows nothing or next to nothing of the customs of Ahirs. He does not know if re-marriages are permitted or if caste rules allow the eating of meat. P. W. No. 19 is another Maratha and states that the plaintiffs' customs are those of the Bundelkhandi Ahirs and not of Chhattisgarhi Ahirs. Domarsingh's son is this witness' son's Mahaprashad. P. W. No. 20 Keshoprasad, Brahmin of Dhamtari, a resident of Rewa but who has lived in these provinces for five years, says that at his native place there are Nandvansi Ahirs who are Vaishyas. He states he can prove it from the Shastras and quotes a book by Pandit Mishra. His arguments are based on the assumption that the mythical Nand was a twice-born. He states that among Nandvansis there is no widow re-marriage. On the birth of a male child they perform the Namkaran and Annaprashan ceremonies as Vaishyas do. Their marriages are performed by Brahmins. He states that no Kshatriya or Vaishya put on a Janav or sacred thread and says that all Ahirs are Vaishyas. He obviously knows little of the caste and is forced to admit that his statement that plaintiffs are Nandvansis is based on information given by their relatives.

P. W. No. 21 is Surdas, Brahmin of Dhamtari. He states he came from Bundelkhand where a large number of Nandvansi Ahirs reside. About 100 or 150 of these are his *jajmans*. He states that all 16 Sanskars are performed by Nandvansi Ahirs who are Vaishyas, and bases his opinion on a book recently published. He says no widow re-marriages are allowed. P. W. No. 22 Beniprashad, another Brahmin of Dhamtari who originally came from Jhansi, has admittedly no personal knowledge of the sub-caste, but states that some 15 or 20 years ago there was a caste agitation to pro-

claim Nandvansis as Vaishyas. P. W. No. 23 Chandoolal, a Kosta of Dhamtari, does not know if plaintiffs are Vaishyas or Sudras. P. W. No. 24 Ghasi of Dhamtari and the Mukhya of the Raouts there is a Chhattisgarhi Ahir. He states that plaintiffs' customs and rites are different from his own; he says he is a Sudra. P. W. No. 31 Dauwa Garoo, Zemindar of Mouza Sura in Bundelkhand, states that Domarsingh has married his niece and Rai Bahadur his daughter. He says that the plaintiffs' family are Nandvansi Ahirs and Vaishyas. They do not wear sacred thread, nor do they eat bread out of the *chauk*. P. W. No. 32 Dauwa Rajlhar makes a similar statement. His family is also related to that of the plaintiffs.

For the defendants witness No. 24 Giridhari Shastri, a Pandit by profession, states that Ahirs who tend cattle and sell milk and curds are Sudras. The witness, however, had never been to Bundelkhand and knows nothing of the Nandvansi Ahirs. D. W. No. 25 Mahadeo Prasad, who came originally from the Banda District in Bundelkhand, states that the Ahirs in Bundelkhand are Sudras. He has never heard of Nandvansi Ahirs. Witness No. 26, who came from Bundelkhand 28 years ago and has still relatives there, speaks to Ahirs in his native country being Sudras. He also states he has never heard of any caste called Nandvansi. D. W. No. 27 Ramdas, a Brahmin, by occupation a Pleader of Raipur, states that the family comes from Bundelkhand and he has visited that province some five or six times. He states that his caste-fellows always regard Ahirs as Sudras. The witness does not know if Nandvansis are Vaishyas. P. W. No. 28 Rajaram, a Dauwa Ahir of Dhamtari, states that he is a Sudra. He is married to the daughter of plaintiff Domarsingh's sister. D. W. No. 30 Ramsewak, a relative of the plaintiffs, and D. W. No. 31 Panchobai, the step-sister of Domarsingh, state that the family are Sudras. Bhairu Prasad Bani, of Chhattarpur says that Ahirs are Sudras and allow widow re-marriage. He also states that a Ahir is termed a Dauwa whose wife suckles a chief's son, and these are Sudras. The next witness is Vijai Lal Chaudhari, another Bania from the same State. He says he never heard the term Nandvansi but Ahirs are Sudras, and confirms the former witness that Dauwas

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are Ahirs whose women have been wet-nurses in chiefs' families. Pandit Gaya Prasad Tiwari, a Pleader of Chhattarpur, states that the Ahirs in his State are Sudras but he does not know the Nandvansi Ahirs. Witness No. 36 for the defendants, Dauwa Sitaram, Jamadar, Police, Chhattarpur, has also not heard of Nandvansi Ahirs, but corroborates the Pleader's statement that Ahirs are Sudras. He states that formerly the pure Ahirs of Bundelkhand did not inter-marry with Dauwas but are now beginning to do so.

We have endeavoured to ascertain from various books of reference what we can about the Ahirs and especially about the sub-caste of that tribe to which the parties to this suit belong. Ahirs are a caste of cowherds, milkmen and cattle-breeders, variously known as Ahir, Gaoli, Gaola, Golkar, Gaolan, Rawat, Gahra and Mahakul. The principal sub-castes of the tribe in Northern India are the Jadhav Vansi, Goral Vansi and Nand Vansi. The parties to this litigation are members of an offshoot of the latter sub-caste. It has been argued that all Nandvansi Ahirs are descendants from Nanda, the cowherd foster father of the god Krishna. The argument is purely conjectural. Russell in his "Tribes and Castes of the Central Provinces of India," the standard work on castes and tribes in these provinces, states that "the Dauwa or wet-nurse Ahirs are descended from the illegitimate offspring of Bundela Rajput fathers by Ahir mothers who were employed in this capacity in their families" (page 25, Volume II); and further that "widow re-marriage is permitted and a widow is often expected to marry the younger brother of her deceased husband." "Widow re-marriage is a sign of the Sudra. In "Hindu Castes and Sects" by J. N. Bhattacharjee, page 294, the author states that cowherds are Sudras though high up in the Sudra castes. Steele in his "Law and Custom of Hindoo Castes" at page 105 ranks the Ahir Gaoli below Koonbees. As regards Damoh, a district containing a large number of Ahirs and not far from Bundelkhand, the District Gazetteer at page 53 speaking of the tribe states that "The Dauwas are another sub-division who are really illegitimate, as they are the offspring of Bundela fathers by Ahir women, who were employed as *dais* or

wet-nurses in Bundela families." In the Raipur District Rawats constitute about 10 per cent. of the population. These tribes are said to be of comparatively low origin in which the re-marriage of widows is permitted: see pages 96-97 of the Raipur District Gazetteer. The author of the District Gazetteer of Saugor, a District where Ahirs are numerous, writing of Dauwa Ahirs, states at page 64 that they are the offspring of a Bundela father and Ahir mother. Such unions are still frequent, and their offspring become Dauwa Ahirs and form a separate sub-caste. The plaintiffs here call themselves Dauwa Nandvansis. Such authorities as we have been able to find unquestionably place the Ahirs among the Sudras. Nesfield in his "Sketch of the Caste System of the North West Provinces and Oudh" places the pastoral caste just above the Kahars, Khewats, Dhimars and others; and Sherring at page 334 of the 1st Volume of his Hindu Tribes and Castes states that "commonly the Ahirs are regarded as Sudras." In Volume XIII of the Report of the Census of India for 1901, page 160, six castes are included among the proper twice-born, namely Brahman, Rajput, Khatri, Kayastha and Parbhu, Kuran Mahanti and Bania. Below these castes is said to be the Ahir; see page 166. The sacred thread is a distinction of the twice-born. It is admitted that Dauwa Ahirs do not wear it. We can find nothing in the books to show that Ahirs are Vaishyas. In *Dalip v. Gimpal* (1) it was taken for granted that they are Sudras. From the defence evidence we are of opinion that it has been established that Ahirs, whether of the Nandvansi or any other sub-caste, are Sudras and that the Dauwa Ahirs are a lower caste than the pure Ahirs.

It is now necessary for us to examine the evidence to see whether *churi* forms of marriage are allowed in the Nandvansi sub-caste, whether the family in suit have from long residence in Chhattisgarh adopted the *churi* form if they did not follow it in their own country, whether Hironi was a Kurmi, whether she married Bhaiyalal in the *churi* form and whether that marriage is legal.

As far as we know, all Sudra castes allow re-marriage by the Pat or *churi* form. The evidence on record is insufficient to warrant

(1) 8 A. 397; A. W. N. (1886, 136.

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any finding whether re-marriages or *churi* marriages are allowed in the Nandvansi caste in Bundelkhand. The evidence on the question is partisan but tends to point to the fact that such marriages are not in vogue. On the other hand it is clear, in fact not denied, that among the Ahirs of Chhattisgarh *churi* marriage is allowed and is common. There is little doubt that the family, when they migrated to Ohhattisgarh, followed the customs of the Ahir castes found in that part of the country. There is evidence to show that these Dauwa Ahirs, an illegitimate branch from the parent stem, finding no brides from their own part of the country in Chhattisgarh, married women who were residents of their new domicile. Domarsingh's recent marriage in Bundelkhand seems to have been entered into with the object of affecting the decision in this suit. There is some evidence to show that Jodhasingh, the original emigrant, married a Rajputin: see the statements of Nanki (D. W. No. 1), Majbutsingh (D. W. No. 6), Ujirsingh (D. W. No. 7) and of the defendant Hirondebai herself. Jalamsingh was the offspring of that union. It is admitted now, in view of the ample evidence there is on record to prove it, that Hirondebai was a Kurmi. Her husband has been examined. He seems to have been a minor when his wife eloped with Bhaiyalal and his father arranged the divorce for him. On a criminal complaint being lodged Bhaiyalal had to pay Rs. 300 to the injured husband. P. W. No. 1 Kulanjan, *Musammât* Hirondebai's former husband, states:—

"The three hundred rupees were spent in giving a caste feast.

"The feast is called Martijiti. It was given to show that henceforth my wife was dead to me. In such cases the woman is at liberty to marry again as well as the man. I mean when the Martijiti feast is given, the wife is divorced and she is at liberty to remarry in *churi* form."

We see no reason to doubt this statement, and *Musammât* Hirondebai was a free woman according to the customs of her caste when she entered into an alliance with Bhaiyalal. That Bhaiyalal married her in the *churi* form is amply proved.

D. W. No. 1 Nanki was present at the wedding. D. W. No. 2 Mahomed Inamulla, a Sub-Assistant Surgeon, states that Bhai-

yalal told him that Hirondebai was his *churi* wife. D. W. No. 3 Halka speaks to the same fact, D. W. No. 5 Kodu was present at the wedding. D. W. No. 9 Birajoo was also present at the wedding as was Sadubai D. W. No. 12 and Paramy-bai D. W. No. 13. D. W. No. 19 Abdul Rahim, a Sub-Inspector of Police, says that the deceased Bhaiyalal used to say that Hirondebai was his *churi* wife, and Hirondebai herself speaks to being married by that ceremony. There is much evidence to show that the two lived together as husband and wife. We find it proved that Bhaiyalal married Hirondebai in the *churi* form. There are other instances given of such marriages in the same caste, though plaintiffs' witnesses speak to marriages in the *churi* form being forbidden. D. W. No. 4 Thakurram, a member of the caste, was himself married in the *churi* form. D. W. No. 32 Biharilal Bhairoprashad states that re-marriages are allowed as does D. W. No. 33 Vijailal Bania, though these witnesses are contradicted by Gayaprasad D. W. No. 34. D. W. No. 35 Dauwa Lalla admits that widow marriages are allowed, but states that the members of the caste cannot marry a Kurmi and D. W. No. 36 Dauwa Sitaram says the same thing. D. W. No. 11 Behari says that marriages outside the caste are allowed. His sister was married to a Ahir, whose mother is a Rajputin and that man's daughter has again married a Ahir. D. W. No. 28 Rajaram, who is married to Domarsing's sister's daughter, speaks to *churi* marriages being permissible. He states that one Gumanabai, a relative of Domarsing, married in this form Ganesh Ahir of Amraoti. Behari's sister Mainabai has been married in *churi* form to Kodu Ahir. D. W. No. 30 Ramsewak says that Rukhmabai, the widow of his elder brother Chotelal, married in the *churi* form Rai Bahadur, one of the plaintiffs, and this statement is corroborated by that of D. W. No. 31 Panchebai, who also speaks to Mainabai's *churi* marriage. That there is some truth in the allegations as regards Rai Bahadur is apparent from the way in which witnesses for the plaintiffs fenced with the question. The father of a girl to Rukhmabai, it is admitted by the Mukaddam Sher Khan P. W. No. 28, was

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shown in the Kotwal's book as Rai Bahadur, though the witness attempts to show that this is a false report. There is little doubt that Rai Bahadur did marry Rukhmabai by the *churi* form. D. W. No. 31 Panchobai also speaks to two other marriages in this form, one Nilkanth having married a Raoutin by name Kanchar, and speaks to a relative Ramdhan marrying a Brahmin widow.

We are satisfied that the *churi* form is in vogue among the caste to which the parties belong.

It is argued that in Exhibit D-2 Bhaiyalal described Hirondebai as his wife, but he mentioned therein his heirs and by his heirs he must have meant his brothers. We are not pressed by this argument. By the expression "heirs" he doubtless meant his reversioners.

It is conceded that if the parties are Sudras then the weight of authority as regards the mixed marriage is against the appellants. It has been held in *Upoma Kuchain v. Bholaram Dhubi* (2) that there is nothing in Hindu Law prohibiting marriages between persons belonging to different sections or subdivisions of the Sudra caste. A Kurmi is admittedly a Sudra. The same principle was enunciated in *Mahantava Irappa v. Gangava Mallappa* (3), *Muthusami Mudaliar v. Masilamani* (4) and by their Lordships of the Privy Council in *Inderun Valungypooly Taver v. Ramasawmy Pandia Talaver* (5).

The fact that plaintiffs and other members of the caste were present at the 2nd defendant's wedding and that Bhagwatibai married a man of her own caste points to the union between Bhaiyalal and Hirondebai being valid. If, as attempted to be made out by the evidence for the plaintiffs, Bhagwatibai was a result of adulterous intercourse, she would not have obtained a husband in the caste. There is little doubt that this branch of the Dauwa Ahirs, on settling in Chhattisgarh, married women of castes equal or superior to their own and adopted, whether the

practice was in vogue in their country of origin or not, the *churi* form of marriage prevailing in Chhattisgarh. Possibly until quite recently these Ahirs were considered out of caste by their fellows in Bundelkhand owing to their adoption of Chhattisgarhi customs. But that these mixed marriages were looked on by themselves as valid is clearly established. By her marriage Hirondebai was looked on as a member of her husband's caste. It is proved that in the family and by outsiders the marriage was looked on as perfectly valid and the offspring of the marriage married into the caste. There is no legal objection under the Hindu Law to such a union.

The finding as to the Wills is not attacked and the last ground of the memorandum of appeal has not been argued.

The result is that this appeal fails and is dismissed with costs.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND APPEAL PETITION No. 22 OF 1918-19.

March 26, 1919.

Present:—Mr. Ferard, S. M.

Musammatt BISMILLAH BEGUM—

APPELLANT

versus

CHUTTAN—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 13 (b)—"Year," meaning of—Tenant re-admitted within one calendar year, whether holds continuously.

The "year" referred to in section 13 (b) of the Agra Tenancy Act is a "calendar year." Consequently, where a tenant was ejected on the 21st August 1913 and was re-admitted on the 1st July 1914, he was held to have been re-admitted within one year from the date of his ejection, within the meaning of section 13 (b) of the Agra Tenancy Act. [p. 300, col. 1.]

Second appeal from the order of the Commissioner, Rohilkhand Division, dated the 10th August 1918, in the case of ejection.

JUDGMENT.—Only grounds Nos. 1 and 2 are pressed. It is admitted that the

(2) 15 C. 708.

(3) 3 Ind. Cas. 982; 33 B. 693; 11 Bom. L. R. 822.

(4) 5 Ind. Cas. 42; 33 M. 342; 20 M. L. J. 49; 7 M. L. T. 17.

(5) 13 M. L. A. 141; 3 B. L. R. P. C. 1; 12 W. R. P. O. 41; 2 Suth. P. C. J. 267; 2 Sar. P. O. J. 498; 20 E. R. 504.

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respondent was ejected on 21st August 1913, i.e., early in 1321 Fasli (not 1322 as accidentally written by Commissioner) and re-admitted at the beginning of 1322, i.e., on 1st July 1914.

He was thus re-admitted within one calendar year from the date of his ejection, and no authority is shown me for holding that the year referred to in section 13 (b), Tenancy Act, is not to be construed as a calendar year, the usual significance of the word. This is the view which the Board, as far as I recollect, have taken in previous cases.

A reference to rule 61 (IV), B.C. 1-VI does not really help the appellant if it be closely examined. I dismiss the appeal with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 47-B OF 1918.

September 12, 1919.

Present:—Mr. Mittra, A. J. C.

PRATAP Singh *alias* RAJA ANAND

RAO—DEFENDANT—APPELLANT

versus

RAJA DATTAJI RAO—PLAINTIFF—

RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 120—Declaration that defendant is not son of particular person, suit for—Limitation, commencement of.

A suit to obtain a declaration that a person set up as the son and heir of a deceased is not the rightful heir must be brought within the period prescribed by Article 120 of Schedule I to the Limitation Act, and such period begins to run from the time when, to the knowledge of the plaintiff, the title of son and heir to the deceased is set up [p. 302, col. 1.]

Appeal against the decree of the Second Additional District Judge, West Berar, Akola, in Civil Suit No. 3 of 1913, dated the 29th July 1918.

Dr. H. S. Gour and Mr. D. W. Kathale, for the Appellant.

Messrs. M. R. Jaikar, D. S. Warde, M. Bhowanishankar and V. K. Rajwadi, for the Respondent.

JUDGMENT.—At Deolgaon Raja in the Buldana District in Berar is situated the

ancient Sansthan of Shri Balaji, said to have been held for some generations by the well-known Maratha family, Jadho. One Ramdas and others sued in Civil Suit No. 3 of 1905 on the file of the First Additional District Judge, Buldana, disputing the right of Raja Bajirao II to hold the Sansthan temple and property belonging thereto as his own. Raja Bajirao II was the defendant in that case, but died on the 6th of January 1906 before it was disposed of. His widow Rani Yemunabai then came on the record as his legal representative and one Anandrao, said to be the posthumous son of Raja Bajirao, was also brought on record on the 8th December 1903.

The present plaintiff Raja Dattajirao Krishnarao applied on the 19th November 1909 for being added as a defendant, but his application was dismissed in default on the 4th January 1910. He has filed the present suit, claiming in the plaint to be the member of an undivided family with Bajirao and entitled as such to the ownership of all property belonging to the Jadho family. It was denied that Rani Yemunabai was pregnant at the time of her husband Bajirao's death and Anandrao, the defendant in suit, is described as a false and spurious heir, no son of Bajirao's but a boy foisted on the family by Rani Yemunabai and Rani Ahilyabai, the grandmother of Bajirao, in a wicked attempt to defeat the claims of the plaintiff. His prayer in the plaint has been translated as follows:—

“(a) That it may be declared that the defendant in suit is no son at all born of the loins of the late Raja Bajirao Mansingrao, that he is not the true heir, that he has been put up falsely as heir, and that he has no right at all to remain on the record of the Civil Suit No. 3 of 1905 on the file of this Court.

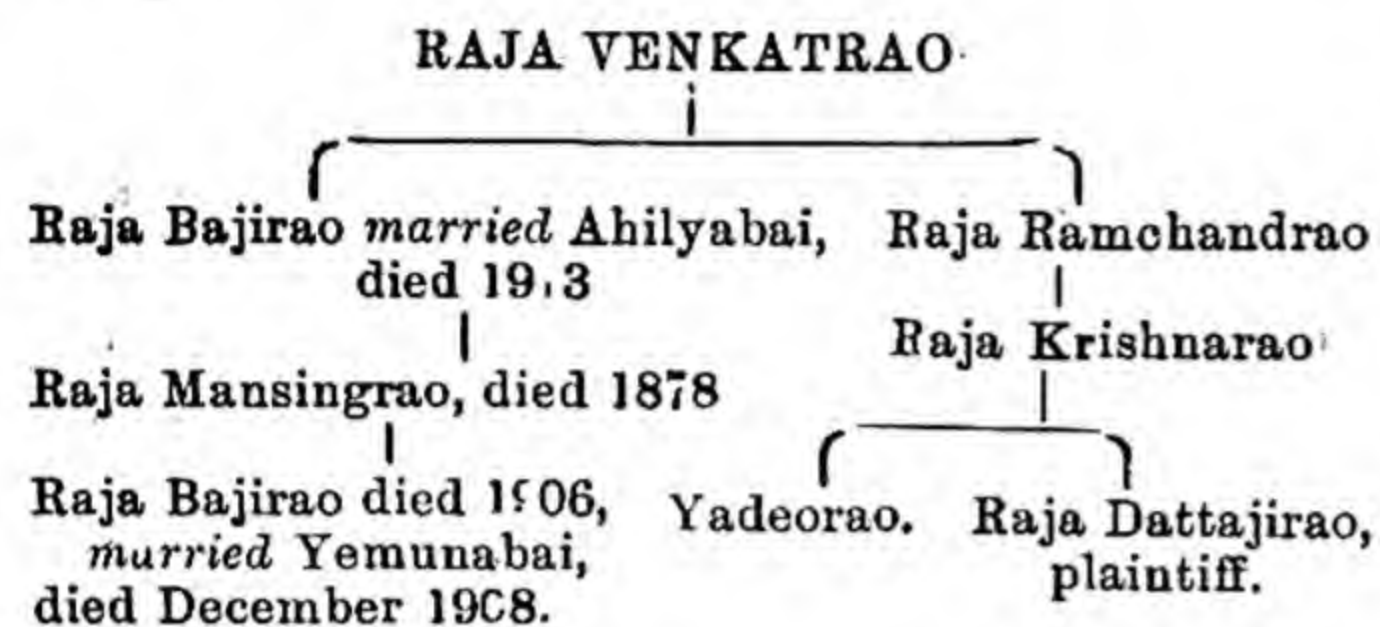
(b) That it may be declared that plaintiff is the true heir of Raja Bajirao Mansingrao and that after him he is entitled to have his name entered in Suit No. 3 of 1905 on the file of this Court as defendant in his capacity as the true heir and legal representative of the late Raja Bajirao Mansingrao.

(c) Defendant may be ordered to pay the plaintiff's costs in the suit.

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(d) The plaintiff may be granted such other and further relief as the Court may deem proper."

The following genealogical tree which has been admitted shows the relationship between the present plaintiff and Bajirao II:—



The following dates of deaths are important:—

Raja Bajirao II, 6th January 1906, Rani Yemunabai, December 1908, and Rani Ahilyabai, 1913.

Rani Nihalkuar, the step-mother of Raja Bajirao, died during the pendency of the suit.

For the defendant it was contended that Raja Anandrao was the true son of Raja Bajirao. Various other pleas were raised which it is unnecessary now to enter into, for we intend to decide this appeal on the question of limitation. It is sufficient to state that the decision of the Trial Court was embodied in the following decree:—

"It is ordered and declared that the defendant Anandrao is not a son born of the loins of the late Raja Bajirao and that the plaintiff is the heir to him."

Against that decision the present appeal has been filed.

The question for decision is whether the suit is within time. The plaintiff says that the cause of action arose on the 4th January 1910, when the Court in Civil Suit No. 3 of 1905 dismissed the plaintiff's application to be brought on the record of that suit as the legal representative of the late Raja Bajirao. The relief that this Court is to declare the plaintiff as the legal representative of Raja Bajirao for the purposes of Suit No. 3 of 1905 is misconceived. In any case the plaintiff having been subsequently made a party to Suit No. 3 of 1905, no

such declaration in respect of this suit should now be granted. The basis upon which this relief is asked is that the plaintiff is the real heir of the said Raja. In the plaint the case made out was one of succession by survivorship in regard to joint property. This position is no longer maintained. The defendant filed an application dated the 2nd April 1918, in which he asked further pleadings and issues to be framed. Upon this the plaintiff admitted that Rani Nihalkuar, the step-mother of Raja Bajirao, was alive when the statement was recorded on the 22nd April. The plaintiff pleaded that she has no status as a preferential heir and that the plaintiff is also entitled to maintain the suit as the next reversioner, and for that purpose he prayed that he may be allowed to amend the pleadings. The Court passed an order disallowing the defendant's application, and with that the plaintiff's prayer for amendment was presumably also disallowed.

According to the defendant-appellant the right to sue for a declaration accrued on the 29th January 1907, when Rani Yemunabai prayed in her petition to the Talukdar of Aurangabad (*vide* Exhibit P-10) that after due enquiry a certificate of heirship be prepared in the name of her son, the defendant Raja Anandrao. The defendant further contends that time began to run against the plaintiff at least from the 14th March 1907, when he filed his counter-petition (Exhibit D 21) in the inquiry started upon Rani Yemunabai's petition. The suit was instituted on the 11th July 1913, that is, more than six years after the plaintiff came to know of a definite assertion of title on behalf of the defendant.

The suit cannot be regarded as one for possession, upon a ten rupee stamp, by reason of the property being in *custodia legis*. It may be noted that there was a Receiver appointed of the temple properties since 1904 in the lifetime of Raja Bajirao. To such a suit for possession Musammatt Nihalkuar would have been made a party, and the fact that she was alive when the suit was filed would have been a good ground of defence. We do not understand the plaintiff's learned Counsel to argue that the suit should be regarded

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as in substance one for possession though in form one of declaration. In answer to the defendant's plea that the plaintiff cannot bring this suit simply for a declaration without asking for consequential relief, the plaintiff has stated that by reason of the property being under attachment in the Hyderabad territory, no consequential relief can be asked for. Similarly, in reply to a plea on the part of the defendant that he is in possession, it has been pointed out that the property in suit is in the custody of a Receiver. But all the same the suit is nowhere described as one substantially for possession.

If the suit could have been regarded as one for possession, then it would not be barred by limitation, as such a suit would be governed by Article 141, the cause of action accruing upon the death of Rani Yemunabai and Ahilyabai. But such a suit would be premature if the step-mother of the deceased, as we are inclined to think, is a nearer heir than the plaintiff under the Bombay School of Hindu Law, which applies to Berar.

The suit must be regarded as one for a declaration, to which Article 120 of the Limitation Act applies. In our opinion, the right to sue for the declaration accrued at least at the time when to the plaintiff's knowledge the defendant was set up as the son and heir of Raja Bajirao. This admittedly took place more than six years ago. It must be noted that in the revenue proceedings in Hyderabad both Rani Yemunabai and Rani Ahilyabai were supporting the claim of Raja Anandrao.

An attempt was made to bring the case under section 13 of the Limitation Act as applied to Berar, but this is a new plea which involves inquiry into facts, and the plaintiff is not entitled to have a remand for this purpose. The fact that the defendant objected to the jurisdiction of the lower Court, amounts only to an admission that he was not living in Berar at the date of the institution of the suit and nothing more, there being no admission that the defendant was absent for a definite period of time.

It is urged that as in her petition (Exhibit P-10) Rani Yemunabai asked for an inquiry, time did not run until

the inquiry terminated in a final order. If this view be correct, then the suit would not be barred. An examination of the Limitation Act, however, shows that where the starting point of limitation is an order, it is expressly so stated, as in Articles 11, 11 (a) and 13. In all these cases a short period of limitation has been fixed and it is necessary to have the order set aside. An order for mutation by the Revenue Authorities is not an order which has to be set aside. We know of no authority for holding, in a case where there is no express provision of the Limitation Act to that effect, that time does not begin to run till after an inquiry an order has been passed.

The respondent relies upon the following passage in the judgment of Ghosh, J., in *Chukkun Lal Roy v. Lolit Mohan Roy* (1):—

"Now, it seems to me that, except in the few cases especially provided for in the Limitation Act (e.g., a suit to obtain a declaration that an adoption is invalid, or that an alienation by a widow is not binding on a reversioner), a suit for a declaratory relief of this nature cannot be held to be barred, so long as the right to the property, in respect of which the declaration is sought, is a subsisting right. So long as the widow was alive, the plaintiffs' right as reversionary heirs was a subsisting right. And I am disposed to think that the right to bring a suit to construe the Will and codicil, and for a declaration of the plaintiffs' right, is a continuing right, and may be claimed within the statutory period (whether it be twelve years, or six years under Article 120) from the time when the plaintiffs become entitled to possession or other consequential relief. This suit having been instituted within six years from the time of Rajeshury's death is, therefore, amply within time."

This case is not on all fours with the present and this view, moreover, has not been followed in other cases: see *Peria Aiyar Ambalam v. Shunmugasundaram* (2).

By reason of the attitude of the two

(1) 20 C. 906 at p. 925.

(2) 22 Ind. Cas. 615; 38 M. 903; 26 M. L. J. 140; 15 M. L. T. 112; (1914) M. W. N. 417; 1 L. W. 119 (F. B.).

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Ranis the plaintiff could have instituted this suit for a declaration in March 1907. The right to sue is, in our opinion, not a continuing right. If Anandrao's claim had been withdrawn, the case might have been different, but the claim has been persistently asserted.

The case of *Ravji Mahadu Patil v. Sakuji Kaloji* (3) relied on by the plaintiff-respondent is distinguishable. There it was held that the plaintiff's right to sue for the particular declaration asked for did not accrue until the death of the widow. The declaration related to the plaintiff's right to be entered in the *patelki vatan* register in the place of the defendant. No further relief apparently could have been asked in the Civil Court, such further relief being only enforceable in the Revenue Department. Such a suit would be governed by Article 141 of the Limitation Act. The Subordinate Judge no doubt relied upon Article 120, but all that Scott, C. J., held was that the right to sue for a declaration did not arise till after the death of the widow. It was in that case unnecessary to decide whether Article 121 or Article 141 applied.

The cases under Article 118 and Article 119, if anything, support the defendant-appellant's contention that the right to sue for a mere declaration in the present instance accrued, as we have already stated, when the defendant was set up as the heir of Raja Bajirao.

Musammatt Nihalkur died at some time before the termination of the suit. If the plaintiff is entitled to possession, then his suit for possession would not be barred by limitation. But the present suit, which must be regarded as one solely for a declaration, is, in our opinion, barred by time. In this view it is unnecessary to go into the merits of the case.

The result is that the appeal succeeds and the suit is dismissed on the ground that the suit regarded as one for a declaration is barred by limitation, and it is, therefore, dismissed with costs. The plaintiff will pay the defendant's costs in both Courts.

Appeal allowed.

COURT OF THE BOARD OF REVENUE,
UNITED PROVINCES.

PETITION No. 21 of 1918-19.

November 1, 1919.

Present:—Mr. Ferard, S. M.
Musammatt MUBARAK FATIMA—
APPELLANT

versus

MUHAMMAD QULI KHAN—
RESPONDENT.

Res judicata—Partition case—Interpretation of judgment—Partition not carried through—Decision, whether res judicata.

The interpretation of a judgment in a previous partition case by a Court competent to try the subsequent case between the same parties and on the same subject-matter operates as *res judicata*. [p. 304, col. 2.]

A decision constituting *res judicata* passed in a partition case does not lose its force as *res judicata* because the partition was not ultimately carried through. [p. 304, col. 2.]

Third appeal from the order of the Commissioner, Rohilkhand Division, dated the 19th October 1918, in the case of correction of *khewat*.

JUDGMENT. This is a third appeal under section 213, Land Revenue Act. It is, therefore, to be seen whether the Commissioner's decision is contrary to some specified law or usage having the force of law. Defendant-appellant is *Musammatt Mubarak Fatima*. Plaintiff-respondent is *Muhammad Quli Khan alias Amir Husan Khan*. The latter applied for correction of *khewat* to the effect that one-sixth of 3 *biswas* odd in this village *Mundia Jagir* be recorded in the name of *Musammatt Mubarak Fatima*, defendant-appellant, and the rest in his own name. All the three Courts below have accepted this. Grounds Nos. 3 and 4 of this third appeal are to the effect that the Courts below have not complied with section 40 (1), Land Revenue Act, which lays down that mutation cases should be decided on the basis of possession, and have not considered the effect of a certain profits case. Nothing was said in the grounds of appeal to the Commissioner about physical possession. One ground alluded to the result of a profits suit but it was not pursued then, and appellant's Counsel drops the matter on hearing from the respondent that the said profits suit has been recently decided in respondent's favour by the High Court. The argument before me has been entirely as in

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the lower Courts, on the question of superior title under section 40 (2), Land Revenue Act. It is common ground that *Musammāt Rahimunissa*, ancestress of the parties, left 7 *biswas* in this village. In 1915 *Musammāt Fatima*, defendant-appellant, applied for partition of her share. Plaintiff-respondent claimed the whole and was referred to the Civil Court. He sued in the Court of the Subordinate Judge and in paragraph 9 of plaint he claimed to be the sole owner of the property specified at 3 *biswas* odd. The final decision of the District Judge, dated 26th January 1916, (in appeal from the Subordinate Judge's order of 10th August 1915) was that *Musammāt Mubarak Fatima*, the defendant-respondent before him, was entitled to one-sixth of the property left by *Rahimunissa*; he did not, however, mention exactly the extent of that property. On receipt of his decision in the partition Court the partition officer and the Collector in first appeal, dated 14th February 1917, concurrently decided that the Judge's decision should be construed as giving *Musammāt Mubarak Fatima* one-sixth of the subject-matter of the civil cases, which was 3 *biswas* odd only. This is clear from the Collector's appellate order of 14th February 1917 of which copy is on the file before me, though copy of the partition officer's order has not been filed.

It was open to *Musammāt Mubarak Fatima* to appeal further. She might have done so against the concurrent decisions, as the correct interpretation of a document, which includes a judgment, is by settled law a question of law. She did not, however, take this course, but withdrew the partition case and filed a suit in the Civil Court to have her right declared. No doubt what she wanted was to have a more specific finding than that of the District Judge of 26th January 1917. Her case was thrown out by the Mansif on 16th August 1917 and by the District Judge in appeal on 17th December 1917, on the ground that the matter was *res judicata* by the judgment of 26th January 1917. Appeal to the High Court under Letters Patent is pending.

The present case for correction of records was instituted by plaintiff-respondent, Quli Khan, in order to have the revenue records brought into accordance with the judgment of the District Judge of 26th January 1917,

as interpreted by the Assistant Collector and Collector in the partition case. The Courts have all decided that the interpretation of the judgment in the partition case, against which as I have said *Musammāt Mubarak Fatima* might have appealed but did not, stands as *res judicata*. The question is whether it does or not. I am of opinion that it undoubtedly does. The Assistant Collector, who decided the point in the partition case, was competent to try the present case, the parties were the same and the subject-matter the same. I am inclined to think, as did the Judge in his appellate order of 17th December 1917, that the interpretation which the Courts in the partition proceeding put on the District Judge's decree of 26th January 1917 was incorrectly narrow, but under the law that interpretation must be accepted as *res judicata* unless a different course becomes possible as a result of *Musammāt Mubarak Fatima's* appeal, which is pending in the High Court. I do not feel justified in acting under section 151, Civil Procedure Code, while that appeal is pending in the High Court.

I cannot accept appellant's contention that because the decisions constituting *res judicata* were passed in a partition case which was not ultimately carried through they lose their force as *res judicata*.

The decision of the Commissioner now under 3rd appeal being a correct interpretation of the law of *res judicata* cannot be interfered with by me under section 213, Land Revenue Act. I, therefore, dismiss the appeal with costs and Rs. 20 Pleader's fee.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 565 OF 1918.

July 22, 1919.

Present: - Sir Henry Drake-Brookman, Kt.,
J. C.

RAMDAYAL—PLAINTIFF—APPELLANT
versus

Musammāt JAGRANI AND ANOTHER—
DEFENDANTS—RESPONDENTS.

Abadi, house in, transfer of—Occupation of transferee

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not objected to by landlord,' effect of—Well sunk in abadi, whether inconsistent with purposes of grant.

As a general rule, where no objection is made by the landlord to the occupation of the *abadi* site by the transferee of a house standing thereon, it must be presumed that such transferee had permission to occupy it on the same terms as his transferor. [p. 306, col. 1.]

The sinking of a well on premises in the *abadi* occupied by an agriculturist is not necessarily inconsistent with the purpose for which the land was granted, especially where there is no indication of any injury to the interests of the landlord. [p. 306, col. 2.]

Appeal against the decree of the Additional District Judge, Saugor, in Civil Appeal No. 68 of 1918, dated the 31st August 1918, arising out of Civil Suit No. 217 of 1916, in the Court of the 2nd Munsif, Saugor, decided on the 6th March 1918.

Mr. B. V. Pradhan, for the Appellant.

Mr. G. L. Subhedar, for the Respondents.

JUDGMENT.—The village of Rajawa is divided into three *pattis*, two of 4 annas and one of 8 annas. The plaintiff owns one of the 4 annas *pattis*, while the defendant with one Bhau owns the third *patti* and is also a tenant of land in the plaintiff's *patti*. Bhau and his brothers had occupancy land in the village and in connection therewith had a house and compound which is now in the plaintiff's *patti* of the *abadi*. On the 21st January 1887 Bhau and his brothers sold the occupancy holding and the premises in the *abadi* to Gajadhar Tiwari and his brother Kesho Pershad for a consideration of Rs. 2,000, the document being Exhibit D-1 of the trial Judge's record. The defendant is the widow of Kesho Pershad and it is now common ground that in 1911 she constructed a *dahlan* at the eastern end of Bhau's premises and in 1916 began to dig a well about 30 feet from the southern end of the *dahlan* and within the area in which Bhau's house had stood: the house itself fell down in 1904. Exhibit D 1 gives the boundaries of Bhau's premises as follows:

- (1) On the north.....a public road;
- (2) On the east and south....the premises of Gajadhar Tiwari;
- (3) On the west.....Bansidhar Misar's premises.

The defendant now occupies Gajadhar's premises and those of Bansidhar Misar are occupied by his brother Ganesh. The position will be clear from the plan prepared by the Amin on the 20th November 1918 for the purposes of this case. In that plan the area admitted by the plaintiff to correspond with Bhau's premises is coloured red. There is no evidence to indicate that the portion left uncoloured was ever occupied by any one but Bhau before the sale of 1887, and it would seem that if the boundaries given in Exhibit D-1 are correct, the portion coloured red in the Amin's plan is considerably too small. It suffices, however, for the purposes of this appeal to note that the site of the well is undoubtedly within the area once occupied by Bhau.

In the plaint the land in dispute was described as a square plot 10 or 12 cubits in length and 10 or 12 cubits in breadth belonging to the plaintiff, and possession of this plot was claimed.

The defendant claimed to have been in adverse possession of all the land sold to her husband and his brother by Bhau for over 12 years and the plaintiff's suit was dismissed on this ground. The plaintiff appealed and the decree of the trial Judge was set aside, the trial Judge being directed to ascertain whether the defendant had used Bhau's premises with the plaintiff's knowledge in the way she had alleged and what the precise position and extent of Bhau's premises were. The plaintiff was also allowed to press a new point, namely, that even if the defendant is regarded as the licensee of the premises in succession to Bhau, she exceeded her rights by sinking a well and is liable to ejectment on that ground.

Further pleadings and issues were recorded and the successor of the first trial Judge gave the plaintiff a decree for possession of the site of the well as given in the Amin's plan. He found that the defendant was in possession of Bhau's premises from 1887 to 1904 and that the plaintiff then had possession and allowed the defendant to construct the *dahlan* in return for a payment of Rs. 5. No evidence was given as to the terms of the license under which Bhau held,

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The defendant appealed and the lower Appellate Court, following *Narain v. Behari* (1), has held that the defendant as successor-in title of Bhan's transferees must be regarded as the licensee of the landlord subject to the terms of the *wajib-ul-arz* till 1904, when Bhan's house fell down. It disbelieved the evidence adduced to prove that the *dahlan* on the east side of Bhan's premises was built on obtaining a fresh permission from the plaintiff and on payment of some money and presumed that the defendant retained possession of the premises right up to the time (November 1916) when she began to construct a well. The evidence regarding other acts of possession put forward by the plaintiff was like that regarding permission to construct the *dahlan* rejected as untrue. The contention that the defendant had forfeited her privilege as licensee by sinking a well was overruled on the ground that such an act adds to the amenities of an Indian house, especially in a village where there is no pipe supply. The trial Judge's second decree was, therefore, set aside and the plaintiff's claim was again dismissed.

In second appeal it is contended on the plaintiff's behalf that as soon as Bhan's house fell down the plaintiff's possession began, he being a proprietor of the land and Bhan having parted with his right. No authority is cited in support of this contention, which appears to be opposed to the general rule laid down in *Narain v. Behari* (1), the case relied upon by the lower Appellate Court, namely that the transferee of a house standing on an *abadi* site, whose occupancy of the site is not objected to by the landlord, must be presumed to have been permitted to occupy it on the same terms as his transferor. The plaintiff-appellant evidently realised when the defence was put in that the construction of the *dahlan* in 1911 negatived the existence of an intention on the part of the defendant to abandon the premises and he endeavoured to meet this fact by alleging that his permission was obtained and that he himself raised crops of *makka* in the rest of the plot. His attempt to prove his allegation has failed,

and his claim to recover possession of a small area admittedly within the premises once occupied by Bhan, on the ground that a well has been commenced on it, cannot be granted without producing the absurdity that he would have no access to that area without trespassing on the land properly in the defendant's possession.

It is next urged that the sinking of a well on premises in the *abadi* occupied by an agriculturist is an act inconsistent with the conditions on which such a license is ordinarily granted. In this connection, too, no authority is cited for the appellant. On the other hand it was held by Chamier, J., in *Bhagwan Das v. Muhammad Yahia* (2) that the construction of a well in the *abadi* was not necessarily inconsistent with the purpose for which the land was granted and that as a well is one of the amenities or conveniences of an Indian house, the grant of land for building purposes carries with it the right of making a well for the convenience of the occupiers. In that case the Zemindar was the plaintiff and the defendants were shopkeepers, who had been in occupation of the premises for generations without paying any rent. The general status of Bhan as an absolute occupancy tenant and that of the defendant as a resident *Malguzar* are doubtless different from that of a shopkeeper, but so far as the advantages which accrue to the occupier of premises in the *abadi* from sinking a well are concerned, no difference whatever is apparent. It is stated on behalf of the respondent, and not denied for the appellant, that water has in Rajawa to be brought from a considerable distance. There exists, therefore, a special need for wells in the village. On the other hand, the appellant vouchsafes no indication of any injury to his interest which can arise from the construction of a well. It may be that in a properly constituted suit the plaintiff can recover the entire area once occupied by Bhan, but this relief he does not even ask for in this Court and as already stated, to pass a decree for possession of the area in which the well is being sunk would serve no useful purpose. A suitable form of relief would

(1) 31 Ind. Cas. 307; 11 N. L. R. 126.

(2) 18 Ind. Cas. 928; 11 A. L. J. 301; 35 A. 292.

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be a mandatory injunction forbidding the defendant from proceeding with the construction of the well, but I am not asked to grant this, though the plaintiff contemplated the issue of such an injunction, and for the reasons already given I am not satisfied that the plaintiff is entitled to any relief of this kind.

The appeal accordingly fails and is dismissed with costs. In the Courts below costs will be paid as already ordered.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1133
OF 1916.

March 26, 1919.

Present:—Mr. Justice Chatterjea and
Mr. Justice Panton.

JOY GOBINDA HAJAM—PLAINTIFF
—APPELLANT

versus

Musammât HAZIRA BIBI—DEFENDANT—
RESPONDENT.

Assam Land and Revenue Regulation (I of 1886), s. 12—Rules framed by Chief Commissioner under s. 12, r. 57—Settlement of land—Previous settlement holder, rights of—Collector, power of, to exclude previous holder—Jurisdiction of Civil Court to see whether rule has been complied with—Civil Court, whether has power to pronounce on sufficiency of reasons for exclusion.

Under rule 57 of the rules made by the Chief Commissioner of Assam under section 12 of the Assam Land and Revenue Regulation, a Collector has power to settle land with any person whom he thinks fit, but preference should ordinarily be given to the previous settlement holder. [p. 308, col. 2, p. 309, col. 1.]

A Civil Court has jurisdiction to decide whether there has been a compliance with the provisions of the foregoing rule, and if, in a case coming under the third paragraph of that rule, it finds that there was no compliance therewith, it may pass a decree as between the parties to the suit. It is not open, in such cases, to the Civil Court to go into the correctness or sufficiency of the reasons for excluding the previous holder and if it appears that the Revenue Authorities took into consideration the fact that preference should be given to the settlement holder, they have a discretion in the matter. [p. 09, cols. 1 & 2.]

Appeal against the decree of the Subordinate Judge, Assam Valley Districts, dated the 18th February 1916, reversing

the decree of the Munsif, Sibsagar, dated the 4th May 1914.

FACTS appear from the judgment.

Babu Narendra Kumar Bose, for the Appellant.—The plaintiff is the appellant. The appeal arises out of a suit instituted by the plaintiff for a declaration that he had a right to obtain settlement of the lands in suit. The lands were at first jungly lands. The plaintiff cleared the jungles and made them fit for cultivation and he was the first settlement holder. The lease was at first for a year only. Both the plaintiff and the defendant applied for the lease. The plaintiff first got the settlement. But subsequently the Collector cancelled the lease and settled with the defendant. The plaintiff then instituted a suit. The Munsif decreed the suit. But on appeal the lower Appellate Court reversed the decree under section 154, clause (a), of the Assam Land Revenue Regulation, holding that Civil Courts had no jurisdiction to go into the case.

I submit the lower Appellate Court was wrong there. It did not go into the facts of the case. The only question here is whether the Civil Court has jurisdiction or not. I submit the Civil Court has jurisdiction. I refer to the case reported as *Madhub Nath Surma v Myarani Medhi* (1) in support of my contention. There is another case, *Patan Maria v. Bhabiram Dutt Barna* (2). I also refer to the case reported as *Nasir Mea v. Arman Ali Mea* (3). I reclaimed the waste lands and claimed settlement. But I was not given the settlement. I refer to two cases, one reported as *Hedlot Khasia v. Karan Khasiani* (4) and the other in *Maksud Mahi (Ananda Kisore Sen) v. Secretary of State* (5).

Monlavi Nuruddin Ahmed (with him Mr. A. S. M. Akram), for the Respondent.—The authorities cited by my learned friend do not cover cases like this. The present case is a case of settlement of waste lands. Before discussing I should like to refer to section 11 of the Assam Land and Revenue Regulation. If my submission is correct, then the Civil Court has no jurisdiction

(1) 17 C. 819.

(2) 24 C. 239; 1 C. W. N. 94.

(3) 18 Ind. Cas. 745; 17 C. L. J. 118.

(4) 13 Ind. Cas. 377; 15 C. L. J. 241.

(5) 7 Ind. Cas. 90; 14 C. W. N. 990.

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and the lower Appellate Court was right. But it is a case of a land-holder and I refer to section 8 of the Regulation. The Regulation makes it incumbent for the Settlement Officer to give settlement to the land-holder. I submit the Civil Court has no jurisdiction to question the discretion exercised by the Revenue Authorities. The rule specifically provides for settlement of waste lands. I refer to section 47 of the said Regulation. As regards the case of *Patan Maria v. Bhabiram Dutt Barna* (2) it has been proved that the plaintiff had an ancestral holding. The case is within the provision of section 32 of the Assam Land and Revenue Regulation. The case in *Patan Maria v. Bhabiram Dutt Barna* (2) is quite on a different footing. I refer to *Hedlot Khasia v. Karan Khasiani* (4).

[CHATTERJEA, J.—Where are the rules made by the Chief Commissioner?]

Rule 57.

CHATTERJEA, J.—Does the rule 57, clause 3, apply?]

Yes; the learned Subordinate Judge says so.

If section 57 applies, then it is not a case in which the Civil Court has any jurisdiction. In that case section 154 applies. Section 154 would operate as a bar, unless section 39 gives a right to the parties. I refer to *Askar Mian v. Sahedali Bara Bhuyian* (6). Here the question of the jurisdiction of the Civil Court was discussed. Section 154 would not operate as a bar because it is controlled by section 39. I refer to *Nasir Mea v. Arman Ali Mea* (3). My submission is that none of the cases cited by my learned friend could be held as authorities.

Babu Narendra Kumar Bose, in reply.—Rule 57 does give me a right. The Civil Court must give the declaration that I am entitled to settlement. The jurisdiction of the Civil Court cannot be ousted, unless it is shown that there is something out of the ordinary in the case.

JUDGMENT.—This appeal arises out of a suit for a declaration that the plaintiff has a right to obtain a settlement of the lands in suit.

It appears that the lands were waste lands which were cleared of jungle and made fit for cultivation by the plaintiff. The plaintiff obtained settlement for one year at a time

for two consecutive years. After the expiry of the period of settlement, both the plaintiff and the defendant applied for settlement. The plaintiff alleges that the settlement was at first made with him, but subsequently the Collector set aside that settlement and it was made with the defendant.

The Court of first instance found the facts in favour of the plaintiff and gave a decree in his favour. The lower Appellate Court did not go into the facts of the case, but reversed the decree of the Court of first instance on the ground that the Civil Court had no power to go into the question.

The case is governed by the provisions of the Assam Land and Revenue Regulation.

The Regulation makes a distinction between the rights of a landholder which are stated in section 9, and those of a settlement holder who is not a landholder. Section 11 lays down that a settlement holder, who is not a landholder, shall have no rights in the land held by him beyond such as are expressed in his settlement lease. Section 32 lays down:—(1) The Settlement Officer shall offer the settlement to such persons (if any) as he finds to be in possession of the estate and to have a permanent, heritable and transferable right of use and occupancy in the same, or to be in possession as mortgagees of persons having such a right.

(2) If the Settlement Officer finds no person in possession as aforesaid, it shall be in his discretion, subject to such rules as the Chief Commissioner may make under section 12, to offer the settlement to any person he thinks fit.

Rule 57 of the rules made by the Chief Commissioner of Assam lays down:—

"In effecting re-settlements of land previously held under leases, the term of which has expired, the Settlement Officer shall proceed according to section 32 of the Land and Revenue Regulation.

If the person in possession is a landholder in respect of the land, settlement shall be offered to such person.

If the person in possession is not a landholder, the settlement may, subject to the provisions of rule 63, be offered to any person whom the Settlement Officer thinks fit but he shall ordinarily give preference to

(6) 31 Ind. Cas. 424; 22 C. L. J. 328; 23 C. W. N. 540

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the previous settlement holder. If no one is found in possession immediately under Government, the settlement may, subject to the provisions of rule 63, be offered to the actual cultivator."

As the plaintiff was not a landholder, paragraph 3 of the rule applies to this case, and the words "he shall ordinarily give preference to the previous settlement holder" in that paragraph indicate that if there be reasons to take it out of the ordinary rule, the Revenue Authorities have a discretion to settle the land with a person who is not a previous settlement holder.

The learned Munsif in the present case has found as follows:—"As the plaintiff has been held to be in possession of the land in suit since his application for the same, the settlement was first given to him and two Pattas Exhibit 1 and Exhibit 2 were rightly issued in his name. But the subsequent order of the Collector dated 26th March 1913 cancelling the Patta issued in the name of the plaintiff cannot be justified on the provisions of section 41 of the Assam Land and Revenue Regulation I of 1886".

The learned Subordinate Judge, as stated before, has not gone into the facts of the case. He was of opinion that the Civil Court had no power to decide whether the discretion of the Collector had been rightly exercised. No doubt the Collector has, under rule 57, the power to settle the land with any person whom he thinks fit, but the same rule lays down that preference should ordinarily be given to the previous settlement holder and the question for decision, therefore, is, whether the Revenue Authorities found anything in the case which would take it out of rule 57 of the rules. Neither of the Courts below has gone into the question whether the Collector has found anything for excluding the plaintiff from the settlement. We think that the Civil Court has power to decide whether there was compliance with the provisions of rule 57 of the rules framed by the Chief Commissioner of Assam under section 12 of the Regulation.

The only thing, however, which we think the Civil Court can see in a case coming under paragraph 3 of rule 57 is whether the rule has been complied with, and if there was no compliance with the rule the

Court may pass a decree in such cases between the parties to the suit. It is not open to the Civil Court in such cases to go into the correctness or sufficiency of the reasons, and once it appears that the Revenue Authorities took into their consideration the fact that preference should ordinarily be given to the settlement holder, they have a discretion in the matter. The reasons, moreover, for excluding the plaintiff might appear not only in the order, but in the office report or even in the petitions of the parties or other settlement papers.

As, however, the question has not been gone into by either of the Courts below, we think that the decrees of both the Courts below should be set aside and the case sent back to the Court of first instance so that the question may be inquired into and the suit decided according to law.

Costs to abide the result.

Case remanded.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND APPEAL PETITION No. 25 OF 1918-19.

May 28, 1919.

Present :—Mr. Ferard, S. M., and
Mr. Hopkins, J. M.

Syed MUHAMMAD NABI—APPELLANT
versus

UMEDI AND OTHERS—RESPONDENTS.

*Agra Tenancy Act (II of 1901), ss. 4 (5), 11—
Occupancy rights, accrual of—Ejectment of tenant—
Lease to third person for one year—Ejected tenant
continuing in occupation and paying rent—Occupation,
whether continuous.*

A landholder ejected a tenant in due course of law and immediately gave a lease of the land to a caste-fellow of the latter for one year only; the ejected tenant, however, continued in occupation, paid the rent due and was re-admitted on expiry of the lease:

Held, per Ferard, S. M.—That as the person liable for the rent under the definition of section 4 (5) of the Agra Tenancy Act was the tenant, and as the tenant in this case was the person in whose favour the lease had been executed, there was not a continuous occupation by the ejected tenant as a tenant for the purpose of section 11 of the Act. [p. 310, col. 2.]

Per Hopkins, J. M.—That there was a continuous occupation by the original tenant. [p. 311, col. 1.]

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The letting of land to a person who does not cultivate, and allowing the original tenant to remain in cultivating possession, does not constitute the former a legal tenant under the definition in section 4 (5) of the Agra Tenancy Act. A tenant is a person by whom rent is payable, and rent is what is paid by a tenant for land held by him. [p. 311, col. 1.]

Second appeal from the order of the Commissioner, Rohilkhand Division, dated the 21st October 1918, in the case of ejectment.

JUDGMENT.—The position is given in the Commissioner's judgment.

FERRARD, S. M.—(March 27, 1919.)—In 1312, the appellant landholder, not desiring that the respondent should acquire occupancy right, sued him for ejectment, obtained decree, and had it executed under section 71, Tenancy Act.

He then gave a lease of it to a caste-fellow (Dhimar) of the respondent for one year. The latter's name, Harjas, is recorded for 1313 and the lease to him is proved. In 1314, the appellant's name appears again, and he has held up to date. The Commissioner, differing from the Assistant Collector, holds that there was no break in appellant's tenancy in 1313, that in fact appellant was re-admitted after his ejectment in 1312.

I am unable to agree. When a landlord carries ejectment proceedings right through, the onus of proving re-admission lies very strongly on the tenant and the respondent has not proved that he paid the rent to the landlord for the year 1313 for this holding. He paid certain small sums according to the receipts, but he has another holding. The Commissioner has decided entirely on the probability that Harjas, another Dhimar, would not have taken over such a large holding for one year only. It is, however, still more improbable that the landlord would at once "re-admit" the old tenant whom he had taken pains to eject in order to break occupancy right. It is very likely that Harjas let the appellant cultivate the land in 1313, it is very likely that the landlord knew that Harjas was going to do this, it is very likely also that whether directly or via Harjas the landlord got the 1313 rent from the appellant, but all the same, in my opinion, Harjas was the landlord's tenant in 1313, the person liable for the rent under the definition of section 4 (5), Tenancy Act. Though the appellant may have, as

the Commissioner thinks, actually held the land in 1313, I would hold that he did not do so as a tenant and that his present occupation can count from 1314 only, and he is liable to ejectment. Continuous occupation for the purpose of section 11, Tenancy Act, must be occupation as a tenant. The case resembles instance (iii) which Mr. Agarwala gives in his note 9 on sections 15-17, Tenancy Act, at page 102 of the 5th edition of his commentary. His view is, of course, not authoritative, but I agree with it. Too much partiality to tenants is often shown in this common class of cases. Landlords have legal power to prevent accrual of occupancy rights and after ejectment, it is for the ejected tenant to prove that within a year under section 13 (b) he was re-admitted to the legal status of a tenant. The Courts often assume too much in his favour and that I find to be the case here. I would allow the appeal and restore the order of the Assistant Collector decreeing ejectment.

This governs the precisely similar appeal for the 15 *biswas mahal*—the case there is even stronger as the new tenant, Harjas's brother Jhao, appeared in the papers in 1313 and 1314, and the appellant's name did not re-appear as tenant again till 1315.

Costs to the appellant throughout.

HOPKINS, J. M.—(March 12, 1919.)—The change in the law introduced by section 13 of the Tenancy Act was intended to remove the landholder's power to prevent the accrual of occupancy rights by nominal ejectment. The landholder has power to prevent the accrual of occupancy rights in two ways—

- (1) by actually and effectively getting rid of the tenant, or
- (2) by granting him a lease for seven years.

The landholder may wish to retain the tenant or to get rid of him. If he wishes to retain him, he must either allow him to count the period of his retention towards the acquisition of occupancy rights or give him a 7 years' lease. He cannot, however, retain him as a tenant-at-will. The test imposed by the law to show that the landholder wishes to get rid of the tenant is that he must keep him out of the holding (or its equivalent) for at least a

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year with, of course, the risk of losing him altogether.

If a new tenant is put in for a year and the old tenant is then re-admitted, the intermediate letting of the land must be a genuine and *bona fide* transaction. It is not enough to give a paper lease to a person who does not cultivate and to allow the original tenant to remain in cultivating possession. I am unable to agree that a dummy tenant of this sort is the legal tenant under the definition in section 4 (5) of the Tenancy Act. A tenant is a person by whom 'rent' is payable, and 'rent' is what is paid by a tenant for land held by him: section 4 (3). In the case supposed, the lessee does not hold land at all. He holds a piece of paper. The setting up of a dummy tenant of this kind is, in my opinion, a colourable transaction intended to defeat the provisions of the law, and effect should not be given to it by the Courts.

It is, of course, possible that the colourable transaction may be not on the side of the landholder, but of the tenant. The landholder may make a *bona fide* letting to a new tenant in a genuinely different interest. The former tenant may seek to show a real sub-tenancy as a colourable tenancy-in-chief. These are questions of fact to be determined on the evidence in each particular case.

In the present case, the conclusion come to by the Commissioner on the facts is that the leases to the intermediate tenant were executed without any idea that they would really be brought into force, but simply with the intention of making a break in the ejected tenant's tenure. He believed that the occupation of the latter had been continuous. My colleague is prepared to admit as much, but in any case the Commissioner's findings of fact are binding on this Court unless it can be shown that there is no evidence at all to support them.

I regret that I am unable to concur in the order proposed.

BY THE COURT.—FERARD, S. M.—As members differ, the appeal stands dismissed with costs. There is a good deal to be said for the point of view taken in my colleague's dissenting note.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 460-B OF 1915.

December 8, 1916.

Present:—Mr. Mitra, A. J. C.

SHANKAR AND ANOTHER—PLAINTIFFS—
APPELLANTS
versus

GOVINDA AND OTHERS—DEFENDANTS—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VII, r. 18 (2)—Documents produced by plaintiff, whether can be used to cross-examine his own witnesses—"Defendant's witnesses", meaning of—Guardians and Wards Act (VIII of 1890), s. 27—Guardian, whether can ratify unauthorised act of previous guardian—Arbitration—Compromise approved by arbitrator, whether award.

Where documents containing depositions of witnesses in a suit, having some bearing on the subject-matter of the suit in which they are produced, are tendered by the plaintiff after the filing of the plaint, but before any of the witnesses are examined, he is entitled to cross-examine witnesses on the basis of the documents, even though the witnesses may have been cited on his behalf. [p. 312, col. 1.]

The expression "defendant's witnesses" in rule 18 (2) of Order VII of the Civil Procedure Code includes witnesses who have turned hostile to the plaintiff, and may be treated as the adversary's witnesses. [p. 312, col. 2.]

A guardian appointed under the Guardians and Wards Act cannot ratify the unauthorised acts of a former guardian; this can be done by the minor alone on attaining majority. [p. 312, col. 2.]

The mere approval of a compromise arrived at between the parties before an arbitrator is not an award. [p. 312, col. 1.]

Appeal against the decree of the Additional District Judge, Akola, in Civil Appeal No. 1 of 1915, dated the 28th September 1915 arising out of Civil Suit No. 43 of 1912, dated the 23rd December 1913, before the Sub Judge Malkapur.

Mr. R. N. Mudholkar, R. B., for the Appellants.

Mr. V. K. Rajwade, for the Respondents.

JUDGMENT.—The facts of the case need not be stated at length in this judgment, as I have come to the conclusion that the case must go back for a fresh decision. The plaintiff-appellant sued upon a mortgage executed on behalf of the minor defendant Govinda by his step mother Abalia as guardian and also by Dhrupadi (defendant No. 2). The main questions for decision are whether there was legal necessity for borrowing the money secured by the mortgage, and whe-

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ther Dhrupadi's husband and his brother were separate.

Certain documents were tendered, admittedly at a late stage of the case, in the first Court and were rejected. In the opinion of both the Courts below, sufficient cause has not been shown for their non-production at the proper time. I may mention that the documents seem to have been produced before any of the witnesses were examined in the case, and some of the documents are public documents containing depositions of witnesses examined in an objection case having some bearing on the present litigation. They were again tendered when Ahalia and Maroti (plaintiff's witnesses Nos. 2 and 3) were examined, and on each occasion the Subordinate Judge refused to allow the plaintiff to cross-examine the witnesses with reference to the statements contained in their former depositions. A similar attempt was not made when Dhrupadi was examined as a witness, obviously in deference to the ruling of the Subordinate Judge already given on two occasions. I think the plaintiff was entitled to cross-examine witnesses on the basis of these documents.

Order VII, rule 18, sub-clause (1), lays down that documents not entered in the list attached to the plaint shall not, without the leave of the Court, be received in evidence on behalf of the plaintiff. Sub-clause (2) says: "Nothing in this rule applies to documents produced for cross-examination of the defendant's witnesses, or in answer to any case set up by the defendant or handed to a witness merely to refresh his memory."

There was no section which expressly excepted such documents under Act VIII of 1859. But in *Ramji v. Rangayya* (1) Scotland, C. J., held that a document given to a witness to refresh his memory did not come within the prohibition laid down by section 39 [Order VII, rule 18 (1)], and section 128 [Order XIII, rule 2]. The saving clause was introduced, it would seem, to give effect to this decision, but if this was the intention, its appropriate place would have been in Order XIII, rule 2, and the wording should have been general and not confined to the case of a plaintiff. The reason given by the learned Chief Justice is that these sections

relate to documents relied upon as themselves evidence in support of the case of the respective parties. It is difficult to see how cross-examination can be effective if the contents of the document on which it is to be based are known to the adverse party at the first hearing. Unless it is an admission made by a party to the suit, a statement made by a living person is not evidence and hence Order XIII, rule 2, does not apply to it.

The witnesses were no doubt cited on behalf of the plaintiff, but they should have been examined on behalf of the defendants and cross-examined by the plaintiff. Although the words used in the section are "defendant's witnesses", I think they ought to be interpreted to include all witnesses who have turned hostile to the plaintiff, so that he is entitled to cross-examine them under the provisions of section 154 of the Evidence Act. Such witnesses may well be treated as the adversary's witnesses.

The saving clause has been enacted *ex cautela majore*, as the prohibition only extends to the reception of documents relied on by the parties. Under these circumstances the procedure of the lower Courts in refusing to allow cross-examination of some of the witnesses on the basis of the documents was illegal. As regards all public documents, now that I have to remand the case, they may be admitted in evidence, as I understand the respondents' learned Pleader himself wishes to rely on some of them. Documents which are not public documents, such as mortgages, should not be admitted except with the consent of the respondents' Pleader. I regret that under the provisions of section 145 of the Evidence Act two of the witnesses (Ahalia and one Maroti) will have to be examined again.

It is desirable that I should dispose of certain contentions, which have been raised before me, as they are questions of law. The first point I would notice is the argument that there has been a ratification of the mortgage by the present guardian of Govinda appointed by the District Judge under the Guardians and Wards Act. There can be no ratification by one guardian of the unauthorised acts of a former guardian. It is the minor, and minor alone, who on attaining majority can ratify them. The fact that the guardian has made payments in part satisfaction of the mortgage would be a relevant

(1) 1 M. H. C. R. 168.

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fact to prove the propriety of the transaction, but the weight to be attached to it depends upon whether he had personal knowledge of the transaction, or whether he made enquiries and had data before him, not available now, on which he was satisfied of the justice of the claim. This is a matter for the lower Appellate Court to decide.

It is urged that the sanction of the arbitrator to whom Suit No. 545 of 1902 was referred was a sufficient sanction within the meaning of section 462 of the Civil Procedure Code. I am unable to agree with this view. The arbitrator did not take upon himself the responsibility of making an award, but he merely sent a report with an application from the plaintiff in that suit, Maroti Kushal, stating that the suit has been compromised out of Court. The mere approval of a compromise arrived at between the parties is not an award, and it is clear that the sanction of the Extra Assistant Commissioner, which was required by law, was never obtained. Under these circumstances, the mortgage is voidable on behalf of the minor. It does not, however, follow that the Court cannot put him on terms when the minor seeks to rescind the mortgage. Under section 64 of the Contract Act, the party rescinding a voidable contract shall, if he have received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received. The Privy Council case of *Mohori Bibee v. Dharmadas Ghose* (2) is distinguishable on the ground that there was no contract, as the minor was himself a party to it. In the present case it was his guardian who entered into the contract. The lower Court has relied upon the judgment of Hallifax, A. J. C., in *Husen v. Rajaram* (3) and has held that the mortgage by the step mother of the minor is absolutely void, but I must respectfully decline to follow that ruling, in view of the fact that a different view has been subsequently taken by a Bench of two Judges of this Court.

The fact that the arbitrator approved of the compromise is a relevant fact, and it is for the lower Appellate Court to decide

what importance should be attached to it. This again depends upon the investigation made by the arbitrator.

The plaintiff in execution of a money decree against Govinda had attached the property in dispute. An objection was filed by Dhrupadi, and some of the property was released from attachment. It is contended that under section 283 of the Civil Procedure Code, 1882, the order has become conclusive. Assuming that the plaintiff is not suing now under a different title, and that the order is conclusive as between the plaintiff and Dhrupadi, there is no reason to suppose that it was conclusive against the minor defendant Govinda as he was not a party to the order, nor could any adjudication be made as against him. The party against whom the order was passed is the plaintiff and not the judgment-debtor Govinda, and Govinda was not bound to set aside that order within one year.

The decree of the lower Appellate Court is set aside and the case is remanded to that Court for a fresh decision with advertence to the above remarks. There will be no order for refund of Court-fees.

The costs of this appeal will follow the result.

Case remanded.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 431 OF 1918.
July 31, 1919.

Present:—Pandit Kanhaiya Lal, J. C.
ANGAD SINGH—PLAINTIFF—APPELLANT
versus

KASHI PRASAD AND OTHERS—
DEFENDANTS—RESPONDENTS.

Mortgage—Redemption, suit for—Consideration, partial failure of—Loss occasioned to mortgagor, whether can be set off—Mortgagee, duty of, to restore mortgaged property to mortgagor on redemption—Possession not originally delivered to mortgagee, effect of.

Where there is only a partial failure of the consideration payable for a mortgage, any loss occasioned in consequence of that failure can only be

(2) 30 C. 539 (P. C.); 30 I. A. 114; 7 C. W. N. 441; 5 Bom. L. R. 421; 8 Sar. P. O. J. 374.

(3) 26 Ind. Cas. 813; 10 N. L. R. 133.

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recovered by a separate suit, and cannot be set off in a suit for redemption. [p. 314, col. 2.]

The duty of a mortgagee to restore at the time of the redemption of the mortgage the mortgaged property to the mortgagor does not arise where possession over that property was not delivered to him at the time of the mortgage or at any time thereafter. [p. 314, col. 2.]

Appeal from the decree of the District Judge, Fyzabad, dated the 31st July 1918, modifying the decree of the Munsif, Fyzabad, dated the 6th March 1918.

Syed Ali Mohammad holding brief of the Hon'ble Syed Wazir Hasan, for the Appellant.

Pandit Harkaran Nath Misra, for Respondents Nos. 1 and 2.

JUDGMENT.—This appeal arises out of a suit for redemption of a mortgage effected by Deoki Nandan, the father of the plaintiffs, in favour of Kishun Prasad and Thakur Din on the 22nd November 1894. The amount secured by the mortgage was Rs. 400, out of which Rs. 325 were left with the mortgagees for payment to Gopal on account of his prior mortgage of the 18th June 1892. Out of the plots mortgaged with Kishun Prasad and Thakur Din only two plots Nos. 134 and 137 *khasra* were mortgaged to Gopal.

The mortgagees did not pay the money left with them for payment to Gopal. On the 22nd May 1896, Gopal filed a suit for foreclosure on foot of his mortgage and obtained a decree to which Kishun Prasad and Thakur Din were parties. This decree was made absolute on the 14th August 1897. By virtue of that decree plots Nos. 134 and 137 passed out of the ownership of the plaintiffs. The plaintiffs seek to debit the mortgagees with the value of the said plots, which they allege were lost on account of their wrongful default. The Courts below treated the claim as one for compensation for breach of a contract and held that it was barred by time.

On behalf of the plaintiffs reliance is placed on the decision in *Shivachidambara Mudeley v. Kamakshi Ammal* (1). But in that case the mortgaged property was lost on account of the failure of the mortgagee to pay the Government revenue assessed on the land, and it was held that a claim for compensation could be maintained under

section 76 of the Transfer of Property Act (IV of 1882) at the time of redemption. Here there was no breach on the part of the mortgagees of a contractual or statutory obligation arising out of the mortgage or annexed to the relationship of the mortgagor and mortgagee created by the transaction. There was only a partial failure of the consideration payable for the mortgage and if any loss was occasioned in consequence of that failure, that loss could not be recovered except by a separate suit. In other words, by taking charge of a portion of the consideration money for the purpose of paying up the prior mortgage, the mortgagees constituted themselves agents or trustees of the mortgagor as much in their own benefit as in that of his; and if they failed to carry out the terms of the agency or the trust, they could not be held responsible for any loss occasioned thereby at the time of redemption. Had the mortgagees paid the money left with them to the prior mortgagee, they would have got possession of the said plots and would have been entitled to recover the entire mortgage-money. Not having done so, they are entitled to recover only what they paid and to claim no compensation for any loss which might have been caused by their own laches. The duty of the mortgagee to restore at the time of the redemption of the mortgage the mortgaged property to the mortgagor does not arise where possession over that property was not delivered to him at the time of the mortgage or at any time thereafter.

In *Naubat Singh v. Indar Singh* (2) it was held that a suit by a mortgagor to enforce the payment of the consideration due on a registered mortgage-deed together with damages for non-payment was governed by Article 116 of the Indian Limitation Act and the time from which the limitation ran was, in the absence of any special provision to the contrary, the date of the execution of the mortgage deed. In *Raghubar Rai v. Jai Rai* (3) it was held in somewhat similar circumstances that the cause of action arose when the breach took place, unless there were successive breaches within the meaning of Article 116 or a continuing

(1) 3 Ind. Cas. 433; 33 M. 71; 6 M. L. T. 239; 19 M. L. J. 498.

(2) 13 A. 200; A. W. N. (1891) 5.

(3) 14 Ind. Cas. 244; 34 A. 429; 9 A. L. J. 534.

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breach within the meaning of section 23 of the Indian Limitation Act (IX of 1908). In *Rani Reghubans Kuar v. Rānak Ali* (4) a suit was brought by the mortgagee to recover the money due on his mortgage. It was found that the mortgagee had not paid a portion of the mortgage money to a prior mortgagee as stipulated in the deed of mortgage. The mortgagor resisted the claim on the ground that he was not bound to carry out his part of the contract because the mortgagee had not carried out his part. It was held that the amount claimed for compensation for the loss occasioned by the failure of the mortgagee to carry out his part of the contract could be recovered by a suit, and not by a set-off against the mortgage money. In *Partab Singh v. Balwant Singh* (5) it was held that where a portion of the mortgage consideration was left with the mortgagee to redeem certain prior mortgages existing on the property and no particular time was specified in the deed for such redemption, it was the duty of the mortgagee to redeem those prior mortgages within a reasonable time and if the mortgagee failed to do so, the mortgagor was entitled to recover from the mortgagee damages sustained by him in consequence of it. The mortgagor was, moreover, a party to the suit for foreclosure. After that suit Rs. 100 were paid by the mortgagees out of the consideration left with them in satisfaction of another mortgage due by the mortgagor to save the property from foreclosure. There is no reason, therefore, for interfering with the decree passed by the Court below. The appeal is dismissed with costs.

Appeal dismissed.

(4) 10 O. C. 69.

(5) 48 Ind. Cas. 550; 5 O. L. J. 670.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 76-B OF 1918.

October 22, 1919.

Present: - Mr. Mittra, A. J. C.

TUKARAM—PLAINTIFF—APPLICANT

versus

DEOJI—DEFENDANT—NON-APPLICANT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 78—Execution of decree—Sale of goods—Goods not answering description—Purchaser, remedy of—Consideration, failure of—Suit for recovery of price paid, maintainability of.

Where goods offered for sale, whether in execution of a decree or privately, are described as of a particular denomination, and every circumstance points to the buyer having contracted for the specific goods produced as described, but the goods tendered do not answer that description, the purchaser is entitled to reject them, and, if he has paid for them, to recover the price as money had and received for his use. [p. 316, col. 2.]

Application for revision of the decree of the Judge, Small Cause Court, Yeotmal.

Mr. M. R. Bobde, for the Applicant.

Messrs. M. V. Joshi and V. V. Chitale, for the Non-Applicant.

ORDER.—The defendant in execution of a decree against one Ramdheen attached certain beads, 19 tolas in weight, and had them put up for sale as gold beads, which the plaintiff purchased for Rs. 306 (three hundred and six). Immediately after the auction sale the plaintiff complained to the Court that the beads were of brass, though the sale proclamation described them as gold beads. The Court refused to set aside the sale. Hence the plaintiff has brought this suit to recover Rs. 306.

The plaintiff alleges that the defendant knew that the beads were brass. The lower Court, however, has found that there was no fraud, and that the defendant was misled by the description given in another attachment proceeding at the instance of a third party. But if the decree-holder had made the slightest inquiry, he would have found out the reason why there were no bidders on the previous occasion. However, I accept the lower Court's finding that there was no fraud or fraudulent misrepresentation. The lower Court is so far right that an action for deceit would not lie.

There was such misrepresentation, though

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not fraudulent, as would have entitled a buyer to rescind a contract and recover the money paid from the seller. But the sale was an execution sale and under Order XXI, rule 78, "No irregularity in publishing or conducting the sale of moveable property shall vitiate the sale; but any person sustaining any injury by reason of such irregularity at the hand of any other person may institute a suit against him for compensation."

The lower Court cites a number of rulings which show that in an execution sale of immoveable property there is no warranty of title. No such question arises in this case. The judgment-debtor had title to the beads, whether gold or brass.

The plaintiff relies upon section 113 of the Indian Contract Act to show that there was an implied warranty. That section lays down:—"Where goods are sold as being of a certain denomination, there is an implied warranty that they are such goods as are commercially known by that denomination." I do not think the section would apply to the case even if there had been a contract between the parties. Gold bead is not a commercial denomination like English Bar Gold, National Bank Bar Gold, or 22 Carat Gold.

I think an action for money had and received lies, as there has been a total failure of consideration. The specific goods were no doubt produced at the auction sale, but the purchaser had no opportunity of inspecting and testing the accuracy of the description given, whereas the decree-holder had ample means of ascertaining whether the articles were of gold or not. Fortunately for the plaintiff, there is no question of the quality of the gold here, it being admitted before me that the beads were of brass.

In Benjamin on Sale, fifth edition, is quoted the following passage from the judgment of Lord Abinger in *Chanter v. Hopkins* (1):—

"A good deal of confusion has arisen in many of the cases on this subject, from the unfortunate use made of the word 'warranty.' Two things have been con-

founded together. A warranty is an express or implied statement of something which a party undertakes shall be part of a contract, and though part of the contract, yet collateral to the express object of it. But in many of the cases, the circumstance of a party selling a particular thing by its proper description, has been called a warranty; and the breach of such a contract, a breach of warranty, but it would be better to distinguish such cases as a non-compliance with a contract which a party has engaged to fulfil; as, if a man offers to buy peas of another, and he sends him beans, he does not perform his contract; but that is not a warranty; there is no warranty that he should sell him peas; the contract is to sell peas, and if he sends him anything else in their stead, it is a non-performance of it."

The Editor adds:—

"There can be no doubt of the correctness of the distinction here pointed out. If the sale is of a described article, the tender of an article answering the description is a condition precedent to the purchaser's liability, and if this condition be not performed, the purchaser is entitled to reject the article, or if he has paid for it, to recover the price as money had and received for his use."

Every circumstance points to the buyer having contracted for the specific goods produced as described. To use the words of Blackburn, J., in *Kennedy v. Panama Mail Co.* (2) "there is a complete difference in substance between what was supposed to be and what was taken; so as to constitute a failure of consideration." The plaintiff's claim can, therefore, be supported as an action for money had and received to the plaintiff's use, and this would apply whether the sale was an execution sale or a sale by a private contract between the plaintiff and defendant, for as laid down by their Lordships of the Privy Council in *Dorab Ally Khan v. Executors of Khajah Mohecodeen* (3), the defendant is to be treated as a principal in the transaction, having applied to the Court for an order of

(1) (1838) 4 M. & W. 399; 1 H. & H. 377; 8 L. J. Ex. 14; 3 Jur. 58; 150 E. R. 1484; 51 R. R. 650.

(2) (1867) 2 Q. B. 580; 8 B. & S. 571; 36 L. J. Q. B. 260; 17 L. T. 62; 15 W. R. 1039.

(3) 3 C. 806; 2 C. L. R. 529; 3 Sath. P. C. J. 520; 5 I. A. 116; 3 Sar. P. C. J. 818.

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sale of these goods describing them as gold beads.

The result is that the application for revision succeeds and the plaintiff's claim is decreed in full with costs in both Courts. I fix Rs. 15 as Pleader's fee in this Court.

Revision accepted.

UDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 460 OF 1918.
July 31, 1919.

Present:—Pandit Kanhaiya Lal, J. C.
BHAGWAN BAKHSH SINGH AND
OTHERS—DEFENDANTS—APPELLANTS
versus

SANT PRASAD—PLAINTIFF—
RESPONDENT.

U. P. Land Revenue Act (III of 1901), s. 110—Time for filing objections, extension of—Jurisdiction of Revenue Court to direct party to get his title determined by Civil Court—Declaration of title, suit for—Khewat, entry in, effect of—Limitation—Adverse possession.

The date originally fixed by the partition officer for filing objections under section 110 of the U. P. Land Revenue Act may from time to time be extended either on account of non-service of the notices or at the request of any of the parties; and the jurisdiction of the Revenue Court to direct a party to get his title determined by the Civil Court within a certain period is not ousted so long as an objection is filed within such extended period and no order is passed by the partition officer determining the shares of the parties and directing the method in which the partition is to be effected. [p. 318, col. 1.]

Where a person continues in possession of his property in spite of a contrary entry appearing in the *khewat*, no question of limitation or adverse possession can arise in a suit filed by him for declaration of his title. [p. 318, col. 1.]

Appeal from the decree of the District Judge, Rae Bareilly, dated the 13th August 1918, confirming that of the Subordinate Judge, Rae Bareilly, dated the 2nd January 1918.

Babu Rajeshwari Prasad, for the Appellants.

The Hon'ble Pandit Gokaran Nath Misra and Pandit Harkaran Nath Misra, for the Respondent.

JUDGMENT.—The dispute in this case relates to a portion of the area of *patti shamilat* of the village Pindaria.

It appears that the village was divided into three *pattis* exclusive of the *shamilat* land. One of the *pattis* was called *Patti Kalidin* and contained 431 *bighas* 17 *biswas* 9 *biswansis* of land at the time of the first regular settlement, which was reduced to 365 *bighas* 18 *biswas* 13 *biswansis* at the last settlement. Another *patti* was called *Patti Gurbakhsh Singh*. It contained 157 *bighas* 18 *biswas* 13 *biswansis* of land at the first settlement, which was increased to 158 *bighas* 11 *biswas* 6 *biswansis* at the last settlement. The third *patti* was called *Patti Sheogulam Singh*. It contained 126 *bighas* 10 *biswas* 19 *biswansis* of land at the first settlement, which was enhanced to 137 *bighas* 6 *biswas* 6 *biswansis* at the last settlement. The *shamilat patti* comprised 569 *bighas* 15 *biswas* 11 *biswansis* of land appertaining to *Pattis* Gurbakhsh Singh and Sheogulam Singh at the first settlement. Its area was enlarged so as to comprise 624 *bighas* 6 *biswas* 7 *biswansis* at the last settlement.

No order of the Settlement Officer has been filed to explain how these alterations in the areas were effected. The explanation offered by the defendants-appellants is that by reason of the accrual of the *jethansi* right the owners of *Pattis* Gurbakhsh Singh and Sheogulam Singh became entitled to more land than they would otherwise have possessed and that the alterations in question were effected in recognition of that right; but the Courts below found that there was no proof that such a *jethansi* custom was in force or that if it was in force, any such right had accrued to the defendants-appellants. The plaintiff is the sole owner of *Patti Kalidin*. His ancestors held a mortgage of *Patti* Gurbakhsh Singh and *Patti* Sheogulam Singh from the other co sharers of the village. The defendants-appellants redeemed half of *Patti* Gurbakhsh Singh from the plaintiff by virtue of a decree dated the 10th December 1914. They applied for the partition of that half share, making the other co sharers of the village parties to the partition proceeding. The plaintiff disputed the right of the defendants-appellants to claim a partition of half the area mentioned by them. The partition officer referred him to the Civil Court. In the present suit he claimed

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a declaration that certain plots measuring 74 *bighas* 3 *biswas* 9 *biswansis* and forming part of *patti shamilat* really belonged to *Patti Kalidin* and were in his possession. The Courts below decreed the claim.

The first contention urged on behalf of the defendants-appellants is that the Court below had no jurisdiction to entertain the suit inasmuch as the reference made by the Revenue Court was *ultra vires*. It does not appear whether the objections of the plaintiff-respondent were filed on the date fixed by the proclamation issued by the partition officer or on a subsequent date. The date originally fixed may, as pointed out in *Amirul Rahman v. Dhan Kumar Das* (1) and *Sheoratan Singh v. Rohan Singh* (2), from time to time be extended either on account of non-service of the notices or at the request of any of the parties. The jurisdiction of the Revenue Court to direct a party to get his title determined within a certain period is not ousted so long as an objection is filed within such extended period and no order is passed by the partition officer determining the shares of the parties and directing the method in which the partition is to be effected. No such objection was, moreover, taken in the Court of first instance. The order referring the plaintiff-respondent to the Civil Court cannot, therefore, be regarded as illegal.

It is next argued that the claim was barred by limitation, inasmuch as it was not brought within 12 years from the date when the settlement *khewat* was verified by Chandidat, the agent of the plaintiff. But as the Courts below found that the plaintiff continued in possession of the disputed plots in spite of the entry made in the *khewat* excluding him from *Patti Kalidin*, no question of limitation or adverse possession can arise. As pointed out in *Jevanand v. Beni Madho* (3) and *Allah Jilai v. Umrao Husain* (4), every invasion of the title gives rise to a fresh cause of action so long as the person whose title is disputed remains in possession or his possession is not disturbed. It is open to a person in possession to treat a denial of his title by another with indifference, if that denial does

(1) 34 Ind. Cas. 689; 3 O. L. J. 201.

(2) 39 Ind. Cas. 715; 4 O. L. J. 115 note; 22 O. C. 139.

(3) 4 Ind. Cas. 159; 12 O. C. 320.

(4) 24 Ind. Cas. 535; 36 A. 492; 12 A. L. J. 810.

not interfere with his possession or enjoyment. If it does, he is bound to take some action to protect his title or possession within the time allowed by law. In this case there was no invasion beyond certain entries, the precise nature of which was not brought home to the plaintiff-respondent or his predecessor-in-interest till the application for partition was made. The possession of the plaintiff-respondent, too, was not disturbed. The suit is not, therefore, barred by time.

The finding of the Courts below that the alleged custom of *jethansi* was not established was based on a consideration of the evidence adduced including the *wajib-ul-arzes* filed, and there is no sufficient reason for questioning its propriety. The Courts below further found that the defendants-appellants did not establish that they belonged to the senior branch. The other co-sharers of the village are not necessary parties to the suit, because they were not interested in denying the title of the plaintiff-respondent.

The appeal fails and is accordingly dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.
CIVIL APPEAL No. 219 OF 1918

March 19, 1919.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Spencer.

T. S. DURAI SWAMI AIYAR AND OTHERS
—DEFENDANTS—APPELLANTS

versus

KRISHNIER — PLAINTIFF — RESPONDENT.

Limitation Act (IX of 1908), ss. 19, 20, 21—Acknowledgment or payment by manager of joint Hindu family, effect of—Agent, payment by, through servant, whether binds principal—Contract Act (IX of 1872), s. 62—Novation of contract—Collapse of substituted agreement, effect of, on original contract.

An acknowledgment of liability by the manager of a joint Hindu family will not, save under special circumstances, bind the other adult co-parceners who are also parties to the original contract. [p. 320, col. 2.] *Narayana Ayyar v. Venkataramana Ayyar*, 25 M. 220 at p. 234, followed.

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Where part of the consideration for a mortgage deed executed by the father and written and attested by the son is payment towards a prior promissory note executed by both father and son, and the mortgagee pays the amount to the obligee of the promissory note, the son must be deemed to have authorised the father to make the payment and time is extended against the son [p. 319, col. 2.]

Payment by an agent through his servant or friend is payment on behalf of the principal within the meaning of section 20 of the Limitation Act. [p. 320, col. 1.]

Indar Pal Singh v. Mewa Lal, 23 Ind. Cas. 429; 36 A. 264; 12 A. L. J. 374, *Saroda Charan Chuckerbutty v. Durga Ram Dey Sinha*, 5 Ind. Cas. 484 37 C. 46; 14 C. W. N. 741; 11 C. L. J. 484, distinguished.

In cases of novation, where the contemplated substituted contract fails, *prima facie* the parties cannot be taken to have intended that the liability of the debtor under the original contract would also cease. [p. 320, col. 2.]

Appeal against the decree of the District Court, Tinnevely, in Original Suit No. 9 of 1918 (Original Suit No. 45 of 1917, on the file of the Subordinate Judge's Court, Tinnevely).

FACTS appear from the judgment.

Mr. K. Bashyam Iyengar, for the Appellants.—The suit is barred as against the 2nd defendant, the son. The acknowledgment or payment by the father will not bind the son. The mortgage-deed was executed by the father and the son was no party to it.

Again the payment was not made by the 1st defendant. It was made by the mortgagee's man. It is not such a payment as comes within section 20 of the Limitation Act.

Lastly, the debt under the promissory note had become merged in the mortgage, Exhibit E, and the liability under the original contract has ceased.

Messrs. K. R. Guruswamy Aiyar, T. V. Muttukrishna Aiyar and A. Subrama Aiyar, for the Respondent.—The mortgage-deed was signed and attested by the son. One of the items of consideration was a payment towards the pro-note, Exhibit A. The son must be deemed to have authorised the father to make the payment. The case comes within the exception to the rule in section 21 of the Limitation Act and time is saved against the son.

The payment having been made by 1st defendant's agent binds the 1st defendant.

The substituted agreement, the mortgage, having become infructuous, there was no novation under section 62 of the Contract

Act. The liability under the original contract continues.

JUDGMENT.

ABDUR RAHIM, J.—The short point regarding limitation which is raised with reference to the liability of the 2nd defendant, the son of the 1st defendant, is this. Both the father and the son executed a promissory note, Exhibit A, in renewal of certain other promissory notes executed by the father alone. Exhibit A is dated 27th April 1914 and the suit is instituted on 10th September 1917. Limitation is sought to be saved by a payment of Rs. 740 made on 6th November 1914 towards principal and interest due on Exhibit A. The payment was actually made by one Khadir Moideen Taraganar on behalf of Aiyaswami Pillai. This Aiyaswami Pillai had obtained a mortgage on the family property of defendants Nos. 1 and 2 on the 28th October 1914 and one item of consideration for it was the sum of Rs. 740, which he undertook to pay to Krishnaiar, the person in whose favour Exhibit A was executed. The mortgage Exhibit M was written by the 2nd defendant, who also attested it. The respondent's contention is that the 2nd defendant must be taken to have authorised his father to make the payment of Rs. 740 towards principal and interest due under Exhibit A. We think that is the proper interpretation to be put on what took place. He must have known, having written the document, that Rs. 740 was to be paid towards Exhibit A, and it follows, in the absence of any evidence to the contrary, that he must have authorised his father to make this payment. If this view of the matter is correct, then it is brought within the exception to the rule laid down in section 21 of the Limitation Act as interpreted in *Narayana Ayyar v. Venkataramana Ayyar* (1). There the learned Judges of the Full Bench lay down: "But it seems clear that, when a creditor deals, not with the managing member only of a family, but with all the members of the undivided family as co-obligors and on that footing enters into a transaction, thereby avoiding any question as to whether the transaction was really for the benefit of the family, he cannot rely upon an acknowledgment of the liability, made by

(1) 25 M. 220 at 234.

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one of them, as an acknowledgment duly made on behalf of all the co-obligors, by reason only that the person acknowledging is in fact the managing member of the family consisting of the co-obligors." Then they add "it may well be, however, that, in particular cases, this circumstance, coupled with the conduct of the joint contractors, may warrant a conclusion that as a matter of fact he was duly authorised to make the acknowledgment on behalf of all." This ruling has been followed by the Calcutta High Court in *Baikunta Gui v. Lal Chand Samanta* (2). Our attention was drawn to an observation in *Indar Pal Singh v. Mewa Lal* (3) to the effect that an acknowledgment by the manager of a Hindu joint family, whether other members joined in it or not, would bind the other members also notwithstanding section 21 of the Limitation Act. But *Indar Pal Singh v. Mewa Lal*, (3) and *Saroda Charan Chuckerbutty v. Durga Ram Dey Sinha* (4), also relied on by the learned District Judge, are not cases within clause (2) of section 21 of the Limitation Act. We are, however, bound by the ruling of this Court in *Narayana Ayyar v. Venkataramana Ayyar* (1) and the present case comes within the exception enunciated therein.

Then it was argued that the payment not being made by the 1st defendant himself does not come within the meaning of section 20 of the Limitation Act. The section says that payment must be either by the debtor or by his agent duly authorized in that behalf, but we do not think that the Legislature could have intended that, if the agent made the payment through the hands of a servant or friend, that would not be payment by the agent on behalf of the principal within the meaning of section 20. We hold that the suit is not barred against the 2nd defendant so far as his liability under Exhibit A is concerned.

As regards his liability under Exhibit C that was not disputed before us.

The second point urged before us was that there had been a novation of the contract under Exhibits A and C or that these contracts became merged in a mortgage, Exhibit E, which was executed on 22nd

March 1915. But the mortgage proved infructuous, inasmuch as the plaintiff sought after execution to introduce some additional property as security. The contemplated mortgage having failed, I am clearly of opinion that there was no novation or merger. Section 62 of the Contract Act deals with the question of substitution of one contract for another and it is clear that this depends upon the intention of the parties. If the contemplated substituted security itself failed, *prima facie* the parties could not be taken to have intended that the liability of the debtor under the original contract would also cease. In this connection it is enough to refer to the rulings in *Abdul Kayam v. Bahadur Vithoba* (5) and *Kiam-ud-din v. Rajjo* (6) in support of this view.

The result is that the appeal is dismissed with costs.

Through some mistakes or oversight the decree of the lower Court does not provide for the payment of interest on the principal amount. The decree will, therefore, be amended by providing for interest at the rates mentioned in Exhibits A and C from the date of those documents to the date of decree and thereafter at 6 per cent. on the aggregate sum. The appellant will pay the costs of the memorandum of objections to the respondent.

SPENCER, J.—In my opinion the cases quoted by the learned District Judge, *Indar Pal Singh v. Mewa Lal* (3) and *Saroda Charan Chuckerbutty v. Durga Ram Dey Sinha* (4), are not sufficient authority for extending the prescribed period of limitation in consequence of an acknowledgment made by the manager of a Hindu joint family on behalf of the adult members of the family who are also parties to the original contract. Section 21, clause (2), of the Indian Limitation Act of 1908 makes it clear that an acknowledgment by one of several co-contractors will not render the other contractors liable in cases where they are capable of contracting for themselves. Clause (1) of this section includes guardians and managers of minors under the expression 'agent duly authorized in this behalf' in

(2) 26 Ind. Cas. 511.

(3) 23 Ind. Cas. 429; 36 A. 264; 12 A. L. J. 374.

(4) 5 Ind. Cas. 484; 37 C. 461; 14 C. W. N. 741; 11 C. L. J. 484.

(5) 13 Ind. Cas. 858; 14 Bom. L. R. 26.

(6) 11 A. 13; A. W. N. (1888) 280.

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sections 19 and 20. *Saroja Chaman Chuckerbutty v. Durga Ram Dey Sinha* (4) was a case of a manager of a Hindu family making a payment of interest on behalf of himself and his minor brothers, and minors being persons under disability from contracting, the case fell naturally under section 21, clause (1). In *Indarpal Singh v. Mewa Lal* (3) it is not clear whether the defendants, on behalf of whom the acknowledgment was made, were minors or adults. The acknowledgment was contained in a written statement filed in a prior suit. The learned Judges simply observed, without discussing the point, that the acknowledgment having been made by the manager of the joint Hindu family was, in their opinion, binding on the other members. This case is, therefore, hardly an authority for the proposition that a manager can bind adult members of a joint Hindu family by his acknowledgment without being duly authorised to make an acknowledgment on their behalf. The decision in *Narayana Ayyar v. Venkataramana Ayyar* (1) dealt with the case of a family of co-obligors on behalf of whom the managing member made an acknowledgment, and the learned Judges who heard the appeal observed that there was no authority for saying that the manager of an undivided Hindu family could, by his acknowledgment, keep a debt alive against other members of the family of which he happened to be manager, the debt having originally been contracted by all the members jointly. But they qualified this expression of opinion by saying that in particular cases the conduct of the joint contractors, coupled with the managing member's acknowledgment might warrant the conclusion that the manager was duly authorised to make the acknowledgment on behalf of all. That was a case under the old Limitation Act of 1877, in which there was no provision like section 21, clause (1), of the Act of 1908. But the principle of treating the managers of joint Hindu families as agents for the purpose of acknowledging valid debts on behalf of members of such families was recognised so long ago as *Ohinnya Nayudu v. Gurunatham Chetti* (7), and the subsequent legislation simply embodies that principle in clause (1) of

section 21 subject to the qualification contained in clause (2) which already existed in the former Act. The law has not altered since *Narayana Aiyar v. Venkataramana Ayyar* (1) was decided.

Applying it to the facts of the present case, I agree with my learned brother that the conduct of the 2nd defendant, Subramania Aiyar, in writing and attesting Exhibit M was conduct from which the Court might well infer that he acquiesced in the acknowledgment made by his father Duraiswami Aiyar in that document of their liability under the two suit promissory notes (Exhibits A and C), which were signed by both of them.

On the other questions argued before us I agree with my learned brother and I have nothing to add.

M. C. P.

'Appeal dismissed.

MAHARAJA'S COURT JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 67 OF 1918.

September 4, 1919.

Present:—Mr. Stuart, J. C.

Khan Bahadur Siyyad TAWAK.

KUL HUSAIN—DEFENDANT NO. 3—APPELLANT

VERSUS

AJODHYA BANK, LTD., FYZABAD
— PLAINTIFFMRS. E. G. F. PAS HAUD—DEFENDANT
NO. 2—RESPONDENTS.

Succession Act (X of 1865), s. 269—Executor, power of, to mortgage assets—Will restricting power, effect of—Mortgage, renewal of, validity of.

An executor who has obtained Probate has absolute authority under section 269 of the Succession Act to mortgage the testator's assets, and his authority is in no way fettered by reason of a stipulation in the Will that he is not to sell or mortgage the property, and he would be acting within that authority if he renewed a mortgage effected by the testator to satisfy the debt created by that mortgage. [p. 322, col. 2.]

Appeal from the decree of the District Judge, Fyzabad, dated the 26th November 1917, reversing that of the Munsif, Fyzabad, dated the 20th June 1917.

Mr. Mohammad Wasim, for the Appellant.

(7) 5 M. 169.

TWAKKUL HUSSAIN v. AJODHYA BANK, LTD., FYZABAD.

Pandit Jagmohan Nath Chak, for Respondent No. 1.

Babu Jiban Krishna Banerjee, for Respondent No. 3.

JUDGMENT.—This appeal questions the validity of a decree granted to the Ajodhya Bank, Ltd., in the following circumstances:—

C. S. Paschaud owned a shop and residential quarters in Fyzabad. He mortgaged the same to the Ajodhya Bank on the 15th April 1895. He made a Will in 1903, under the terms of which his brother G. F. Paschaud was declared his executor and his brother's daughter Emma, now Mrs. Nixon, was made sole legatee. Under this Will Mrs. Nixon inherited the whole property. There was a clause in the Will to the effect that the executor had no authority to sell or mortgage the property. C. S. Paschaud died in the same year that he made the Will. G. F. Paschaud took out Probate under the Indian Succession Act (X of 1865) which had application, and also under the Probate and Administration Act (V of 1881) which had no application. He took out Probate on 19th March 1904. On the 6th April 1907, just before the period during which the Bank could have instituted a suit on the basis of the mortgage of 15th April 1895 expired, G. F. Paschaud executed a mortgage of the same property in favour of the Ajodhya Bank to pay off the amount due on the former mortgage. In 1914 Mrs. Nixon sold the shop and the residential quarters to Khan Bahadur Saiyad Tawakkul Husain. Subsequently the Bank sued on the deed of the 6th April 1907 in the Court of the Munsif of Fyzabad. The learned Munsif dismissed the suit. The learned District Judge decreed it. Khan Bahadur Saiyad Tawakkul Husain appeals. The decree is for a small sum of Rs. 334 13 6 to be recovered by sale of the mortgaged property. The mortgage was for a considerably greater sum. The amount due was reduced by certain payments. Some of the payments at any rate, if not all, were made by G. F. Paschaud.

The power of an executor to mortgage the testator's assets has been recognised under the English law by an unbroken series of decisions, and this principle of the English law has been introduced into sec-

tion 269, Act X of 1865, which is the Act applicable to European Christians. It is true that the authority of an executor in this respect is qualified under the provisions of Act V of 1881. But that Act does not govern the present case. The question then arises whether the stipulation in the Will, that the executor was not to sell or mortgage the property, can be of effect in view of the circumstances that the law gives the executor absolute power to mortgage the testator's assets. I am of opinion that this attempt to fetter the authority of the executor can be of no avail.

The next point to consider is whether G. F. Paschaud was, at the time that he executed the mortgage, administering the estate. There can be no doubt as to the fact that at the time that the mortgage of 1907 was executed G. F. Paschaud was administering the estate. No other conclusion is possible. He had to wind up the estate completely. I am not in a position to know whether he had or had not filed the necessary accounts which the Act requires an executor to file. But whether he had done so or not, he clearly had authority to satisfy the debt due from the testator's estate created by the execution of the mortgage of 1895 by renewing that mortgage. He did nothing more. On these two points alone the appeal would fail. But even if the Bank's case had not been as strong as it is, if for example G. F. Paschaud had not had authority to renew the mortgage, I consider that the Bank would nevertheless succeed on the ground that Mrs. Nixon, having taken advantage of the satisfaction of the debt due from her uncle's estate by the renewal of 1907, was legally estopped from questioning the validity of the mortgage. This estoppel would also bind the present appellant, who on the evidence was aware at the time that he purchased the property that the mortgage of 1907 was in existence.

For the above reasons I dismiss this appeal with costs.

Appeal dismissed.

NILKANTH v. MADHORAQ.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

[FIRST CIVIL APPEAL No. 11 OF 1917.

August 25, 1917.

Present:—Mr. Batten, A. J. C.

NILKANTH AND OTHERS—APPELLANTS
versus

MADHORAQ AND OTHERS—RESPONDENTS.

*Limitation Act (IX of 1908), Sch. I, Art. 181—
Mortgage, suit on—Preliminary decree—Appeal, con-
firmation of decree in—Final decree, application for
—Limitation, commencement of.*

Where a decree of a lower Court is affirmed by the Appellate Court, the lower Court's decree is wiped out by being merged in the decree of the Appellate Court, which takes its place to all intents and purposes, and both the decrees cannot exist simultaneously. [p. 323, col. 2.]

Where an appeal is preferred against a preliminary decree in a mortgage suit and that decree is affirmed, the right to present an application to make the decree final accrues on the day the appellate decree is passed. [p. 324, col. 1.]

Appeal against the decree of the Additional District Judge, Wardha, in Civil Suit No. 183 of 1911, dated the 17th July 1916.

Mr. M. B. Kinkhede, for the Appellants.

Sir Bepin Krishna Bose and Mr. M. R. Indurkar, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for sale on a mortgage. The preliminary decree of the first Court was passed on 23rd February 1912 and the date fixed for re-payment was 23rd August 1912. The mortgagor appealed to this Court and the Judicial Commissioner dismissed his appeal on 17th June 1913 in First Appeal No. 35 of 1912 without fixing a fresh date for payment. Meanwhile on 8th February 1913 the decree-holders purchased a portion of the mortgaged property. This Court in First Appeal No. 75 of 1914, disposed of on 28th January 1915, decided that the mortgaged property purchased by the decree-holders was as subject to the mortgage as the rest of the property, and that there must be an apportionment of the mortgage money due by the mortgagor in proportion to the value of the property still held by him, and that such money could be recovered by the sale of the property still with the mortgagor. On 6th October 1915 the decree holders made an application for the preliminary decree to be made final and the whole history of the case was set out in the application. The Additional District Judge has now made a

final decree in which the sum of Rs. 4,386 6 9 is given as the sum to be recovered by sale of the property still with the mortgagor. The mortgagor appeals to this Court. In the first Court the mortgagor pleaded that the application to make the decree final was barred by time, but this plea was rejected in an order dated 23rd December 1915. The 1st ground of appeal is that the lower Court is wrong in holding the application to be in time. The learned Advocate for the respondent does not support the grounds on which the lower Court held the application to be in time, but he urges that the decree which had to be made final was not the original preliminary decree of the lower Court dated 23rd February 1912, but the appellate decree of this Court dated 17th June 1913. He admits that Article 181 of the Limitation Schedule is applicable and says that the time began to run from the date of this Court's decree. The right to apply to make the decree final could not, it is argued, accrue until this Court affirmed by its decree the preliminary decree of the first Court. There is an unanimous course of decisions to the effect that where a decree of a lower Court is affirmed by the Appellate Court, the lower Court's decree is dead and gone by, being merged in the decree of the superior Court, which takes its place to all intents and purposes, and both the decrees cannot exist simultaneously. It is sufficient to mention the cases reported as *Chandra Kanta v. Lakshman Chandra* (1) and *Muhammad Sulaiman Khan v. Muhammad Yar Khan* (2). The principle was recognised by their Lordships of the Privy Council in *Brij Narain v. Tejbal Bikram Bahadur* (3) with reference to a preliminary decree in a mortgage suit. None of the cases cited by the learned Advocate for the respondents is one of making final a preliminary decree. But I see no reason differentiating a preliminary decree in a mortgage suit from other decrees to which the principle has been applied. The learned Pleader for the appellant cites a case in his favour which is exactly to the point, *Madho Ram v. Nihal Singh* (4), in which it

(1) 36 Ind. Cas. 460; 21 C. W. N. 430; 24 C. L. J. 517.

(2) 11 A. 267 (F. B.).

(3) 6 Ind. Cas. 669; 32 A. 295; 14 C. W. N. 667; 7 A. L. J. 50; 11 C. L. J. 530; 12 Bom. L. R. 444; 8 M. L. T. 57; 20 M. L. J. 587; (1910) M. W. N. 392; 37 I. A. 70 P. C.)

(4) 30 Ind. Cas. 494; 38 A. 21; 13 A. L. J. 985.

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was held that the right to make an application for making a preliminary decree final accrues on the day when the time limited by the preliminary decree expires, even when there has been a decree on appeal, unless such time has been extended by the Court of appeal. With due respect I am unable to hold that the law has been correctly laid down in the above case. The learned Judges give no reason for their decision except a reference to another case reported as *Gaya Din v. Jhuman Lal* (5), which they say is analogous. The case they rely on however, appears to me to have no bearing whatever on an application of the present nature. The learned Judges do not refer to the question of the decree of the first Court being merged in the decree of the Appellate Court. It may be the case that there is nothing to prevent the holder of a preliminary decree for sale applying to have the decree made final pending the disposal of an appeal, and if the appeal is dismissed, it may be that the proceedings on his application might rightly be continued. But they would be so continued as having reference to the decree of the Appellate Court. The application is no doubt barred by time considered as an application based on the preliminary decree of the first Court, but when it was made, the decree of this Court had superseded the original decree. At the date of the application the only decree which could be made final was the decree of this Court, and time cannot be said to have begun to run before that decree was passed. I, therefore, hold that the application to make the decree final was not barred by time.

I now come to the merits of the case. The 2nd ground of the appeal is to the effect that the burden of proof that the value of the property held by the mortgagor bore a higher proportion to the value of the property held by the decree-holders than was admitted by the mortgagor, lay on the decree-holders. This is undoubtedly the case; but the burden was so laid, and the case has been decided on the evidence brought by both sides and not on any consideration of burden of proof. There is no force in this ground of appeal. The 3rd ground of appeal urges that while

the decree-holders stated that the value of the property held by the mortgagor was Rs. 3,500, the Court has held that the property so held is worth Rs. 9,005: thus a value has been found for the mortgagor's property in excess of that alleged by the decree-holders. It is not urged that the decree-holders are estopped, but it is argued that the evidence proving the property to be worth more than that pleaded by the decree-holders is worthless and should be disregarded. This argument, however, is of no value in the circumstances of the case. The decree-holders pleaded that the total value of all the property was Rs. 4,200, held by the decree holders and the judgment-debtor respectively in the proportion of 1 to 5. The judgment-debtor pleaded that the total value of the whole property was Rs. 9,005, held respectively in the proportions of 7 to 2. The Court has held that the total value of the property is Rs. 14,005, of which property worth Rs. 5,000 is held by the decree-holders and property worth Rs. 9,005 is held by the judgment debtor, the proportionate values being thus 5 and 9. The estimate of the total value of the property made by both parties was very wide of the mark. There is no dispute in respect of what property is held by the parties. The sole dispute is as to the relative values of the portions held by each. The Court had to find what was the total value of the property, and having found that, was bound to apportion the value between the two sides irrespective of what the parties pleaded. He could not possibly on any pleadings of the parties hold that the value of the two portions was less than the total value. Moreover, the pleas of the parties refer rather to the proportion than to the actual values of the properties. There is, therefore, no force in this ground of appeal. The grounds Nos 4 to 7 call in question the valuation made by the lower Court. It is first urged that the property with the decree-holders should have been valued at Rs. 7,000 instead of Rs. 5,000. The only evidence on the subject is that of the appellant's first two witnesses. This evidence is perfectly worthless and the witnesses give no ground for their opinions. The Judge has relied on admissions of the witnesses for the decree-holders to the effect that land is worth about Rs. 50 an acre, and has adopted that rate approximately; there

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are no grounds whatever for taking a different view. As regards the property with the appellants, the finding of the lower Court is challenged only in respect of the value of 4 annas share of Ramnagar. The lower Court, relying on the evidence of appellant's witnesses Nos. 11 and 10, has found the value to be Rs. 6,500. The witness No. 11 sold a 10-anna $\frac{1}{2}$ pie share of the village together with 22 $\frac{1}{2}$ acres of home farm land for Rs. 2,000. He alleges that Rs. 500 was the value of the fields and Rs. 1,500 was the value of the share. The Judge has accepted this statement without any question. It appears to me, however, that in the absence of any circumstances to corroborate the witness, the value of the fields should be taken to be the Rs. 50 an acre adopted by the Judge for other fields in the village, and the value of the Malguzari share should be calculated accordingly, and would be Rs. 875 out of Rs. 1,500. On the same basis of calculation the defendant's 4 annas share would be worth Rs. 4,000. If we treat the evidence of the 10th witness in the same way, including his statement that the fields were worth Rs. 1,000, the value of the defendant's share would be Rs. 6,000. It seems fair to take an average between the two, and I, therefore, adopt Rs. 5,000 as the value of the Malguzari share instead of Rs. 6,500 the value adopted by the Judge. The total value of the defendant's share is, therefore, Rs. 1,500, less than that adopted by the Judge. The result is that the total value of the decree holders' share is Rs. 5,000 and that of the defendant's share is Rs. 7,505, in the proportion of 2 and 3.

The 8th ground of appeal has no meaning, since the figure Rs. 5,377 is an imaginary figure given by the plaintiff and is not referred to by the Judge at all in his calculations. The 9th ground of appeal is explained as meaning that the lower Court has wrongly charged compound interest since the date of the suit. This error will be avoided in framing the decree of this Court.

The result is as follows. The figure Rs. 4,386.6.6 in the decree of the lower Court should have been Rs. 3,969; the appellant has, therefore, succeeded to the extent of Rs. 417 and the costs in this Court will be calculated accordingly. The

amount, calculated upto the present day, due by the appellant is Rs. 4,161 and this figure will be entered in the decree as the amount due this day from the defendant. Costs, as already observed, will be in proportion in this Court, the appellant having succeeded in respect of Rs. 417 and failed as regards the rest of the amount in respect of which he filed his appeal. Costs in the lower Court will be borne by the parties incurring them, as already directed by the lower Court. The amount due by the appellant as costs will be added to the above amount and future interest on the whole amount will be awarded at 8 annas per cent. per mensem until realisation.

Order accordingly.

ODUH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 34 OF 1918.
August 5, 1919.

Present:—Mr. Lyle, A. J. C., and
Mr. Ashworth, A. J. C.

Thakur GANDHARP SINGH AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

Thakur NIRMAL SINGH AND OTHERS—
DEFENDANTS—RESPONDENTS.

Partition suit—Decree, form of—Share of each party, extent of, definition of—Decree, whether binding on defendants inter se—Registration Act (XVI of 1908), s. 17 (2) (vi)—Compromise—Award based on compromise, whether requires registration—Hindu Law—Joint family—Compromise entered into by father to avoid dispute, whether binding on sons—Family arrangement.

Where in a suit for partition of a joint property the decree declares the shares of every one of the parties interested in the property, the declaration as to the extent of the shares of the defendants is as binding between the co-defendants themselves as between the defendants and the plaintiffs [p. 328, col. 1.]

Where an award given by arbitrators is in accordance with a compromise made by the parties to a suit and not going beyond the scope of the suit, and the award is made a decree of Court, registration of the award is not necessary under section 17 (2) (vi) of the Registration Act. [p. 328, col. 1; p. 329, col. 1.]

A compromise, which is entered into by a Hindu father with regard to ancestral property for the purpose of avoiding an existing or even possible litigation and which is in the nature of a family settle-

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ment, is in the absence of fraud, collusion, undue influence or other like reason binding on his sons. [p. 329, cols. 1 & 2.]

Appeal from the decree of the Additional Subordinate Judge, Hardoi, dated the 5th March 1918.

Messrs. N. N. Sinha and N. P. Singh, for the Appellants.

Dr. S. N. Sen and Babu Ishri Frasad, for Appellant No. 1.

Mr. A. P. Sen, the Hon'ble Pandit Gokaran Nath Misra, Babu Mohun Lal, R. B., Mir Amjad Ali, K. B., and Mr. H. K. Ghosh, for the Respondents.

JUDGMENT.—Khan Sah, the ancestor of the parties in this case, had three sons Umrao Singh, Bachan Singh and Ujagar Singh. Umrao Singh had two sons both of whom died childless. Bachan Singh had three sons Lalta Bakhsh, Jiwan Singh, and Bhuja Singh, and Ujagar Singh had one son Ganga Bakhsh Singh. Lalta Bakhsh had two sons Nirmal Singh defendant No. 1 and Anand Bakhsh who was defendant No. 5. Ganga Bakhsh, the son of Ujagar Singh, had no children but he adopted Anand Bakhsh, who is the father of the three plaintiffs in the present suit. The defendants in the suit are Nirmal Singh and his sons and other descendants of Bachan Singh.

The suit was brought for a declaration that the plaintiffs were owners of half of certain property mentioned in list A attached to their plaint. The plaintiffs alleged that all the property entered in that list was the joint ancestral property of the parties and that, therefore, they with their father Anand Bakhsh were entitled to a half share in it. They alleged that they with the other members of the family were in possession of their share in the property and on this ground a suit for a declaration only was brought. The cause of action for the suit is given in paragraphs 4, 5 and 6 of the plaint. In these paragraphs it is alleged that Hardeo Bakhsh Singh, a grandson of Bhuja Singh, brought a suit on the 30th of March 1914 against the other members of the family for partition of the family property, that the plaintiffs were no parties to that suit and that certain properties which are now alleged to be joint family properties were not included in that suit.

It was further stated that the parties to that suit entered into a compromise under which it was held that Anand Bakhsh was entitled to one-half of the property while Nirmal Singh defendant No. 1 in the present suit was entitled to a one-sixth share only; but owing to influence exercised on Anand Bakhsh by Nirmal Singh defendant No. 1, it was also entered in the compromise that Anand Bakhsh and Nirmal Singh should pool their shares and that the total should be divided equally between them, that is, that instead of getting one-half and one sixth respectively they should each get one-third as their share. This compromise was effected on the 4th of October 1914, and the plaintiffs give that date as the date of the accrual of the cause of action for the present suit. They allege that Anand Bakhsh had no power to enter into such an agreement and that the agreement has no effect as against them not only because they were not parties to the suit but because the agreement, even if obtained without undue influence, was unregistered and without consideration.

The suit was defended on various grounds. The defendant No. 1 Nirmal Singh alleged that the property in suit was included in the Raigain Taluqa and that according to a custom obtaining in the family it was an impartible estate and always held by a single owner, and that he (Nirmal Singh) was the present holder, that none of the other members of the family was entitled to a share in it but merely to maintenance; nor was any one entitled to claim partition of the estate. It was further pleaded that the plaintiffs and the defendant No. 1 were not members of a joint family, that the property in suit was not joint or ancestral, that the plaintiffs were not in possession of any share either in the immoveable or moveable property with regard to which a declaration was claimed and that, therefore, the suit was barred under section 42 of the Specific Relief Act. It was also pleaded that Anand Bakhsh was not the adopted son of Ganga Bakhsh, but the lower Court found that he had been adopted by Ganga Bakhsh and the learned Advocate for the defendants-respondents has not seriously attacked that finding. It was

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further alleged that Nirmal Singh defendant No. 1 owing to physical infirmities was under the influence of Anand Bakhsh who had been entrusted with the management of his affairs and that Anand Bakhsh, taking advantage of his position, entered into the compromise in Hardeo Bakhsh's suit for a division of the Raigain estate and that the compromise was agreed to by Nirmal Singh, defendant No. 1, while suffering from fever and acting under the influence of Anand Bakhsh without understanding its terms. It was, however, further pleaded that as the compromise had been entered into by Anand Bakhsh, the plaintiffs were bound by it and in any case it could not be set aside in part only.

The learned Subordinate Judge fixed an issue No. 7:—

"Whether the plaintiffs are in possession of their share of the property in suit jointly with other co-sharers and is, therefore, the suit as laid maintainable?"

Two other issues were framed with regard to the form of the suit, namely issues Nos. 18 and 19:—

"Whether the plaintiffs are entitled to a declaratory decree sued for and can their share be determined in this suit as brought?"

"Should not the Court exercise its discretion in granting a declaratory decree under the circumstances of the case?"

The learned Subordinate Judge did not come to a separate finding on issue No. 7 but on issues Nos. 18 and 19 he has found, after somewhat uncertain arguments, that the plaintiffs were entitled to maintain a suit for a declaratory decree and, had the compromise in Hardeo Bakhsh's suit not been binding on the plaintiffs, the Court should have granted such a decree.

It is clear from a perusal of the plaint that the only cause of action mentioned by the plaintiffs is the agreement arrived at in Hardeo Bakhsh's suit. In the present suit admittedly a number of properties which were not included in Hardeo Bakhsh's suit have been entered in list A attached to the plaint. So far as such properties are concerned, the plaint discloses no cause of action and the learned Pleader for the appellants has to admit that he cannot support the claim for a declaration

with regard to any property which was not included in the suit brought by Hardeo Bakhsh. It is also clear that so far as the moveable property included in Hardeo Bakhsh's suit is concerned, the plaintiffs are not entitled to maintain their suit for a declaration. Under the compromise in Hardeo Bakhsh's suit the different parties were to remain in possession of the moveable property mentioned in that suit which they respectively held and no party was to have any claim against any other party with regard to any moveable property in his hands. It is clear, therefore, that from the date of the decision of that suit, that is the 16th of February 1915, the different parties have been in separate possession of the moveable property which was then in their hands, and there is no evidence whatsoever that the appellants at the time of the institution of the present suit or indeed at any time were in possession of any portion of this moveable property. The suit, therefore, for a mere declaration with regard to such moveable property is barred under the provisions of section 42 of the Specific Relief Act.

In the view which we take of the case it is unnecessary to consider in any great detail the accuracy of the findings at which the learned Subordinate Judge has arrived on most of the issues which he framed. We may, however, remark that we are not disposed to attach as much value as the learned Subordinate Judge appears to have attached to the entries in the various *wajib-ul-arzes*, *khewats* and assessment statements as proof of the existence of the alleged custom of *gaddinashini*; nor do we think that the admission by Anand Bakhsh, the father of the plaintiffs, in the written statement which he filed jointly with Nirmal Singh in Hardeo Bakhsh's suit can be taken as any evidence against the plaintiffs of the existence of the alleged custom. The plaintiffs are attacking the whole conduct of their father Anand Bakhsh in the proceedings in Hardeo Bakhsh's suit and clearly any admission made by Anand Bakhsh in those proceedings which would be against their interests could not be used as evidence against them. Taking the most favourable view of the case for the plaintiffs-appellants, namely, that there was no custom of *gaddinashini* in the

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family, that Anand Bakhsh was the adopted son of Ganga Bakhsh and that the property was ancestral joint family property in which Anand Bakhsh and the appellants would have been entitled to a half share on partition, we are of opinion that in all the circumstances of the case the appellants are bound by the compromise which was entered into between Anand Bakhsh and the other parties to Hardeo Bakhsh's suit. That compromise was entered into between members of the family with regard to property alleged to be joint family property and was, in our opinion, in the nature of a family settlement. It has been urged on behalf of the appellants that for the purposes of the suit, which was a suit for partition of the family property, all that was necessary was to declare that separate share to which each of the parties to the suit was entitled, as was done in the first portion of the decree and that the latter portion of the decree, in which it is stated that Nirmal Singh and Anand Bakhsh agreed to join their shares and divide them equally between themselves, is an agreement altogether outside the scope of the suit. With this view we cannot agree. The decree must be read as a whole. The suit being one for partition, it was necessary to determine and make a declaration of the shares of every one of the parties interested in the property (see rule 18 of Order XX of the Code of Civil Procedure). It would not have been sufficient for the purposes of the suit to have declared Hardeo Bakhsh entitled to a one twelfth share of the property. The shares of all the other persons interested in the property had also to be determined, and the declaration as to the extent of those shares is as binding between the co-defendants themselves as between the defendants and the plaintiffs. *Parsotam Rao Tantia v. Rudha Bai* (1). These shares were settled by compromise and the decree was passed in terms of the compromise. Under that compromise the shares to which, according to the genealogical tree, each one would *prima facie* have been entitled were set out, and it was agreed that while the shares of the other parties to the suit should be in accordance with the *shajra*, the shares of

Nirmal Singh and Anand Bakhsh on partition should be each one third though according to the *shajra*, Nirmal Singh would have received only one sixth and Anand Bakhsh would have received one-half. It is clear from the evidence of the arbitrator that Nirmal Singh would not have consented to the compromise unless he had been given an equal share with Anand Bakhsh. The joint written statement filed by Nirmal Singh and Anand Bakhsh shows that the whole property was held by Lalta Bakhsh by right of *gaddinashini* and later on was divided half and half by a mutual pact between Lalta Bakhsh and Anand Bakhsh; and Nirmal Singh was certainly not prepared to allow Hardeo Bakhsh and the other members of the family to get their shares out of the half claimed by him and leave Anand Bakhsh in undisputed possession and ownership of the other half. It may also be noted that Hardeo Bakhsh had included a large amount of moveable property in his suit for partition and that not only Nirmal Singh and Anand Bakhsh but all the parties to the compromise agreed that the moveable property should not be divided in accordance with the *shajra*, but that each party should continue in possession of whatever moveable property he held and that no party should have any claim against any other party with regard to the moveable property. This condition with regard to the moveable property finds place both in the compromise and the decree after the condition with regard to the equal division of two-thirds of the immovable property between Nirmal Singh and Anand Bakhsh and is an essential condition of the compromise, without which Nirmal Singh at least would never have been willing to agree to the compromise as the greater portion of the moveable property was in his hands.

These considerations also dispose of the plea taken by the appellants that the compromise having gone beyond the scope of the suit is bad for want of registration. The compromise, in our opinion, has in no way gone beyond the scope of the suit. The award of the arbitrator was given in accordance with the compromise and the award was made a decree of Court, and under clause (vi) of sub-section 2 of section 17 of the Registration Act, registration was

(1) 6 Ind. Cas. 692; 32 A. 469; 7 A. L. J. 451.

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not necessary. *Franal Anni v. Lakshmi Anni* (2) and *Oharu Chandra Mitra v. Sambhu Nath Pandey* (3).

Looking as we do upon this compromise which was embodied in the decree as in the nature of a family settlement, we are of opinion that although the plaintiffs-appellants were no parties to the suit, yet they are bound by the compromise entered into by their father Anand Bakhsh. It is clear that although Nirmal Singh and Anand Bakhsh filed a joint written statement in the suit, yet the decision of the suit and the determination of the shares of every one of the parties interested in the property involved a conflict of claims between Nirmal Singh and Anand Bakhsh as well as between them and the plaintiff Hardeo Bakhsh. We have already referred to the evidence of the arbitrator, which shows that there was a discussion as to the shares which should be allotted to Nirmal Singh and Anand Bakhsh, and we have stated that Nirmal Singh would never have agreed to the compromise unless he had been allowed a share equal to that given to Anand Bakhsh and also been allowed to retain the moveable property in his hands. In their plaint the plaintiffs alleged that Anand Bakhsh had been induced by undue influence to accept the compromise, but this plea was abandoned by the learned Pleader for the appellants in arguing the appeal. It has, however, been urged that presuming that the property was ancestral in which the plaintiffs had an interest, their father Anand Bakhsh was not justified in entering into a compromise so obviously opposed to their interest. It may be observed that this is not a case of a sale or a mortgage of ancestral property made by a Hindu father, where his interest may be opposed to the interest of his sons. In the present case the interests of Anand Bakhsh and the plaintiffs were identical and there is no reason to suppose that Anand Bakhsh would deliberately enter into a compromise with the knowledge that it was detrimental to his own interest. If Anand Bakhsh had good reason to suppose that his title to

a half share of the property was doubtful (and we shall show that he had ample reasons for doing so),* we are of opinion that in the absence of fraud or undue influence or other like reason, none of which has been shown in the present case, the compromise entered into by him is binding upon his sons, the plaintiffs-appellants. Even though he might have been mistaken as to his legal position and acting under that mistake given up the property to which he was entitled, that would be no ground for holding that the compromise was not binding on his sons. In Kerr on Fraud at page 335 the following proposition of law has been stated and this passage has been quoted with approval in the case of *Ram Nirunjun Singh v. Prayag Singh* (4) —

"Mistake in law is not a ground for setting aside a compromise, if the parties to the transaction were in difficulty and doubt and wished to put an end to disputes and to terminate or avoid litigation. If one or more parties having, or supposing they have, claims upon a given subject-matter, or claims against each other, agree to compromise these claims and the knowledge, or means of knowledge, of each of them with respect to the mode in which, and the circumstances under which, his claim arises, stand upon an equal footing, and there is an absence of fraud or misrepresentation, the transaction is binding, although the conclusion at which the parties may have arrived is not that which a Court of justice would have arrived at had its decision been sought. The real consideration which each party receives under a compromise being, not the sacrifice of the right but the settlement of the dispute, and the abandonment of the claim, it is no objection to the validity of the transaction that the right was really in one of the parties only and that the others had no right whatever. If, for instance, two parties claim adversely to each other the inheritance of a deceased person, and, in order to avoid litigation agree to divide the inheritance, it is no ground for setting aside the agreement that only one was heir, and that the other gave up the right which he really possessed. The fact that the one may have had no claim is immaterial, if he was

(2) 22 M 508 (P. C.); 1 Bom. L. R. 294; 26 I. A. 101; 3 C. W. N. 485; 9 M. L. J. 147; 7 Sar. P. C. J. 516.

(3) 46 Ind. Cas. 358; 3 P. L. J. 255; 4 P. L. W. 393; (1918) Pat. 193 (F. B.).

(4) 8 C. 138; 10 C. L. R. 66.

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honestly mistaken as to his claim. It is enough if, at the time of the compromise, he may have believed he had a claim and that the parties have, by the transaction, avoided the necessity of going to law. To render valid the compromise of a litigation, it is not even necessary that the question in dispute should really be doubtful, if the parties *bona fide* consider it to be so. It is enough to render a compromise valid, that there is a question to be decided between them. A compromise of doubtful rights will not be set aside on any other ground than fraud.

"The principles which apply to the case of ordinary compromise between strangers, do not equally apply to the case of compromises in the nature of family arrangements. Family arrangements are governed by special equity peculiar to themselves, and will be enforced if honestly made, although they have not been meant as a compromise, but have proceeded from an error of all parties, originating in mistake or ignorance of fact as to what their rights actually are, or of the points on which their rights actually depend."

In the case of *Stapilton v. Stapilton* (5) it was held that the compromise of a doubtful right is a sufficient foundation of an agreement. In the case of *Pitam Singh v. Ujagar Singh* (6), which is in many respects very similar to the case before us, it was held that a compromise entered into by a father with regard to ancestral property for the purpose of avoiding litigation was in the absence of fraud or collusion binding on his sons.

Even if there were no actual dispute at the time of Hardeo Bakhsh's suit between Nirmal Singh and Anand Bakhsh with regard to their respective interests in the property, we are of opinion that if Anand Bakhsh had good reason for believing that such a dispute might arise and that his title to a half share in the estate was not free from doubt, he was justified in entering into the compromise and the plaintiffs-appellants are bound by its terms. We have already stated that the compromise in Hardeo Bakhsh's suit is in the nature of a family settlement. In order to validate a family settlement it is not necessary that there should

(5) (1739) 26 E. R. 1; 1 Wh. & T. L. C. (7th Ed.) 223; 1 Atk. 2.

(6) 1 A. 651.

be an existing dispute. It is sufficient that there should be the possibility of a future dispute which might result in litigation, and the avoidance of possible litigation and the consequent preservation of the family property is sufficient consideration for a family settlement. In the present case Anand Bakhsh had the very strongest reasons for holding that his title to a half or indeed to any share in the bulk of the family property was open to doubt. It was at least a matter of uncertainty whether the custom of *gaddinashini*, by which the family property devolved upon a single owner who had complete power of transfer, existed in the family. It is unnecessary for the purposes of this judgment to state in any great detail the various facts which might have led Anand Bakhsh to believe that such a custom existed. It is a fact admitted by both parties that the property was originally held by Khan Sah, the great-grandfather of Nirmal Singh and Anand Bakhsh, that afterwards it was held by Bachan Singh alone and then by Ujagar Singh alone, who were respectively the second and third sons of Khan Sah. The first summary settlement was made with Lalta Bakhsh alone and it would follow, on the assumption that Anand Bakhsh had been adopted by Ganga Bakhsh, that Nirmal Singh was the most likely person to succeed to the whole property if the custom of *gaddinashini* were established. Anand Bakhsh must have been aware that the *wajib-ul arzes* of all the main villages showed that the property was in the name of Lalta Bakhsh alone and recorded a custom of *gaddinashini*, and that he could produce no evidence to show that the existence of such a custom had been denied by any member of the family at the time of settlement. Anand Bakhsh had also before him the fact that at the first regular settlement Lalta Bakhsh was recorded as the sole owner of most of the villages of the estate and that both in Rai Hazari Lal's settlement of 1883-84 and the last settlement of 1897 Nirmal Singh was recorded as the sole owner in most of the villages. He had also before him the fact that in Rai Hazari Lal's settlement Ganga Bakhsh, his adoptive father was shown in most of the settlement *khewats* not as having a share but merely as guardian and manager on behalf of the owner Nirmal Singh. Of the

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31 villages included in Hardeo Bakhsh's suit Ganga Bakhsh was recorded as having a share in only two, while all the other villages were entered either in the name of Lalta Bakhsh alone or in the name of Lalta Bakhsh and the other descendants of Bachan Singh. Furthermore Anand Bakhsh had before him the facts that, after the Mutiny, the settlement was made with Lalta Bakhsh who was the son of Bachan Singh and not with Ganga Bakhsh the son of Ujagar Singh, the last holder, and that Lalta Bakhsh asserted his title as the sole owner of most of the property; and in a statement made as far back as 1883, which is printed at page 171 of respondents' book, Ganga Bakhsh had admitted that he was acting as *sarbarahkar* on behalf of Nirmal Singh. There is also the fact that on the death of Lalta Bakhsh Ganga Bakhsh did not assert his title to any share in the estate, but allowed mutation to be effected in the name of Nirmal Singh with himself as guardian and *sarbarahkar*. All these facts must have led Anand Bakhsh to entertain a reasonable doubt whether, even assuming that he could prove that he had been validly adopted by Ganga Bakhsh, he could successfully contest Nirmal Singh's claim to the bulk of the estate and indeed it will be noted that the learned Subordinate Judge, after considering all the evidence before him, has in fact come to the conclusion that the custom of *gadrinashini* has been established. Furthermore Anand Bakhsh might well have doubted whether he could have proved to the satisfaction of the Court that he had been validly adopted by Ganga Bakhsh. Hardeo Bakhsh had in his suit denied that any such adoption had taken place and an issue had been framed on the question of adoption. No deed of adoption was produced in that suit, nor has any such deed been produced in the present suit. Anand Bakhsh has in many documents declared himself to be the son not of Ganga Bakhsh but of Lalta Bakhsh, and one of those documents was executed only a few days before the institution of Hardeo Bakhsh's suit. The facts which we have above stated were, in our opinion, ample to justify Anand Bakhsh in believing that his title to a half share in the estate was open to doubt. It follows that even assuming that the property was joint ancestral property, Anand Bakhsh was justified in entering into

the compromise and the plaintiffs appellants are bound by its terms.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 218 OF 1918.

March 17, 1919.

Present:—Mr. Justice Oldfield and
Mr. Justice Seshagiri Aiyar.

Jogirdar RAMA RAO—DEFENDANT—
RESPONDENT—APPELLANT

versus

KOTTIPI THIMMA REDDI—PLAINTIFF—
PETITIONER—RESPONDENT.

Pensions Act (XXIII of 1871), s. 11—Grant of land revenue, whether pension.

A grant of land revenue is not a pension for the purposes of section 11 of the Pensions Act, and is liable to attachment in execution of a decree. [p. 332, col. 1.]

Appeal against the order of the District Court, Bellary, in Interlocutory Application No. 474 of 1917, in Original Suit No. 24 of 1917.

FACTS.—There was an application praying that, for the reasons mentioned in the affidavit, the amount with the Receiver in Original Suit No. 3 of 1915 to the credit of the defendant may be attached before judgment and paid to the plaintiff. The defendant pleaded that the order could not be made as his Jaghir was one to which section 4 of the Pensions Act applied. The lower Court passed the following order:—

"The defendant's Jaghir has been held in *Rama v. Subba* (1) to be one to which section 4 of the Pensions Act, XXIII of 1871, applies; but that section deals not only with pensions but also with grants of money or land revenue, and it appears that it was held to apply to this Jaghir because of that Jaghir being by way of a grant of land revenue. It is now a case of applying section 11, in the scope of which grants of land revenue are not includ-

(1) 12 M. 98.

JUDGMENT.—On the 21st of March 1916 the plaintiffs executed a sale-deed of certain property for Rs. 21,000 in favour of Sant Bakhsh Singh, defendant No. 1, but the whole of the consideration was left in the hands of Sant Bakhsh Singh for payment of the plaintiffs' creditors. It was provided that the creditors should be paid in the presence of the plaintiffs, that if any sum remained over after payment of the creditors it should be handed over to the plaintiffs, while if Sant Bakhsh Singh had to pay more than Rs. 21,000 the plaintiffs would make the difference good. Sant Bakhsh Singh paid Rs. 7,875 to certain creditors of the plaintiffs and mortgaged the property purchased from the plaintiffs with other property to Jagannath defendant No. 2 for the sum of Rs. 13,500 in payment of certain mortgages held by Jagannath against the plaintiffs. The plaintiffs brought this suit, alleging that Sant Bakhsh had overpaid Jagannath on the mortgages, that the sum properly payable was Rs. 10,534 3-10 and that, therefore, they were entitled to the sum of Rs. 2,590 12-2, the balance left out of the Rs. 21,000, with interest thereon. The plaintiffs claimed this sum from defendant No. 1 alone and they admitted that they had no claim against the defendant No. 2; and on this admission the name of the defendant No. 2 was struck off the record by an order of the 5th of March 1917. Later on, however when the case again came before another Subordinate Judge, defendant No. 2 was again made a party by an order of 3rd

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September 1917. He filed a written statement and examined witnesses. The plaintiffs' suit was dismissed, but in appeal the plaintiffs were given a decree by the Court of the District Judge for a sum of Rs. 1,637.2.6 and proportionate costs were awarded against both the defendants. Defendant No. 2 applied under section 162 of the Code of Civil Procedure to the learned District Judge to have the decree amended, on the ground that the decree should have been against Sant Bakhsh alone as there was no contest between the plaintiffs and the defendant No. 2 and no relief was claimed against him and no costs should have been assessed against him. This application was rejected by the learned District Judge.

Defendant No. 2, Jagannath, has now come to this Court in appeal against the decree of the District Judge and in revision against the order of the District Judge rejecting the application for amendment. He claims that the decree should be against Sant Bakhsh Singh defendant No. 1 alone and that no decree should have been passed against him for costs. An objection has also been filed by the plaintiffs under Order XLI, rule 22, of the Code of Civil Procedure, in which they claim interest on the sum decreed in their favour from the date of the institution of the suit till payment.

The learned Advocate for the plaintiffs admits that he did not ask for any relief against Jagannath, defendant No. 2, and that the decree for Rs. 1,637.12.6 should be against Sant Bakhsh defendant No. 1 alone. With regard to the costs, however, he urges that although originally Jagannath was made a defendant, yet on the 5th of March 1915 the plaintiffs stated that they claimed no relief against him and his name was struck off the record, and the plaintiffs made no subsequent application to have his name brought on the record. He also points out that the defendant No. 2 vigorously contested the plaintiffs' claim and examined witnesses in the lower Court. In all the circumstances of the case I think that the defendant No. 2 should pay his own costs throughout and that proportionate costs in both Courts should be allowed as between the plaintiffs and defendant No. 1 alone.

With regard to the objection filed by the plaintiffs a preliminary point has been

taken that as the objection affects Sant Bakhsh Singh, defendant No. 1, alone and he is not an appellant but a co-respondent, no objection can be filed. Reliance is placed on certain rulings of the Calcutta High Court of a date prior to the passing of the present Code of Civil Procedure (Act V of 1908). Section 561 of the old Code of Civil Procedure has been replaced by rule 22 of Order XLI, and it is to be noted that the wording of this rule differs in certain respects from the wording of section 561 of the old Code and the phrase "party who may be affected by such objection" has been substituted for the word "appellant". This alteration clearly indicates that the Legislature wished to set at rest the disputed question, whether one respondent in an appeal could claim relief against a co-respondent by way of a memorandum of cross-objections. I agree with the view taken by the Madras High Court in the Full Bench decision, *Munisami Mudaly v. Abbu Reddy* (1), and hold that objection can be taken.

It is clear that the plaintiffs are entitled to reasonable interest on the sum which the defendant No. 1 ought to have returned to them from the date on which the money should have been returned. The learned Advocate for the plaintiffs asks for interest only from the date of the institution of the present suit, that is, from the 1st of February 1917, and the plaintiffs are clearly entitled to interest at 6 per cent. from that date. The decree of the lower Court will, therefore, be amended as follows:—

The plaintiffs will be given a decree against the defendant No. 1 for Rs. 1,637.12.6 with interest thereon at 6 per cent. per annum from the 1st of February 1917 until realization. The plaintiffs and defendant No. 1 will receive from and pay to each other costs in all Courts in proportion to their success and failure. The defendant No. 2 will pay his own costs in all Courts.

Appeal, Revision and Cross-objection allowed.

(1) 27 Ind. Cas. 323; 33 M. 705; 27 M. L. J. 740; (1915) M. W. N. 45.

BULKI v. DAGDIA.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 400-B OF 1916.

September 12, 1917.

Present:—Mr. Mittra, A. J. C.

Musammatt BULKI—PLAINTIFF—APPELLANT
versusDAGDIA AND OTHERS—DEFENDANTS—
RESPONDENTS.*Berar Land Revenue Code, s. 96—Record of Rights, entry in—Presumption as to correctness, whether applies to trees standing on land—Suit for setting aside entry, presumption, whether can be relied upon in.*

Under section 96 (i) of the Berar Land Revenue Code an entry in the Record of Rights must be presumed to be true until the contrary is proved or a new entry is lawfully substituted therefor, and this presumption arises even in a suit brought to have the entry set aside, and extends to trees standing on land [p. 334, col. 2.]

Appeal against the decree of the 3rd Additional District Judge, Akola, in Civil Appeal No. 1 of 1916, decided on 7th April 1916, arising out of Civil Suit No. 126 of 1915 in the Court of the Munsif, Basim, dated the 10th November 1915.

Mr. V. R. Pandit, for the Appellant.

Mr. G. L. Subhedar, for the Respondents.

JUDGMENT.—The plaintiff-appellant sued for a declaration that the mango trees in Survey No. 100 belong exclusively to her, though the defendants have fraudulently got their names recorded in the Record of Rights as joint owners of the mango trees. The plaintiff's case was that the field as well as the trees were self-acquired property of her father. The defendants pleaded that they and the plaintiff's father were once members of a joint Hindu family. This much is not denied by the plaintiff. The defendants further said that at a partition made about 30 years ago the field was allotted to the share of the plaintiff's father, whilst the mango trees were kept joint. Both the Courts below are agreed in holding that the oral evidence on the record is unreliable. The first Court decreed the plaintiff's claim on the ground that as the plaintiff was admittedly the owner of the field, in the absence of proof to the contrary, she should be presumed to be the owner of the mango trees. This is a view of the law which is perfectly unexceptionable. The Munsif, however, ignored the entry made in favour of the defendants in the Record of Rights, on the ground that the suit itself has

been brought to contest that entry and that there is nothing to support the entry.

The lower Appellate Court has taken a contrary view and has given effect to the entry made in the Record of Rights. Now section 96 (i) of the Berar Land Revenue Code lays down that an entry in the Record of Rights shall be presumed to be true until the contrary is proved or a new entry is lawfully substituted therefor. The view taken by the first Court, that no presumption arises under section 96 (i) in the present case merely because the suit is brought to have the entry set aside, has not been supported before me, nor is there anything in the law to justify such a view. It is, however, argued that the presumption only arises in respect of an entry made regarding land, but not regarding the mango trees on the land. In support of this argument reliance is placed upon the wording of section 96A, which authorises the Chief Commissioner to direct the preparation and maintenance of the Record of Rights in land; but the word 'land' has been defined in section 4, sub-section 3, to include amongst other things trees. Moreover, under section 96B, clause 1, sub-section (d), the Record of Rights shall include such particulars in addition to those specified in the section itself as the Chief Commissioner may prescribe by rules made in this behalf. The record has been directed by the Chief Commissioner to be in certain forms prescribed. In column 9 the name of the occupant or holder of the land is to be entered. In column 10 the nature and origin of title is to be noted. In column 11 the officer in charge of the Record of Rights is to note other rights or encumbrances with the name of the right holder or encumbrancer. It is clear other rights would include the right to trees on the land. The entry, therefore, is one which it was competent for the officer in charge of the Record of Rights to make. Therefore, the presumption under section 96 (i) applies. The lower Appellate Court was, therefore, justified by law in holding that the presumption arising from the entry, which records the land as exclusively belonging to the plaintiff and the mango trees thereon as jointly belonging to the plaintiff and the defendants, has not been rebutted. If as the

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lower Courts held, neither the plaintiff nor the defendants have been able to prove anything by the oral evidence, then the conclusion arrived at by the lower Appellate Court is correct.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 102 OF 1919.

July 23, 1919.

Present:—Pandit Kanhaiya Lal, J. C.

GOPAL—PLAINTIFF—APPELLANT

versus

RAM HARAKH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Court, competency of, to try subsequent suit, how to be judged—Value of property, increase in, effect of—Jurisdictions, different, owing to alteration in value of property, effect of.

Under section 11, Civil Procedure Code, the competency of the Court to try the subsequent suit has to be judged with reference to the time when the first suit was brought, that is, as if the second suit had been instituted at the time when the first suit was filed. Thus, where the first suit was within the jurisdiction of a Munsif and the subsequent suit by reason of an increase in the value of the property was beyond his jurisdiction and within the jurisdiction of a Subordinate Judge, such subsequent suit would nevertheless be barred, inasmuch as if the subsequent suit had been brought at the time when the first suit was brought, the Munsif would have been competent to try it. [p. 336, col 1.]

Misir Raghobardial v Sheo Baksh Singh, 9 C. 439; 12 O. L. R. 520. 9 I. A. 197 (P. C.); 4 Sar. P. C. J. 395, *Rafique and Jackson's* P. C. No. 70, *Ran Bahadur Singh v. Lucho Koer*, 11 C. 301 (P. C.); 12 I. A. 23; 4 Sar. P. C. J. 602 and *Jit Singh v. Ram Baksh Singh*, 27 Ind. Cas. 537; 2 O. L. J. 44, distinguished from.

Appeal from the decree of the District Judge, Fyzabad, dated the 4th February 1919, confirming that of the Subordinate Judge, Fyzabad, dated the 17th April 1917.

Pandit Jagmohan Nath Ohaik, for the Appellant.

Sheikh Niamat Ullah, for Respondent No. 1.

Babu Ram Chandra for Respondents Nos. 2 and 3.

JUDGMENT.—In 1905 the plaintiff-appellant, Gopal Tiwari, and another person filed a suit against Indardat and Ramnath for a declaration of his title to a one-third share in certain property. That suit was valued at Rs. 450 and was filed in the Court of the Munsif of Akbarpur. The suit was decreed by the Court of first instance and the Court of Appeal, but on second appeal it was held by this Court that the evidence of the two witnesses who were called on behalf of the plaintiffs was wholly insufficient to prove their title to the property in face of the admitted fact that the names of the defendants and their father had been recorded in the *khewat* since 1882. It accordingly allowed the appeal and dismissed the suit.

The present suit has been brought by Gopal Tiwari against Ram Harakh, the son of Indardat, and two other persons, Achaibar Tiwari and Kashi Ram Tiwari, who are the grandsons of Ramnath, for possession by partition of a one-third share in the same property. The suit has now been valued at Rs. 1,100, and the explanation offered is that the market-value of the property which was in dispute in the previous suit has risen since then. The Courts below dismissed the claim, holding that the decision of this Court in the previous suit operated as *res judicata* and barred a determination of the same matter in the present suit.

Section 11 of the Code of Civil Procedure prohibits a Court from trying any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court. The contention of the learned Counsel for the plaintiff-appellant is that if the market value of the property in dispute mounts up in course of time to a limit exceeding the jurisdiction of the Court which decided the previous suit, the decision in the previous suit becomes nugatory

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and the entire matter can be re-opened in a Court which has jurisdiction to decide it at the time when the second suit is instituted. The logical result of this contention, if accepted, would be that no decision of any suit or issue would be binding, if the amount due to the plaintiff on the original cause of action, which was the basis of the former suit, or the value of the property then in dispute, rises to such an extent in the course of time as to exceed the pecuniary limits of the Court which originally decided it. Such a proposition cannot, however, be entertained, because a rise in value is a recurring incident of most properties due either to fortuitous circumstances or to the lapse of time. It knocks at the bottom of all finality. The competency of the Court to try the subsequent suit has to be judged with reference to the time when the first suit was brought, that is, as if the second suit had been instituted at the time when the first suit was filed.

In *Gopi Nath Chobey v. Bhugwat Pershad* (1) it was held that where the first suit was within the jurisdiction of the Munsif and the subsequent suit by reason of an increase in the value of the property was beyond his jurisdiction, such subsequent suit would nevertheless be barred, inasmuch as if the subsequent suit had been brought at the time when the first suit was brought, the Munsif would have been competent to try it. In *Rughunath Paniah v. Issur Ohunder Chowdhry* (2) a similar interpretation was placed on the words of section 13 of the old Code of Civil Procedure. In *Kunji Amma v. Raman Menon* (3) the circumstances were somewhat peculiar. A suit was brought for a declaration of the title of the plaintiffs' *tarwad* to certain land in the District Court against the Maharaja of Cochin and others, including the trustees of a temple. It appears that the same land had been the subject of a suit instituted in a Subordinate Court earlier, to which the representatives of both the plaintiffs' *tarwad* and the temple were parties, and that the land was then found to be the property of the temple and a decree was

passed accordingly. The contention in that case was that the subsequent claim was not barred by reason of the decree in the previous suit, because under section 443 of Act X of 1877, which came into force during the pendency of that suit, no sovereign prince could be sued in any Court subordinate to the District Court. It was nevertheless held that the Court which passed the decree in the previous suit was competent to try the subsequent suit, because the competency must be referred back to the time when the previous suit was heard and determined.

The learned Counsel for the plaintiff-appellant relies on the decisions in *Misir Baghobardial v. Sheo Baksh Singh* (4) and *Ran Bahadur Singh v. Lucho Koer* (5). But in none of those cases the property in dispute in the previous and subsequent suits was the same. The decision in *Jit Singh v. Ram Baksh Singh* (6) also does not apply, because in that case the suits related to different properties and the Court in which the earlier suit was instituted was not competent to try the suit in which the later one was filed.

It is also urged on behalf of the plaintiff-appellant that Indardat was a confessing defendant in the previous suit and that no question of *res judicata* ought to stand in the way of a determination of the claim of the plaintiff as against him. But the share which the plaintiff claims is not in the possession of Indardat or his son. It is in the possession of Ramnath and his successors.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(4) 9 C. 439; 12 C. L. R. 520; 9 I. A. 197 (P. O.); 4 Sar. P. O. J. 395; Rafique and Jackson's P. O. No. 70.

(5) 11 C. 301 (P. O.); 12 I. A. 23; 4 Sar. P. O. J. 602.

(6) 27 Ind. Cas. 537; 2 O. L. J. 44.

(1) 10 C. 697.

(2) 11 C. 153.

(3) 15 M. 494; 2 M. L. J. 262.

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CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 2 OF 1913.

March 18, 1919.

Present:—Justice Sir Ernest Fletcher, Kt.,

Mr. Justice Justice Beachcroft and

Mr. Justice Greaves.

THE CHAIRMAN OF THE COSSIPORE AND
CHITPORE MUNICIPALITY—DEFENDANT

—APPELLANT

versus

THE CORPORATION OF CALCUTTA

—PLAINTIFF—RESPONDENT.

*Bengal Municipal Act (III B. C. of 1884), s. 101,
proviso 3—"Machinery", meaning of—Overhead tank for
storage of water, whether machinery.*

Held, by a majority (Fletcher, J., dissenting), that an overhead steel tank constructed by a Municipal Corporation for the storage of water during the hours when the demand is comparatively small, and to supplement the supply when the demand is large, is not "machinery" for the purposes of section 101 of the Bengal Municipal Act, and is, therefore, not exempt from assessment as "machinery." [p. 352, col. 1.]

Beachcroft, J.—It cannot be properly said that everything which is connected in a system comes within the description of machinery merely because mechanical contrivances are employed in the working of some parts of that system. The test to be applied with reference to any particular part of the system is whether it is essential to, or assists in the working of, the mechanical contrivance. [p. 349, col. 2.]

Per Greaves, J.—"Machinery" is an apparatus for applying mechanical power, consisting of a number of inter-related parts, each having a definite function, and it is in this sense that the word is used in section 101 of the Bengal Municipal Act. [p. 352, col. 2.]

Letters Patent Appeal against the decree of Mr. Justice Chatterjea, differing in opinion from that of Mr. Justice Walmsley, dated the 12th April 1918, in Appeal from Original Decree No. 204 of 1916, against the decision of the Second Subordinate Judge, Alipore, dated 21st July 1916.

FACTS appear from the following judgment of

CHATTERJEA, J.—This appeal arises out of a suit by the Corporation of Calcutta for a declaration that the valuation and assessment made by the Cossipore-Chitpore Municipality of a holding owned and occupied by the former at an annual value of Rs. 25,000 is *ultra vires* and illegal and for other reliefs.

It appears that the Calcutta Corporation owns a holding No. 1, Khelat Babu's Lane, measuring about 16 *bighas* 18 *cottas* and 5 *chittaks* of land at Talla, within the limits of the Cossipore-Chitpore Municipality, on which there is an overhead steel tank (or reservoir of water) resting on and supported by steel columns and girders. The tank is constructed in connection with the supply and distribution of filtered water to the town of Calcutta. The pumping house is situated at No. 71, Barrackpore Road, adjoining the said holding, No. 1, Khelat Babu's Lane. Before the erection of the tank, the annual value of holding No. 1, Khelat Babu's Lane, was assessed by the defendant Municipality at Rs. 1,053 and the quarterly rates and taxes amounted to Rs. 46-10-3. After the erection of the tank, the defendant Municipality proceeded to assess the holding in view of the quinquennial assessment to take effect from 1st April 1913. There was a good deal of correspondence between the parties on the point. On the 24th January 1913, the Assessor of the defendant Municipality wrote to the Secretary of the Calcutta Corporation asking for a return of the cost of the "buildings" on the holding, to which the Assistant Engineer of the Corporation replied that there were no buildings on the site with the exception of small out-offices and the large steel tank. The Assessor of the defendant, on the 26th March 1913, wrote to the Assistant Engineer of the plaintiff that "the Commissioners consider the raised reservoir is to be treated as a building within the meaning of section 101 of the Bengal Municipal Act. Even if it is not, there is no doubt that its erection has immensely enhanced, the value of the lands, which cannot consequently now be assessed with reference only to the rates of rent of the neighbouring lands. It is, therefore, necessary for the Commissioners to know all the expenses incurred by your Corporation on that land in connection with the construction of the reservoirs." The Assistant Engineer of the Corporation, on the 17th April 1913, wrote in reply that he did not agree that the raised reservoir is to be treated as a building and that he has advised that it was not a building within the meaning of section 101 of the Act to

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be rated on the basis of construction and without admitting his right to the information about the cost of construction, he said that the raised reservoir with the foundations cost about 20 lacs of rupees. He further said, "as for the erection of the tank enhancing the value of the land I do not quite follow your argument, as it is not clear how the value can be enhanced when no use whatever can now be possibly made of any portion of the land."

The defendant Municipality thereupon valued the holding at one lac and twenty-seven thousand and thirty rupees, and assessed the rates and taxes at Rs. 1,462-5-3 per quarter. Some further correspondence followed, and on the 11th August 1914 the Assessor of the defendant Municipality wrote to the Assistant Engineer of the Corporation that "if you object to treat the Talla raised reservoir as a building within the meaning of section 101 of the Act as you have done in your letter dated 17th April 1913, the only alternative is to assess the new holding on the gross rental at which it may be reasonably expected to let. As Assessor of the Cossipore-Chitpore Municipality I have now assessed it at a gross annual value of Rs. 30,000, on which basis the quarterly rates payable on it work out to Rs. 1,207-8-0."

After further correspondence, the Assessor of the defendant Municipality on the 3rd December 1914 wrote to the Assessor of the Calcutta Corporation "that after due deliberation the valuation had been reduced from Rs. 1,27,030 (calculated on the cost of construction basis) to Rs. 30,000 (on rental basis), having been fixed at the gross annual rental at which the holding may be reasonably expected to let" and could not further be reduced.

On the 15th December 1914, the Solicitor to the Corporation wrote to the Assessor of the defendant Municipality that the Chairman objected to the valuation as excessive and requesting him to "give us a hearing before asking us to accept the valuation." A separate application was made on the same day on behalf of the Chairman of the Corporation for review of the assessment on the grounds: (i) that the valuation

was excessive; (ii) that the fact that the premises are being used for a Municipal purpose for the welfare and benefit of the public had not been taken into account and (iii) that full particulars of the valuation had not been furnished.

There was a proceeding of the Appeal Board of the defendant Municipality on the 16th March 1915 under section 114 of the Act, at which Mr. M. L. Sen, the Solicitor for the Corporation, and Mr. D. P. Roy, Assessor of the Corporation, represented the Calcutta Corporation. The contentions raised by the Solicitor were that the overhead tanks were not assessable, that the structures were not a building and that the holding could not be reasonably expected to let at all. The Board was of opinion that assuming that the structures were not "building," they had power to assess the holding under the first part of section 101, that it could not have been the intention of the law that the land alone was to be taken into consideration, and the finding of the Board was that "all the circumstances connected with the holding in question should be taken into account in assessing its annual value." In conclusion the Board held, "making every allowance in favour of the Calcutta Corporation and giving the benefit of the doubt of the interpretation of the word 'building' to the said Corporation, the Board determined the annual value of the holding at Rs. 25,000, being the amount at which the holding could be reasonably expected to let."

After this decision by the Appeal Board the Chairman of the Corporation, on the 19th April 1915, wrote to the Chairman of the defendant Municipality that the Advocate-General had been consulted in the matter of the assessment, and he was of opinion that the overhead tank is not a building, but a piece of machinery, and requested him to reconsider the matter and to assess the holding on the land value only. On the 1st May 1915, the Chairman of the defendant Municipality in reply referred to the proceedings which had taken place and pointed out that under section 114 of the Act, the decision of the Board was final and that there was no provision in the law under which the Appeal Board could be asked to reconsider its decision.

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The present suit was thereupon instituted on the 15th June 1915.

The Court below held that the raised reservoir was machinery, that it was not shown by the defendant Municipality that it had not taken the value thereof into consideration and that, therefore, the assessment was *ultra vires* and illegal and the plaintiff Corporation was under no liability to pay any sum thereunder.

The defendant Municipality has appealed to this Court.

The first question for consideration is whether the raised reservoir or steel tank is a machinery within the meaning of the last proviso to section 101 of the Bengal Municipal Act.

It is to be observed that the valuation of the holding formed the subject matter of correspondence between the two public bodies, as stated above, commencing from the 24th January 1913, and the decision of the Appeal Board was not passed until the 16th March 1915. During this long period of more than two years, no objection was raised on behalf of the Corporation that the raised reservoir was "machinery" and, therefore, could not be taken into account. In the order of the Appeal Board, it was stated that the Solicitor to the Corporation, on being questioned by two members of the Board admitted that the overhead tanks were not machinery and this was repeated in the letter dated the 11th May 1915. The correctness of the statement, however, was denied in the letter of the Chairman of the Corporation dated the 3th May 1915, and as no witnesses have been examined on the point no notice can be taken of the statement. But in the proceedings before the Appeal Board the Corporation was represented by its Solicitor and Assessor and objections were taken to the assessment on specific grounds. Before the question whether the tank is or is not machinery can be decided, the purpose for which the tank was erected and its working have to be considered, but as stated above no objection was taken on the ground that the tank was a machinery. The word "machinery" is not defined in the Act. The ordinary dictionary meaning of the word is "the assemblage of machines," machines or the constituent parts of a machine taken collectively; the mechanism

or works of a machine or machines (see Oxford Dictionary), and in the same dictionary a machine is described as "an apparatus for applying mechanical power consisting of a number of inter related parts each having a definite function. In recent use the word tends to be applied especially to an apparatus so devised that the result of its operation is not dependent on the strength or manipulative skill of the workman."

On behalf of the plaintiff Corporation, two witnesses have been examined: one being Mr. MacCabe, the Chief Engineer of the Corporation, other Mr. Williamson, a Sanitary Engineer under the Government of Bengal. They positively say that the tank is a machinery. On the other hand, the defendant Municipality has examined Mr. Firth, the chief structural expert of Messrs. Barn & Co., engineers. He is equally positive that the tank is not machinery though it is a part of the contrivance for distribution of water, and that it is the non-mechanical part of a mechanical contrivance.

The use of the tank is thus described by the two witnesses examined for the Corporation. Mr. MacCabe says: "the tank was designed to meet automatically the demand of water which varies from moment to moment in Calcutta. It effects that purpose in this way; when the demand for water in the town is greater than the output of the pumps, the level of the water in the tank is falling and thus supplementing the supply from the pumps, while on the other hand when the demand for water is less than the output of pumps, the level of the water in the tank is rising and thus storing the surplus from the pumps. The tank and the pumps combined is a mechanical contrivance for putting pressure on the water and for meeting the fluctuating demand." Mr. Williamson says: "the tank is what is known technically a balancing reservoir, that is to say, it forms the purpose of balancing the constantly varying rate of consumption in Calcutta with the rate of pumping which is kept as constant as possible. When water in Calcutta is being consumed at a greater rate than is being pumped, the excess water is drawn from the water stored in the tank. If the rate of consumption in Calcutta becomes less at any time or moment than the rate at which the pumps are working, the surplus water goes

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into the tank and increases the quantity of water that is stored there. The supply in Calcutta is dependent upon that balancing tank and the pump;" It would appear from the above that the "balancing tank" is a reservoir for storage of water which varies from time to time according to the output of the pumps, and Mr. MacCabe himself admits that he would not call the elevated reservoir a machinery "if it was isolated and unutilisable." He says that the tank and pumps combined were designed as one unit. Mr. Firth also says that "the tank serves in combination with the pumps to distribute the water. The two are together and you cannot separate them," but that the tank does not work, it merely stores water. If, however, the tank or reservoir, which does not work and merely stores water, by itself is not machinery, it is difficult to see how it becomes a machinery merely because it is connected with the pumps. Take the case of an underground reservoir under a pumping machine. They are designed as one unit, they go together, the reservoir is not "isolated nor unutilisable" but that would not make the underground reservoir a machinery. Mr. Williamson says: "there is one main big pipe for taking water from the Tallah Station to the town of Calcutta for the distribution of water in Calcutta. I cannot say offhand whether the underground tank or reservoir at Tallah is a part or parcel of the pumping machinery. I do not consider the big main pipe to be a machinery or a part of any machinery." Further on, he says: "the pumping machinery has got distinct parts of its own and these parts are known by particular names. The pumping machinery does not include the source from which the water has to be brought for pumping." Anything which is connected with a machine, therefore, is not necessarily a 'machinery.' In the case of *Chamberlayne v. Collins* (1) cited on behalf of the defendant Municipality, the question was whether a switchback railway was 'operative machinery' within the meaning of certain restrictive covenants in a building lease and it was held that it was. Lord Esher, M. R., said: "That the railway is 'machinery' I have no doubt at all. It is something made to have a given effect by means of power applied to it. It is built

solely for the purpose of operating upon something, namely on certain carriages in a particular way. Being built on purpose to perform a particular operation, I think that if it carries out the operation as it is intended to, it is operative machinery;" and Davey, L. J., observed:—"There is always great danger in giving definitions, but I think I may say that 'machinery' implies the application of mechanical means to the attainment of some particular end by the help of natural forces, and the addition of the word 'operative' means 'with the potentiality of operating or doing work.' It is clear to my mind that a switchback railway comes within that definition, because it is a thing skilfully built with curves of a particular shape which by their peculiar form supply the motive power which actuates the carriages which run up and down the railway." The switchback railway was held to be a machinery because it "is built solely for the purpose of operating on certain carriages in a particular way" and supplies the "motive power which actuates the carriages which run up and down the railway." The reservoir of water does not operate upon anything nor supply any motive power. The tank helps the pumps as the power of the pumps that would be needed to meet the demand for water in excess of the average output is reduced, but that is only by storing the surplus water. As already stated, it does not work. It is true that there is motion in the water when it is running out of the tank, but that would not make the tank a machinery any more than motion in the water when it is poured out of a glass would make the glass a machinery. Neither does it appear that there is any automatic working of the tank itself, for it appears from the evidence of Mr. Williamson, quoted above, that when water is being consumed at a greater rate than is being pumped, the excess water is drawn from the water stored in the tank, and when the rate of consumption becomes less, the surplus water goes into the tank, and increases the quantity of water that is stored there. It may be said that as the demand for water varies from moment to moment, the drawing of the water from, or the going of the water into the tank must be done by some automatic process and does not depend upon the "manipulative skill of the workman." Mr.

(1) (1894) 70 L. T. (N. S.) 217; 9 R. 311.

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Firth, however, says: "the balancing tanks that I have made had an inlet pipe, overflow pipe and an outlet pipe. The tank in dispute is of the same nature as the tanks I have made, only different in size." If there are three pipes in the Tallah tank as described by him, the *drawing* of the water from, and *going* of the water into the tank need not necessarily be due to any automatic working of the *tank*. The two witnesses examined by the plaintiff do not say anything on that point, but they say that the tank is designed to meet automatically the demand of water, and that the level of the water in the tank varies according to the output of the pumps, though the process is not clearly described. Under these circumstances and upon the evidence as it stands, I agree with Mr. Firth that though the raised reservoir is a part of the pumping scheme or plant it is not part of the machinery, but in the absence of clearer evidence of the working of the tank, I do not wish to rest my decision on that ground.

Assuming, however, that the raised reservoir is a machinery, the point for consideration is whether it could be taken and was taken into account in making the valuation. Section 101, clause (1), lays down that the gross annual rent at which any holding may be reasonably expected to let, shall be deemed to be the annual value thereof. The first two provisos lay down how the annual value of any building that may be on the land is to be determined. The last proviso says that "in estimating the annual value of a holding under the section the value of any machinery that may be on such holding shall not be taken into consideration."

Until the opinion of the Advocate-General was taken, no question was raised that the reservoir is machinery, and the controversy between the parties was whether the building (*i.e.*, the tank and the structures) was assessable or not. In the letter of the defendant dated the 11th August 1914, the Secretary of the Cossipore Municipality stated, "if you object to treat the Tallah raised reservoir as a building within the meaning of section 01 of the Act, as you have done in your letter, the only alternative is to assess the new

holding on the gross rental at which it may be reasonably expected to let" and that their Assessor had assessed it at Rs. 30,000. Then again in the proceedings of the Appeal Board, dated the 16th March 1915, it is distinctly stated, "making every allowance in favour of the Calcutta Corporation and giving the benefit of the doubt of the interpretation of the word 'building' to the said Corporation, the Board determined the annual value of the holding at Rs. 25,000, being the amount at which the holding could be reasonably expected to let."

There is no reason to disbelieve what is stated in the proceedings, but the matter does not rest upon the proceedings above. The figures show that the value of the machinery could not have been taken into account. The tank and trestles together with the foundation cost about Rs. 20 lakhs, and calculating the value (as a building) as laid down in the first two provisos together with a reasonable ground rent the annual value would amount to rupees one lakh, twenty-seven thousand and odd, and that was the figure at which the holding was originally assessed. Upon the objection of the Calcutta Corporation that it was not a building, the valuation was reduced to Rs. 30,000, and ultimately to Rs. 25,000.

The learned Counsel who appeared for the Calcutta Corporation, if I understood him rightly, did not contend that the *value* of the machinery (meaning thereby the capital value) had been taken into consideration. What he contended was, that in raising the valuation to Rs. 25,000, the defendant must have taken into account the existence of the machinery on the premises, and that it could not be done under the last proviso to section 101 of the Act.

There is no doubt that in determining the annual rent at which the holding may be reasonably expected to let, the Calcutta Corporation is to be regarded as one of the possible tenants. The provision in the Bengal Municipal Act, that the annual rent at which the holding may be reasonably expected to let, shall be deemed to be the annual value thereof, corresponds to the provisions of section 1 of 6 and 7 Will. IV, chapter 96, which speaks of the "net annual value of the hereditament,

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that is to say, of the rent at which the same might reasonably be expected to let from year to year." As pointed out by Lord Herschell, L. C., in *London County Council v. Church Wardens* (2), "An owner who is in occupation of premises can, of course, never reasonably be expected to take them as tenant from year to year—he cannot become a tenant to himself. Yet it has been held that the rent which, if the property were in other hands, he would be willing to pay, may be taken into account when enquiring what is its annual value: that is, at what sum it might reasonably be expected to let from year to year. If the hypothesis be admissible that the owner might himself be amongst the possible tenants, although, as a matter of fact, he could not be so, it seems to me no more violent hypothesis to conceive him as amongst the possible tenants, even although he may be subject to certain legal restrictions which would prevent his becoming so." That being so, the next question is whether the existence of the machinery on the holding should be left out of consideration in determining the annual value of the holding. In the case of *Mersey Docks and Harbour Board v. Birkenhead Assessment Committee* (3) the Lord Chancellor (Lord Halsbury) observed (at pages 182 and 183): "What you are to find out is what a tenant will reasonably give, looking, surely, at all the circumstances of the particular occupation, including therein the business that has been done on the premises," and the nature of the business and the chances of its permanency, the structural value of the buildings, the value of the land and all the surrounding circumstances.

Again in the case of *Kirby v. Hunslett Union Assessment Committee* (4) it was held that a tenant's machinery placed in a factory and used therewith for the business of the factory, whether it be affixed to the freehold or not, may be taken into consideration so as to increase the amount in assessing the factory to the poor rate. Lord Halsbury, L. C., observed

(2) (1893) A. C. 562 at p. 596; 63 L. J. M. C. 9; 6 R. 22; 69 L. T. 725; 42 W. R. 330; 57 J. P. 821.

(3) (1901) App. Cas. 175; 70 L. J. K. B. 584; 84 L. T. 542; 49 W. R. 610; 65 J. P. 579.

(4) (1906) App. Cas. 43; 75 L. J. K. B. 129; 94 L. T. 35; 79 J. P. 10; 4 L. G. R. 144; 22 T. L. R. 167.

(at page 48):—"The Overseer has a comparatively simple problem to solve although it is difficult enough sometimes: he sees the place being conducted as a brewery, or an iron foundry, or what not: he looks at the premises, he looks at the furniture which is necessary for carrying on the business as a brewery or foundry: he does not in his own mind analyse, and to my mind he ought not to analyse, what would be likely to be the initial arrangement between the intended brewer and the owner of the freehold, to see who should provide this or that engine, or what not, but he looks at the premises as they are, as they are being occupied, and as they are being used, and he says to himself, 'well, looking at the whole of the place, such and such is the rent which would probably be paid by a tenant from year to year for such an establishment as this,' and in that he does not and ought not to strip the whole of the place of everything but the four walls which contain the whole system of manufacture therein contained and simply value either the ground upon which the building is placed or the four walls and roof which are the containing elements of all the manufacture that goes on in it."

It is contended on behalf of the Corporation that although that is the law in England, the machinery must be left out of consideration under the express terms of the proviso to section 101 of the Bengal Municipal Act. But under the English law also, machinery and plant belonging to the tenant are not *per se* rateable and there cannot be any assessment on account of the value of those things to the tenant. The question, however, still arises under that law whether the hereditament has an enhanced value in consequence of the presence upon it of things which are not *per se* rateable, and according to the authorities in England "if the machinery in the premises is being so used as that it makes the factory appropriate to the particular industry carried on therein, the machinery itself is not to be disregarded in assessing the value of that thing as it is." The question, therefore, resolves into this, *viz.*, whether the words, "the value of any machinery that may be on such holding shall not be taken into consideration," in section 101, Bengal Municipal Act, mean, not only that

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the value of the machinery is not to be taken into consideration, but the existence of the machinery is also to be disregarded, in other words, whether the machinery is to be excluded from consideration altogether for all purposes. If the Legislature intended that the presence of the machinery on the premises is also to be excluded from consideration (a question upon which there was a good deal of discussion in the English cases), it would have been the simplest thing to say that in determining the annual value, the presence or existence of the machinery (instead of the value of the machinery) that may be on the premises shall not be taken into consideration; and it seems that the last proviso was enacted to make it clear that under the Indian Act any machinery (itself) which may be on the premises, whether permanently attached to the holding or not, is *not liable to assessment* and the value thereof is, therefore, not to be taken into consideration in determining the annual value of the holding. It is said that the words "value of machinery" have reference only to the letting value of the machinery and that the taking of the existence of the machinery into account involves the taking of the letting value of the machinery into consideration. But the very same argument might be advanced against the principle (*viz.*, that the existence of the machinery may be taken into account) laid down in the cases decided under the English law, under which also there cannot be any assessment on account of the value of the machinery to the tenant.

But even if the existence of the machinery on the premises cannot be taken into consideration, and assuming that the trestles, the iron and steel columns and girders on which the tank rests are also machinery, I think that the "concrete cement foundation," *i. e.*, the plinth can certainly be taken into consideration in assessing the annual value of the holding. It was argued on behalf of the Corporation that the plinth also cannot be taken into consideration, because it is necessary for supporting the superstructure (the tank, and the trestles, etc., upon which the tank rests), that the tank, the trestles, etc., and the plinth should be taken together, and that, therefore, the plinth is part of the machinery. I am unable to hold that the plinth (the

masonry structure) is part of the machinery. If the contention of the respondent is correct, all masonry structures, such as brickbuilt engine houses, etc., in jute, flour and oil mills are machinery because they are constructed for holding or using the machinery. On the same ground it may be said that the earthwork on which rails are placed in a railway is also part of the machinery, because the earthwork is constructed and is necessary for supporting the rails. I am of opinion that the plinth is not any part of the machinery even in the widest sense of the terms.

The plinth alone, we are told, cost more than a lac of rupees. It can be utilised for other purposes (by erecting dwelling-houses or other buildings) by the defendant Municipality or by private persons. It cannot be said that it is a 'building,' in which case the annual value could not exceed $7\frac{1}{2}$ per cent. of the cost of construction. The word "building" is not defined in the Act, but as observed by Lord Esher, M. R., in *Moir v. Williams* (5), what is ordinarily called a building is "an enclosure of brick or stone work covered in by a roof." It is not the plaintiff's case that it is a building, in fact the plaintiff objected to the assessment on the ground that there were no buildings on the land with the exception of small out-offices.

I am of opinion, therefore, that in any case the plinth can be taken into consideration. The land, it appears from the plaint, was acquired at about one lac and twenty-two thousand rupees, the annual value of the land alone would, therefore, be about Rs. 8,000. The value of the land must have been enhanced by the construction of the plinth which, as stated above, can be utilized for other purposes. The defendant Municipality assessed the holding on the gross rental at which it may be reasonably expected to let, which in their opinion was Rs. 25,000. The Courts have no power to go into the question of the amount at which the annual value is assessed so long as the assessment does not contravene the provision of the Act. The assessment of the holding at Rs. 25,000, therefore, cannot be said to be *ultra vires*.

As regards the question whether the Civil Courts have jurisdiction to interfere, I am

(5) (1892) 1 Q. B. 264 at p. 270; 63 L. T. 215; 61 L. J. M. C. 33; 40 W. R. 69; 56 J. P. 197.

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of opinion that if the assessment had been made contrary to the provisions of the Act, the Civil Court would have the power to declare it illegal, but I do not think that the assessment is in contravention of the provisions of the Act.

I would accordingly decree the appeal and dismiss the suit.

WALMSLEY, J.—The appeal is preferred by the Chairman of the Cossipore-Chitpore Municipality against a decision by the second Subordinate of Alipur in favour of the Corporation of Calcutta.

The circumstances are as follows:—The Corporation of Calcutta acquired a piece of land measuring sixteen *bighas* odd at No. 1, Khelat Babu's Lane, a few years ago. On an adjoining plot No. 71, Barrackpore Grand Trunk Road, the Corporation has its pumps and engine house and on the sixteen-*bigha* plot it erected a large overhead tank for the supply of water to Calcutta. Both holdings are situated within the limits of the Cossipore-Chitpore Municipality. The holding at No. 1, Khelat Babu's Lane, was formerly valued at Rs. 1,053 per annum, and the Municipal rates levied on it were Rs. 46 10 3 per quarter. In January 1913 the Secretary of the Cossipore-Chitpore Municipality wrote to the Calcutta Corporation, saying that a quinquennial assessment to take effect from April 1st, 1913, was being made and asking for information as to the cost of the construction of the buildings on the holding. In March the Assistant Engineer of the Calcutta Corporation replied that there were no buildings on the holding except some small out-offices and the large tank. The Assessor answered that the tank was to be regarded as a building within the meaning of section 101 of the Municipal Act and again asked for information as to the cost of construction; he also remarked that if the tank was not a building, its erection had immensely enhanced the value of the holding. The Assistant Engineer replied that he did not think the tank was a building, but as a matter of courtesy he said the cost of construction was about 20 lacs. Then the Cossipore-Chitpore Municipality appears to have submitted a bill for Rs. 1,462-5 3 as the rates to be paid for the holding. There was some correspondence about this bill, and on August 1914 the Assessor wrote to the Assistant Engineer saying that in view

of the objection that the tank was not a building he was valuing the holding at Rs. 30,000 per annum, the sum which he considered the gross annual rental at which it might reasonably be expected to let. On this assessment the rates payable amounted to Rs. 1,207 8 0 quarterly. In December 1914 the Assessor addressed the Assessor of the Calcutta Corporation on the subject, pointing out that the annual value had been reduced from Rs. 1,27,030 to Rs. 30,000 and expressing the hope that the valuation would be accepted. The Solicitor to the Calcutta Corporation then dealt with the matter, and made a formal application for review of the assessment, as provided by the Act. The Appeal Board of the Cossipore-Chitpore Municipality passed orders on this application on March 16th, 1915, and decided that the annual value of the holding was Rs. 25,000, being the amount at which the holding could be reasonably expected to let. On this assessment the appellant Municipality demanded Rs. 1,026-4 0 per quarter as the rates payable by the Calcutta Corporation.

After due notice the Calcutta Corporation instituted a suit, praying that the assessment should be set aside as illegal and made *ultra vires* and that the defendant Municipality should be restrained from levying rates calculated on that assessment and be directed to make a fresh valuation in accordance with law. The lower Court decreed the suit and the Cossipore Chitpore Municipality has preferred this appeal.

Before setting out the points for decision it will be well to explain how the various sums demanded by the Municipality have been reached.

In the first instance the Assessor made the valuation under the first proviso of section 101. Mr. Jackson on behalf of the appellant was kind enough to show us the mode of calculation. The capital outlay was assumed to be twenty five lakhs, and the annual value was reckoned at five per centum on this sum (instead of the maximum rate allowed by law) and to this was added a ground-rent of six rupees per *cotta*. The result is Rs. 1,27,030, and it is the second proviso to section 101 that causes the rates payable on this sum to be so little more than the rates payable on Rs. 30,000; the sums of

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Rs. 30,000 and Rs. 25,000 are, of course, mere estimates, the reasonableness of which cannot be demonstrated, the fact that the latrine tax is subject to a maximum explains why the rates leviable on these two sums are not proportionate. I have given these figures, because at first sight the bills submitted by the appellant Municipality are not intelligible.

The points which have been urged in appeal may be said to be three. *First*, it is urged, that the Civil Court has no jurisdiction to interfere, *secondly*, that the Cossipore Chitpore Municipality has not taken the tank into consideration in determining the annual value of the holding and, *thirdly*, that the tank is not machinery.

It will be convenient to take up the last point first. For the respondents it is urged that the tank and the trestles on which it is supported are not machinery. The proviso to section 101 is as follows:—“Provided further that in estimating the annual value of a holding under this section the value of any machinery that may be on such holding shall not be taken into consideration.” If the tank is not machinery, then the other questions will not arise. Before referring to the evidence, I may deal with the argument based on the statement that the Solicitor to the Corporation declined to adopt the theory that the erection was machinery. The assertion is made in the order of the Appeal Board and repeated in the Chairman's letter. It is denied by the Chairman of the Corporation in his letter of 13th May 1915. No witness had been examined on the point, so I think the argument must be ignored. The Corporation examined Mr. Williams, the Sanitary Engineer, and Mr. McCabe, its own Chief Engineer, and the appellants examined Mr. Firth, an employee of Messrs. Burn and Company, the well-known engineers. These gentlemen have deposed; the former that the tank should be regarded as machinery and the latter that it should not. I have no doubt that they were all speaking in perfect good faith, but their evidence is of more value in explaining the purposes for which the tank was erected. I may remark that Mr. Firth speaks of the tank as a balancing tank; this fact disposes of the suggestion

that the word “balancing” was introduced at a late stage in order to import a mechanical idea not to be found in the simple word “tank.” As explained by Mr. Williams, the object of the tank is to reduce the power that would be needed to meet the demand for water in the early hours of the day: on the figures given by him by the aid of the tank the horse power required is one for every 12,000 persons instead of one for every 5,000 persons, and the result is that the initial cost of the installation is reduced as well as the cost of upkeep. It is clear that the entire *raison d'être* of the tank is to work in combination with the pump. As Mr. Williams says, “the tank is a part and parcel of the pumping machinery,” or as Mr. McCabe puts it, “the tank and the pumps combined were designed as one unit.” Mr. Firth is at one with them on this point; he says “it (the tank) serves in combination with the pumps to distribute the water; the two are together and you cannot separate them.” Now it is conceded that the pumping apparatus is machinery, and the question is whether the word machinery is comprehensive enough to embrace the tank also. Mr. Firth justifies his views by saying that the pump is a mechanical contrivance, while the tank and its trestles are the non-mechanical parts of a mechanical contrivance; his theory is that “mechanical movements, bearings, wheels, belts, valves, etc.,” are essential to the idea of machinery. I agree with him that the word machinery does generally call up a feature of wheels going round and of power being distributed in various directions by means of belts and the like. But I do not think it right to put such a limited construction on the word, and secondly it must be borne in mind that the word in the Act is machinery and not machines. In the Oxford Dictionary a machine is described as “an apparatus for applying mechanical power consisting of a number of inter-related parts each having a definite function.” It is pointed out that in recent use the word tends to be applied especially to an apparatus so devised that the result of its operation is not dependent on the strength or manipulative skill of the workman. This description, I think, disposes of Mr. Firth's idea that the apparatus, instead of being treated as an indivisible whole, may be divided into a mechanical part and a non-mecha-

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nical part, and that the word machine is applicable only to the former. As he says, "the tank and the pumps are designed in relation to each other, each has a definite function, and it is the combined effect that forms the purpose for which the apparatus was erected." It is true that the pumps without the tank can accomplish something, and that the tank without the pumps can do nothing, but once they are connected they produce an effect that neither can produce separately and bring the force of gravitation into play; each part becomes complementary to the other in fulfilling the object of the designer.

The other point to which I have referred is this: We are concerned with the words 'machinery,' not 'machine' or 'machines'. Of machinery the Oxford Dictionary says that it means "machines or the constituent parts of a machine taken collectively, the mechanism or works of a machine or machines." Regarding the suffix 'ery,' the same dictionary says that it denotes for the most part a place where an employment is carried on, as in bakery and brewery: that it occasionally denotes classes of goods, as in pottery and that after the analogy of this latter use it is added to some substantives with a general collective sense, equivalent to ware, stuff or the like, as in crockery, machinery and scenery. It is this general collective sense which appears to me to give the word machinery a very comprehensive meaning. Bearing in mind what I have said about the unanimity of the experts on both sides as to the pumps and the tank being parts of one whole, I think it must be held that the word machinery is wide enough to cover the tank so long, of course, as it is connected with the pumps and takes its part in carrying out the scheme for the distribution of the water. As the plaintiff Corporation is seeking to establish that it is not liable to tax on account of the tank, it is entitled to demand that the word machinery should receive as wide an interpretation as may be put upon it. My conclusion, therefore, is that the tank is machinery and in the words of the proviso its value is not to be taken into consideration.

Before passing to the second point I wish to refer to the only English case which

has been mentioned before us bearing on the meaning of the word machinery. It is the case of *Chamberlayne v. Collins* (1). The defendant-appellant by the covenant of a lease bound himself not to erect any operative machinery on certain premises: he erected on the premises a switchback railway upon piles driven into the ground. It was argued on his behalf that the railway, apart from the carriages which run upon it, was not machinery and in the railway there was nothing which moved or worked. The answer was that the railway could not be considered separately from the carriages which run upon it; and that whatever the cause of the motion of the carriages, a railway is a machine, and when the carriages are used it is an operative machine. In delivering judgment Lord Esher, M. R., said: "That the railway is 'machinery,' I have no doubt at all. It is something made to have a given effect by means of power applied to it. It is built solely for the purpose of operating upon something, namely, on certain carriages in a particular way. Being built on purpose to perform a particular operation, I think that, if it carries out the operation as it is intended to, it is operative machinery." Lopes, L. J., entirely agreed. Davey, L. J., said: "This railway is operative machinery. There is always great danger in giving definitions but, I think, I may say that 'machinery' implies the application of mechanical means to the attainment of some particular end by the help of natural forces, and the addition of the word 'operative' means 'with the potentiality of operating or doing work.' It is clear to my mind that a switchback railway comes within that definition, because it is a thing skilfully built with curves of a particular shape which by their peculiar form supply the motive power which actuates the carriages which run up and down the railway." It appears to me that the language used in these judgments may be applied to the present case, and if the track of a switchback railway, apart from the carriages, is machinery, the balancing tank should also be regarded as machinery.

The next question is whether the appellant Municipal Committee has taken the value of the machinery into considera-

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tion. On the face of the proceedings, it has not done so, but I think an examination of the correspondence and resolutions shows that it has. In a letter of March 26th, 1913, the Secretary asked the Assistant Engineer to the Corporation for full information as to the expenditure incurred in building the tank, and remarked that the erection of the tank had "immensely enhanced the value of the land which cannot, consequently, now be assessed with reference only to the rates of rent of the neighbouring lands." As I have shown above, it was at first proposed to assess and tax the holding on the method laid down by the first and second provisos of section 101. Subsequently this method was abandoned, and the annual value was fixed at a round sum, first of Rs. 30,000, and afterwards of Rs. 25,000. The concession was very astute, for the reduction of liability was trivial as compared with the apparent reduction on the assessment. The Appeal Board was careful to say that the sum of Rs. 25,000 was fixed as the amount at which the holding could be reasonably expected to let. Now we have it on the record that up to 1913, the holding was assessed at an annual value of Rs. 1,053, the statement in the plaint that the holding was acquired at a cost of Rs. 1,22,000 is not denied and that sum at fifteen years' purchase means that the annual value was about Rs. 8,000. It may well be asked, therefore, why in 1915 it should be supposed that any tenant would be ready to pay Rs. 25,000 for the holding. It seems to me that the only possible answer is that the Appeal Board held that the annual value of the holding had been increased by the erection of the tank. This is what the Secretary had said in 1913: "the erection of the tank had immensely enhanced the value of the land." Further, there is the reference in the order by the Appeal Board, dated 16th March 1915, and in the Chairman's letter dated 11th May 1915, to the fact or alleged fact that the Solicitor to the Corporation did not assert that the erection was machinery. It is clear from these papers that the Commissioners held that the proviso to section 101 did not stand in their way, only because of their view that the erection was not machinery. It

appears to me, therefore, that the machinery has been taken into consideration. The proviso directs that the *value* of machinery shall not be taken into consideration, and for the appellant it is urged that it is not the value but the *existence* of the machinery that has been taken into consideration. I do not think that there is any force in this argument. Suppose the balancing tank had cost not twenty lakhs of rupees, but only twenty thousand rupees, would the appellants by taking into consideration only its existence have come to the same conclusion as to the annual value of the holding? Assuming that the holding was worth Rs. 8,000 a year on the basis of the cost of acquisition, it seems absurd to suppose that the existence of machinery worth only Rs. 20,000 could have raised the annual value to Rs. 25,000. The Assessor and the Appeal Board must have taken the value of the machinery into consideration.

Then the argument is advanced that the annual value must be taken to be such as a hypothetical tenant would be prepared to pay for the holding. On the English cases the Corporation must be regarded as a hypothetical tenant although it be the only possible tenant. On the date to be found in the record it is no doubt true that if the holding were in the market with the tank erected upon it, the Corporation would gladly pay Rs. 25,000 as rent, for that would be a much smaller sum than the interest payable on the cost of construction. The method, however, cannot be applied here. In England the rating law in regard to machinery is to this effect: "The actual equipment of a hereditament with machinery and plant must not be left out of account, even though the whole or some part of the machinery...is unattached to the freehold, or would not pass upon a demise of the hereditament" (24 Halsbury's Laws of England Rates, section 48). The proviso to section 101 of the Bengal Municipal Act, on the other hand, lays down that the value of machinery shall not be taken into consideration and it follows that in this case the theory of the hypothetical tenant can be applied only to the bare holding without the machinery. A further argu-

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ment is that the third proviso is a proviso to the first proviso, that is to say, that the prohibition against taking the value of machinery into consideration applies only when the assessment is calculated on the actual cost of erection as provided by the first proviso. This argument is met by the words of the provisos, which runs "in estimating the annual value of a holding under this section" the proviso must apply to the whole section.

A last argument is that the appellants are at any rate allowed to take into consideration the foundations and plinth on which the trestles of the tank are erected. The idea seems to be that they are bricks and mortar, while the superstructure is of iron and steel, and iron and steel possess the potentiality of being made parts of a machine. The answer to this argument, I think, is that the erection must be regarded as a whole: the foundations are necessary for the superstructure, and they play their part in achieving the result for which the tank was designed. In the same way the piles on which the switchback railway was built were regarded as part and parcel of the railway, the whole of which was held to be machinery. Another idea underlying the argument appears to be that the plinth might be converted to other uses, for example, that with the superstructure removed it could be utilised for dwelling houses and other buildings. I think the same answer may be given.

My conclusion is that the appellants in their zeal for the revenues of the Cossipore-Chitpore Municipality have taken into consideration the *value* of machinery erected on the holding.

On this view the third point needs no discussion. The appellants have been guilty of a flagrant violation of an express prohibition. It is well settled that under such circumstances Civil Courts have power to interfere.

I would, therefore, dismiss the appeal with costs and affirm the decision of the lower Court.

The Advocate-General and Babus Jogendra Nath Mookerjee, Parash Nath Mookerjee, Surendra Nath Bose and Kanaidhan Dutt, for the Appellant.

Sir B. O. Mitter, Messrs. N. Sirkar, S. C. Roy and Babu Debendra Chunder Mullick, for the Respondent.

JUDGMENT.

FLETCHER, J.—This appeal comes before us under the provisions of clause 15 of the Letters Patent owing to a difference of opinion between Chatterjea, J., and Walmsley, J.

The Corporation of Calcutta instituted the suit for the declaration that the valuation and assessment made by the Cossipore Chitpore Municipality of a holding owned and occupied by the Calcutta Corporation at an annual value of Rs. 25,000 was *ultra vires* and illegal.

The Calcutta Corporation own a holding No. 1, Khelat Babu's Lane, containing 16 *bighas* odd at Tallah within the limits of the Cossipore-Chitpore Municipality on which there has been erected an overhead steel tank supported by steel columns and girders. The tank was constructed in connection with the supply and distribution of filtered water to Calcutta.

The pumping house is situate at No. 71, Barrackpore Road, adjoining the holding No. 1, Khelat Babu's Lane. Under the terms of the proviso to section 6, sub section 3, the two holdings ought to have been assessed as one holding. Before the erection of the tank the holding No. 1, Khelat Babu's Lane, was assessed by the Cossipore-Chitpore Municipality at Rs. 1053. The annual value of the holding has now been raised to Rs. 25,000. I have had the opportunity of reading the judgment about to be delivered by Greaves, J. He has in the course of his judgment summarised the evidence as to the purposes for which the tank was erected and I do not intend to repeat it here.

The first question we have to decide is whether the tank is "machinery" within the meaning of section 101 of the Bengal Municipal Act.

The learned Subordinate Judge was of opinion that it was. Chatterjea, J., thought it was not—Walmsley, J., agreed with the Subordinate Judge. I am of the same opinion as the learned Subordinate Judge. On the evidence I think the overhead tank is a mechanical contrivance used in connection with the pumps for the attainment of a particular end and that it forms an integral part of the machinery for the distribution of the filtered water supply to Calcutta. This, I

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think, brings the overhead tank within the definition of "machinery" given by Davey, L. J., in *Chamberlayne v. Collins* (1).

I agree, therefore, with the conclusion of the learned Subordinate Judge that the tank is not liable to be taken into consideration for the purpose of valuing the holding.

The second contention was that even if the tank is "machinery" within the meaning of section 101 of the Bengal Municipal Act the existence of machinery on the holding should not be left out of consideration. This view was adopted by Chatterjee, J., and in the course of his judgment he has referred to certain English authorities in support of his view. But those cases were decided on a totally different Statute and it is, I think, misleading to refer to those cases for the purpose of the construction of section 101 of the Bengal Municipal Act. Section 101 of the Bengal Municipal Act, I think, excludes machinery from the valuation of the holding for all purposes.

The next question is whether the appellant Municipality has taken the value of the machinery into consideration. I think quite clearly they have. The correspondence and resolutions establish this without doubt, and there can be no other reason for the enormous increase in the valuation.

Lastly it was, faintly suggested that if the valuation was made contrary to the terms of the Act, the Civil Courts had no power to interfere. The authorities show quite clearly that the Civil Court in such circumstances has power to interfere.

In the result I agree with the judgment of Walmsley, J., and the present appeal ought, I think, to be dismissed.

As my learned colleagues are of a different opinion, according to the opinion of the majority of the Bench, the appeal will be allowed with costs both in this Court and in the Court below.

BEACHCROFT, J.—The principal point which we have to decide in this appeal is whether the overhead tank comes within the term "machinery" used in section 101 of the Bengal Municipal Act.

To judge whether it does or not, it is unnecessary to ascertain exactly what part it plays in the scheme for the supply of water to Calcutta. The water is brought from the

river to underground reservoirs at the pumping station. There it is pumped up into the main pipe supplying Calcutta. The demand for water is not constant throughout the day in Calcutta and when the water pumped up exceeds the demand, the excess passes into the overhead tank through a valve operated by hand, which is opened to let the water through. When the water pumped up is insufficient to meet the demand, the water in the tank runs out again by the same pipe by which it was pumped into the tank, the valve being opened again to let it out. There is also a valve at the centre of the tank, which is used for shutting off the water from any of the 4 compartments, into which it is divided, for cleaning purposes. The engines are intended to pump up about $2\frac{1}{2}$ million gallons per hour, and a Diesel engine has been added which will pump perhaps $\frac{1}{4}$ million gallons, but as one of the pumps is generally undergoing repair or being cleaned, the amount usually pumped is about 2 million gallons per hour. The demand in the early hours of the day, i. e., from 6 to 10 A. M., is about 4 million gallons and during those hours water is running out of the tank.

It is not suggested that the tank by itself could be called machinery, but it is argued that it answers that description by reason of its connection with the pumps, the two, to use Mr. McCabe's words, being "designed as one unit," and the fact that it is part of the system for supplying water to the city.

It does not seem to me that the tank can be said in any way to answer the definition of machinery suggested by Davey, L. J., in *Chamberlayne v. Collins* (1). Nor do I think that it can be properly said that everything which is contained in a system comes within the description of machinery merely because mechanical contrivances are employed in the working of some parts of that system. I think the test to be applied with reference to any particular part of the system is whether it is essential to, or assists in the working, of the mechanical contrivance. Does the tank answer that test? It is argued for the plaintiff Corporation that the tank increases the efficiency of the pumps, in that if the tank were not in existence, pumps of higher power would

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be required to meet the demand at the time of maximum demand and the working of the pumps would be intermittent, as less power would be required when the demand fell off. Now to my mind it is beside the point to consider whether some other system would have been less economical or less efficient. You have to take the system as it is and then apply the test. Mr. Pearce, who was examined before us to explain the working of the tank in connection with the pumps, tells us that the pumping plant could not deal with the maximum demand of 4 million gallons per hour. He says: "the tank enables the pumps to be worked more or less constantly: we don't keep them absolutely constant. It tends to allow us to keep them constant. If we had not the reservoir, we should want more pumps." He does not suggest that the tank actually assists the working of the pumps in any way. It seems to me that the function of the tank is simply this, to store water during those hours when the demand is comparatively small and to supplement the supply given by the pumps when the demand is large. In my opinion, the tank is not "machinery."

In some respects the tank answers the same purposes as a pipe for part of the day, viz, it contains the water during its passage from the pumps to the consumer. We are not concerned with the question whether the pipes carrying the water to the city come within the terms "machinery," but it seems to me that there must be some point at which we must stop short of the tap by the turning of which the house-holder gets his water.

It is conceded that if it be held that the tank is not machinery, no objection can be legally taken to the assessment. And it is obviously so, for the tank, being attached to the earth, is "land" within the definition contained in section 6 (5) of the Act and, as such, liable to assessment.

I would allow the appeal and dismiss the suit with costs in both Courts.

GREAVES, J.—This appeal comes before us by reason of a difference of opinion between Chatterjea, J., and Walmsley, J. The question that arises for decision is whether the Cossipore and Chitpore Municipality have acted *ultra vires* in assessing the Corporation of Calcutta upon an annual value of

Rs. 25,000) in respect of their holding of 16 *bighas* 18 *cottas* and five *chittaks*, No. 1, Khelat Babu's Lane, at Tallah in the 42 Parganas, situate within the limits of the Cossipore and Chitpore Municipality, which has on a portion thereof a one-storied old masonry building measuring 30 feet by 20 feet used as an out-office and an overhead steel tank resting on and supported by steel columns and girders which stand upon a concrete cement foundation or plinth. The question involves deciding whether the steel tank is machinery within the third proviso to section 101 of the Bengal Municipal Act, 1884 (Act III of 1884), and assuming that it is machinery, whether the Cossipore and Chitpore Municipality were entitled to take into account its existence on the holding in arriving at the annual value of the holding under section 101.

Up to 1913 and prior to the erection of the tank the holding was assessed upon an annual value of Rs. 8,000 approximately. There is no evidence on the record that apart altogether from the erection of the tank the holding has so appreciated in value that its annual value is now Rs. 25,000, and consequently I think that the inference is obvious that the tank has been taken into account in arriving at the present annual value of Rs. 25,000.

Chatterjea, J., has held that the tank is not machinery within the third proviso to section 101 and that even assuming it is machinery, its existence upon the holding has been rightly taken into account in arriving at the annual value of the holding under section 101. Walmsley, J., has held that the tank is machinery and that the third proviso is an absolute prohibition against taking the tank into account in arriving at the annual value.

We thought it necessary to take additional evidence upon the hearing of the appeal and accordingly Mr. Arthur Pearce, a member of the Institute of Civil Engineers and the Executive Engineer of the Waterworks of the Calcutta Corporation, who has been in the service of the Corporation for 22 years, was called and explained to us the working of the tank in connection with the rest of the waterworks undertaking and produced five plans, Exhibits X-1-5. It appears from his evidence that

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the steel tank is 330 feet from the engine house, that it is connected with the pumps by a steel pipe, which is 5 feet in diameter extending from valve A in the tank as shown on X-1 to the valve marked B on X-1, and that after that the pipe is 6 feet in diameter, at which diameter it is shown as conveying the water to Calcutta.

It appears that the water for the use of Calcutta is conveyed by two pipes, shown by dotted lines on X-1, from Falta to the underground reservoir shown on X-1 and that from this reservoir it is pumped into the 6 feet pipe or main, the engine house connecting with the pipe between valves B and C shown on X-1.

Mr. Pearce stated that the works at Tallah were the main station for distributing water throughout Calcutta, that prior to the erection of the steel tank there was a distributing station at Tallah and three sub stations in the town of Calcutta with underground reservoirs at Bhowanipur, Wellington Square and Halliday Streets, that the water received from Falta went into the main Tallah reservoir and that from thence part was pumped direct into the town and part into the three underground reservoirs mentioned above, the distribution to the town being completed from these sub-stations, that under this system the town supply was given daily from 6 A. M. to 10 A. M. and from 3 P. M. to 6 P. M. the pumps at Tallah working more or less constantly and some all the time, more pumping, however, being done in the day time than at night, the sub-stations pumping only in the day time. He stated that after the steel tank was built and the new system instituted, the sub-stations in the town were done away with altogether, that some of the old pumps at Tallah were done away with and replaced by others, but that some of the old pumps were retained, that the new system was devised to give a constant supply to Calcutta, the idea of the scheme being to increase the supply of water and give a constant supply to Calcutta and maintain a constant pressure by pumping from the underground reservoir and by using a raised reservoir, which would automatically govern the pressure to the town by keeping it constant. He stated that the steel tank was called a

balancing tank, as it balanced inequality between supply and demand, as the demand varied and the supply from Falta was continuous, and that the pumps and the tank constituted one unit. He told us that 36 million gallons a day were received from Falta, $1\frac{1}{2}$ million gallons flowing into the reservoir in one hour, that the demand in Calcutta from 6 A. M. to 10 A. M. was 4 million gallons an hour, that the pumps could not raise so much, as the engines were not powerful enough and were only intended to pump $2\frac{1}{2}$ million gallons an hour and usually pumped about 2 million gallons an hour, the difference between this amount and the 4 million gallons demand between 6 A. M. and 10 A. M. being obtained from the steel tank. He added that the pumps were connected with the steel tank as stated above and that when the demand was less than the 2 million gallons pumped, the excess was put into the steel tank from which it was drawn when the demand was greater than the pumps could supply. He stated that the working of the pumps was not necessarily constant or continuous but that they worked at a more or less constant rate, the system tending to allow the working of the pumps to be kept constant. In cross-examination he stated that valves A, B and C on X-1 were worked by hand and that they did not work automatically and that the height of the tank was to get the pressure and that during part of the day, that is from 10—3 and during the night, the tank was purely a reservoir as there was no need of the pressure. He stated that the pumps did not draw water from the tank and that the tank would serve its purpose equally well if it was some miles away.

In the lower Court three witnesses were called, two on behalf of the Calcutta Corporation, namely, Mr. G. B. Williams and Mr. W. S. McCabe, and one Mr. Henry Firth on behalf of the Cossipore and Chitpur Municipality.

Mr. Williams is a Sanitary Engineer under the Government of Bengal and a member of the Institute of Civil Engineers and of the Institute of Mechanical Engineers, and he stated that he had carried out a number of schemes of waterworks in India. He

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stated that he considered the tank to be a part and parcel of the pumping machinery and that the tank must be called machinery, and that it was as much a part of the machinery as the boiler and that it could not be designed or constructed without the pumps and that it helped the pumps.

Mr. MacCabe is a Civil Engineer of 28 years' standing and a member of the Institute of Civil Engineers and was formerly Chief Engineer of the Calcutta Corporation. He stated that as Chief Engineer he supervised the water supply of Calcutta and designed the scheme for supplying water in Calcutta by means of a balancing tank and that the tank and the pumps combined were designed as one unit, the tank being designed to meet automatically the demand of water which varied from moment to moment in Calcutta, the tank and pumps combined being a mechanical contrivance for putting pressure on the water and for meeting the fluctuating demand, and he stated that he called the tank a part of the machinery for the supply of water in the town and that it was so designed. In cross-examination he stated that he could not dissociate the pumps from the tank any more than he could dissociate the boiler from the pumps.

Mr. Firth stated that he was in the employ of Messrs. Burn and Company of Howrah one of the principal firms of structural engineers in India, that he was a practical engineer and had designed tanks on trestles. He stated that he did not consider the tank machinery, which he would define and describe as a combination of complicated mechanical parts causing motion; in cross examination he stated that he knew that the tank and pumps were designed in relation to each other, but that the pumps could work independently of the tanks but could not alone perform the same function as the combination of the two which served combined to distribute the water, that they were together and could not be separated. He further described the tank and the trestles as the non-mechanical parts of a mechanical contrivance, which with the pipes he described as plant, and he stated that the tank did no work at all but stored water, which was not work. This is all the evidence.

The Bengal Municipal Act con-

tains no definition of machinery, but the dictionary definition of machinery as appearing in Murray's New English Dictionary, Volume VI. published by the Clarendon Press at Oxford in 1908, is as follows: "machines or the constituent parts of a machine taken collectively; the mechanism or works of a machine or machine," and in the same dictionary a machine is defined as "(1) a structure of any kind, material or immaterial; a fabric or erection," although this meaning is said to be now rare, and (4) in a narrower sense, "an apparatus for applying mechanical power, consisting of a number of inter-related parts, each having a definite function," and I think that it is in this sense that the word is used in section 101 of the Bengal Municipal Act.

In *Chamberlayne v. Collins* (1) we find this definition, "machinery implies the application of mechanical means to the attainment of some particular end by the help of natural forces."

And *Nutley and Finn, In re* (6), on a contract for the sale of a freehold brewery which provided that its fixed plant and machinery should be paid for by valuation, Kekewich, J., held that speaking generally machinery included everything which by its action produced or assisted in production and that plant might be regarded as that without which production could not go on and included such things as brewer's pipes, vats and the like.

I am not unmindful that we are in the present case called on to construe the meaning of "machinery" in a clause in a Statute imposing a rate and to construe the word in respect of an exemption from liability in respect of the rate imposed, but even so I am not prepared to hold that the steel tank falls within the meaning of machinery in the third proviso to section 101. Upon the evidence it appears to me that the tank in question is nothing more than a building for the storage of water, the water so stored being used when the need arises to supplement the amount of water pumped into the mains from the underground reservoir. It, no doubt, forms part of the system for supplying Calcutta with water and is filled

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from the same pumps which pump the supply of water into the mains but that, in my opinion, does not make it machinery within the third proviso to section 101. *Prima facie* the tank is not a machine and I do not see that it becomes a machine by reason of its connection with the pumps and engine by means of the steel pipe.

In this view the other question, namely, whether if the tank is machinery it should be taken into account in arriving at a valuation of the holding, does not arise but assuming that I am wrong in the conclusion at which I have arrived, and that the tank is machinery, then I do not think that the Cossipore and Chitpore Municipality were justified in taking its existence into account in valuing the holding. The third proviso to section 101 expressly prohibits the taking into consideration of the value of any machinery in estimating the annual value of a holding under section 10. It is said, however, in reliance upon the English cases of *Kirby v Hunslet Union Assessment Committee* (4) and *Mersey Docks and Harbour Board v. Birkenhead Assessment Committee* (3), to which we were referred, that although the tank may not be rateable *per se*, yet in valuing the holding its existence thereon must be taken into account in arriving at the annual value for the purposes of section 101. I do not think that this is so. The third proviso is express in its terms and if the tank is considered at all, it seems to me that this must involve taking into consideration its value in some form, which is what the third proviso forbids and which I think in effect means that it must be taken as non-existent for the purpose of arriving at the annual value under section 101. The English cases, to my mind, have no application, for our decision must rest upon the construction of the third proviso to section 101.

But for the reasons already given I think the appeal should succeed upon the other ground.

Appeal allowed.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 71 OF 1919.

August 1, 1919.

Present:—Mr. Lyle, A. J. C., and

Mr. Ashworth, A. J. C.

RAM UDIT AND OTHERS—PLAINTIFFS

—APPELLANTS

versus

BISHESHWAR AND OTHERS—DEFENDANTS

—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 103, O. XX, r. 4—Judgment, contents of—Court of first instance, duty of—Evidence, consideration of—Documentary evidence, failure of Court to mention, effect of—Appeal—Appellate Court, consideration of evidence by—Appeal, second—High Court, power of, to determine issue of fact.

A Court of first hearing is bound to consider all the evidence adduced before it, but the mere fact that that Court omits to mention a document in its judgment is no sufficient proof that it failed to take the document into consideration, especially where the document is of obviously no importance or weight. Where, however, the document is of obvious weight or importance, it is incumbent on the Court to mention the document in its judgment and its omission to do so may be regarded by a Court of Appeal as sufficient proof that the document was not taken into consideration. [p. 355, col 1]

A party is not entitled to have a document considered by an Appellate Court, unless the attention of the Court is drawn to it, or it is impliedly relied on. In the absence of evidence to the contrary, it may be presumed that a respondent relies on the judgment of the lower Court in his favour, and that any document, treated as a document of importance by that Court, has been impliedly brought to the notice of the Appellate Court [p. 355, col. 1.]

Where an Appellate Court has determined an issue of fact without a proper consideration of the evidence, it is within the power of the High Court, under section 10 of the Civil Procedure Code, to determine that issue, if there is sufficient evidence on the record for its determination. [p. 357, col. 1.]

Appeal from the decree of the Subordinate Judge, Bara Banki, dated the 19th December 1918, reversing that of the Munsif, Ram Sanhighat, at Bara Banki, dated the 13th February 1918.

Mr. S. N. Sinha, for the Appellants.

Mr. A. P. Sen, for the Respondents.

ORDER OF REFERENCE.

ASHWORTH, A. J. C.—23rd June 1919.—The substance of this appeal is that the lower Appellate Court failed to take into consideration certain documentary evidence filed by the appellants. The appellants' Counsel has specified this

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this documentary evidence as consisting of Exhibits 2, 7, 10, 12 and 13. To prove that the lower Appellate Court has not taken them into consideration, he refers me to the judgment which fails to mention these documents. To prove that the lower Appellate Court is bound to take into consideration all documents filed in the case and admitted by the Court of hearing, he refers to *Sheodharshan Lal v. Assesar Singh* (1). The failure of a Court to mention a document specifically in its judgment is no proof that it has not considered the document. Nor again, in my opinion, can an Appellate Court be required to consider any document unless that document is brought to its attention either by the judgment of the Court from which it is hearing the appeal or by the Pleader who is prosecuting the appeal. Order XLI, rule 10, provides for an appellant being heard in support of and the respondent being heard against the appeal. There is no provision requiring the Court to travel outside the arguments and pleadings of the parties to the appeal. In the case referred to I find that Mr. Lindsay stated that it appeared to him that no attention had been paid to the documentary evidence in the case. This remark does not appear to me to justify the headnote—"A finding of fact can be questioned in second appeal, if it is found that the lower Appellate Court failed to consider the entire evidence on the record relating to that fact." The correct view of the law appears to me to be that an Appellate Court is only bound to take into consideration documentary evidence relied on by the parties in the argument of the appeal, but that it may be inferred that one side or other in appeal relied on the documents specifically mentioned in the lower Court's judgment. In the case of other documents an affidavit ought to be filed by the Counsel who appeared in the lower Appellate Court that he brought the documents to the attention of the Judge. Again it can only be presumed from failure of a Subordinate Court to mention any document in its judgment that it failed to take it into consideration, if the document is one of obvious importance.

The appeal is admitted, but I desire it to come before a Bench as a ruling is necessary on the matter mentioned.

(1) 46 Ind. Cas. 52; 5 O. L. J. 179.

JUDGMENT.—This appeal arises out of a suit for a declaration of the title of the plaintiffs along with defendant No. 4 to certain property. The suit was bound to fail if the defendants No. 2 Prithipal and No. 3 Surajpal were proved to be the legitimate sons of one Kunj Behari. The learned Munsif found that they were not the legitimate sons of Kunj Behari. On first appeal the learned Subordinate Judge of Bara Banki reversed the finding of the Munsif and held that they were proved to be the legitimate sons of Kunj Behari. In second appeal to this Court it is urged that the lower Appellate Court failed to take into consideration some of the documentary evidence filed by the plaintiffs. It is also urged that it wrongly refused to treat as substantive evidence a certain Exhibit 9. The case originally came before a single Judge of this Court under Order XLI, rule 11. In the course of argument on the first question mentioned above the appellants' Counsel maintained that the absence in the judgment of any mention of documents was proof that the Judge had not considered those documents. He also maintained that a lower Appellate Court is bound to take into consideration all documents filed in the case and admitted by the Court of hearing. In support of this he quoted various rulings of this Court. It appeared to the Judge of this Court before whom the case originally came that this contention, in view of the rulings on the matter, should be considered by a Bench. Accordingly this case has now been argued before this Bench.

The questions that arise in this appeal are:—

(1) Can it be presumed from the absence of mention by a Judge in his judgment of any documents that he has failed to take these documents into consideration?

(2) Is a lower Appellate Court bound to take into consideration all the documents which have been admitted by the Court of first hearing?

(3) Did the lower Appellate Court in this case fail to take into consideration any documents and did its failure to do so constitute a substantial error or defect in procedure within the meaning of section 100 of the Code of Civil Procedure?

(4) Was the lower Court in error in

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refusing to treat Exhibit 9 as substantive evidence in this case?

As to questions Nos. 1 and 2 we have no hesitation in saying that the mere failure of a Court to mention a document in its judgment is no sufficient proof that the Court failed to consider it. The parties to a case are entitled to have their evidence considered by the Court of first hearing from the point of view of the particular purpose for which that evidence is adduced. Where any document is obviously of no importance or weight, it is not incumbent on a Court to mention the document in its judgment. If, however, the document is of obvious weight and importance, the omission of the Court of first hearing to mention it in its judgment may be regarded by a Court of Appeal as sufficient proof that it failed to take the document into consideration, because the probability of a Court passing over in silence a document of obvious importance which it has considered is less than the probability of its omitting to consider it by some oversight. The case is, however, somewhat different where mention of a document is omitted in the judgment of a first Appellate Court. Before an Appellate Court a party is not entitled to have a document considered unless his Counsel draws the attention of the Court to it, or impliedly relies on it. This appears to us to follow from the provisions of Order XLI, rule 16, which describes the procedure on hearing an appeal and states that the appellant and respondent shall be heard. It may, however, be presumed, in the absence of evidence to the contrary, that a respondent relies on the judgment of the lower Court in his favour and that any document treated as a document of importance by the Court of first hearing has been impliedly brought to the notice of the first Appellate Court.

As to question No. 3, the appellants' Counsel showed considerable uncertainty as to what documents he referred to in this connection. We ultimately understood from him that the documents which he maintained the first Appellate Court had not considered were Exhibits 2, 7, 10, 12 and 13. The Counsel for the respondents has attempted to show that these documents or the greater number of

them were mentioned by the learned Subordinate Judge. It is clear, however, that before we can hold that they were taken into consideration by the Subordinate Judge for the purpose for which they were cited or relied on, we must find them treated by the Subordinate Judge under the issue in respect of which they were relied on, that is to say in this case the issue as to the legitimacy of defendants Nos. 2 and 3. The Subordinate Judge's appellate judgment on this issue does not mention any of the exhibits in question. There is no proof, however, that any of these exhibits were cited by the appellants' Counsel before the Subordinate Judge in his argument. It remains then to see whether they were such documents as the lower Appellate Court was bound to consider by reason of their having been relied on by the Court of first hearing as documents of importance. Exhibit 2 is mentioned by the Court of first hearing twice over. In one place it is said to be the copy of a Sessions Judge's judgment which the Court of first hearing regarded as of no importance, and in the other place it appears to be the copy of a judgment of a Munsif. It is this latter Exhibit 2 to which reference is made by appellants' Counsel. The Munsif said that this Exhibit 2 as well as Exhibit 7 were relevant to show that the appellants were not questioning the legitimacy of defendants Nos. 2 and 3 for the first time. These exhibits cannot be said to have been considered as of importance by the Court of first hearing and we, therefore, hold that the first Appellate Court may well have considered them without having mentioned them in its judgment. Exhibit 13 is not mentioned in the judgment of the Court of first hearing at all. Exhibits 10 and 12 are mentioned and treated as of importance. Exhibit 10 is an order in a criminal case showing that the defendant Prithipal and one Musammatt Ramdei (or Musammatt Gulbasa) were prosecuted together in a certain case under section 323 and other sections. Exhibit 12 shows that Prithipal called this Musammatt Gulbasa his mother. These two documents were undoubtedly of importance to prove that the defendants Nos. 2 and 3 were not legitimate, and for the following reasons,

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The plaintiffs' case was that the mother of the defendants was one *Musammatt Gulbasa* who had been the wife of one Mahabir and afterwards formed a *liaison* with Kunj Behari, the result of which was the birth of defendants Nos. 2 and 3. The case of defendants Nos. 2 and 3 was that their mother was *Musammatt Ramdei* and that she was never known by the name of *Gulbasa* and had never been the wife of Mahabir. Now Exhibit 12, read with Exhibit 10, clearly constitutes an admission by Prithipal that he and his brother were the children of *Musammatt Gulbasa*. On the contention, therefore, that *Musammatt Ramdei* was quite a different person from *Musammatt Gulbasa*, this admission, if considered conclusive, would entirely destroy the case of the defendants. The course of the pleadings shows that it was not the contention of the defendants that their mother was *Musammatt Gulbasa* while married to Mahabir and that subsequently she was lawfully married to Kunj Behari and became *Musammatt Ramdei*. We consider it proved, therefore, that the lower Appellate Court failed to take into consideration Exhibits 10 and 12 by reason of its failure to mention them in its judgment.

As to question No. 4, Exhibit 9 was the statement of *Musammatt Gulbasa* just referred to in the criminal case under section 323. In this statement that *Musammatt Gulbasa* clearly implied that defendants Nos. 2 and 3 were her children. Read with Exhibits 10 and 12 her statement clearly amounted to an expression by conduct of a belief that defendants Nos. 2 and 3 were her children. Exhibit 9 is, therefore, relevant under section 50 of the Evidence Act as substantive evidence. The lower Appellate Court, assuming that *Musammatt Ramdei* and *Musammatt Gulbasa* were one and the same persons (which was contrary to the case of the defendants), held that *Musammatt Ramdei's* evidence in this case could be rebutted by the evidence of *Musammatt Gulbasa* in the criminal case under section 323, but held that the latter evidence was not admissible as substantive evidence. For the reasons stated, we hold that this was incorrect.

The question now arises whether we should send this case back to the first

Appellate Court for consideration of Exhibits 10 and 12 and for consideration of Exhibit 9 as substantive evidence or should dispose of the case ourselves. The lower Appellate Court decided in favour of the legitimacy of defendants Nos. 2 and 3 on the basis of their oral evidence, especially on the evidence of the witness Ramanand. We are of the opinion that this oral evidence cannot prevail against the evidence afforded by Prithipal's admission that *Gulbasa* was his mother and the conduct of *Musammatt Gulbasa* in the 323 case showing that she regarded defendants Nos. 2 and 3 as her children. This admission of the defendant No. 2 and this conduct of *Musammatt Gulbasa* is absolutely destructive of the defendants' contention that their mother is *Musammatt Ramdei* who had nothing to do with *Musammatt Gulbasa*. If, however, we allow the variation in the defendants' case, which the two lower Courts appear to have impliedly allowed, namely that *Musammatt Ramdei* was the same as *Musammatt Gulbasa*, then it would be necessary to have reliable evidence that *Musammatt Gulbasa* could never have been the married wife of Kunj Behari. The plaintiffs' witnesses all depose to this fact, because they describe *Gulbasa* as running away from her first husband Mahabir and living with Kunj Behari in circumstances negative of the possibility of a second marriage with Kunj Behari. This evidence may be believed, if for no other reason, for the reason that the defendants never attempted to meet that evidence otherwise than by denying the identity of *Musammatt Ramdei* with *Musammatt Gulbasa*. This denial of the identity is rebutted by the fact that Prithipal clearly admitted *Gulbasa* to be his mother. Even then if we allow the variation we must hold that the legitimacy of defendants Nos. 2 and 3 is disproved. It has been argued that there is a presumption of law in favour of legitimacy under section 114 of the Evidence Act. Be this as it may, no presumption could prevail against the evidence and inference to the contrary which appear in this case.

It has been urged by the respondents' Counsel that we are not entitled to decide a question of fact in second appeal, and he

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relies on the case of *Appa Kalga Naik v. Mallu* (2) as authority for the proposition that the case must be remanded to the lower Appellate Court. This ruling was passed before the present Code of Civil Procedure of 1908 came into force. Under section 103 of the present Code of Civil Procedure in second appeal a High Court may, if the evidence on the record is sufficient, determine any issue of fact necessary for the disposal of the appeal but not determined by the lower Appellate Court. We hold that this provision also applies to an issue of fact determined by the lower Appellate Court without proper consideration of the evidence. An issue so determined cannot be regarded as determined within the meaning of this section. In any case it would be absurd to hold that this Court may determine an issue not determined by the lower Appellate Court while it may not determine an issue of which the determination is vitiated by the proper exclusion of evidence.

We, therefore, allow this appeal and restore the decree of the learned Munsif with costs throughout.

Appeal allowed.

(2) 16 B. 477.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 564 OF 1915.
July 31, 1919.

Present:—Sir Dawson Miller, Kt., Chief Justice, and Mr. Justice Foster.

RAMYAD PANDAY—APPELLANT

versus

RAMBIHARA PANDE—RESPONDENT.

Hindu Law Widow, alienation by—Reversioner, next male, right of, to question alienation—Female reversioners, presence of, effect of—Necessity, proof of—Transferee, failure of, to make enquiry, effect of—Marriage, contemplated, of daughter, whether necessity.

A male reversioner, between whom and the estate there are only female heirs, is entitled to sue for a declaration that a transfer made by the widow of the last male holder is invalid. [p. 358, col. 2.]

Where the necessity for an alienation by a Hindu widow is alleged to be the contemplated marriage of a daughter, but it appears that there was no negotiation for the marriage at the time the money was

advanced and that the transferee made no enquiries as to the necessity before making the advance, the alienation cannot be upheld as being justified by legal necessity [p. 351, col. 1.]

Appeal from a decision of the Subordinate Judge, Shahabad, dated the 21st February 1918, affirming that of the Additional Munsif, Buxar, dated the 19th July 1917.

Mr. Siva Narain Bose, for the Appellants.

Mr. N. N. Sen, for the Respondents.

JUDGMENT.

MILLER, C. J.—This is an appeal by some of the defendants in the suit against a decision of the Subordinate Judge of Shahabad dated the 21st February 1918. The plaintiff was the cousin of Ram Lakhan deceased, being the son of a brother of Ram Lakhan's father. Ram Lakhan died leaving a widow and two daughters. There was no nearer male heir to his estate than the present plaintiff, who undoubtedly would be the reversioner to his estate after the death of his widow and his two daughters. After the death of her husband the widow, Basmuti Kuer, who is the 1st defendant in the suit, executed a usufructuary mortgage in favour of the remaining defendants. That was on the 5th February 1916. Shortly afterwards, viz., on the 30th March 1916, the plaintiff as reversionary heir brought this suit for a declaration that the mortgage deed executed on the 5th February by the widow in favour of the other defendants was forged, fraudulent and without consideration and that the defendant No. 1 had no right to transfer the property left by her deceased husband without any valid necessity.

No fraud was proved at the trial, but the learned Munsif determined that the advance in respect to which the usufructuary mortgage was granted was not entirely for legal necessity but that to the extent of Rs. 300 out of Rs. 800 advanced the mortgage was for legal necessity. The Rs. 300 were advanced to the widow to meet the expenses of the marriage of a younger daughter which, according to her, was at that time under contemplation.

On appeal to the Subordinate Judge he found as a fact that at the time when the money was advanced there had been no negotiations at all with respect to the marriage, that there was no evidence to show that the mortgagee had made any

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enquiry about the existence of any legal necessity on the part of the widow for executing the mortgage or as to her ability or otherwise to meet the expenses of the contemplated marriage out of the income of the property left to her by her husband, and further he came to the conclusion that even conceding for the sake of argument that there was some negotiation for the marriage at the time, the widow was not justified in contracting debts of this nature for that purpose until the marriage was finally settled, and it appeared at the trial that the daughter for whose contemplated marriage this money was borrowed had not in fact been married at all.

From that decision there is no appeal by the widow, but the mortgagees and others who were joint with him in estate have preferred this appeal and their contention is that the plaintiff, not being the immediate reversioner, is not entitled to maintain a suit for a declaration of this sort, and reliance is placed for that contention on the case of *Venkata Narayana Pillay v. Subbammal* (1). In that case their Lordships of the Privy Council were dealing with a claim by a reversioner between whom and the last male owner other male lives existed, and it was laid down there that in such circumstances the plaintiff was not entitled to sue. In the present case it is admitted that there is no male life between the plaintiff and the last male owner, and whether a reversioner in such circumstances is entitled to sue or not has been the subject of judicial decisions on many previous occasions in the High Courts of Calcutta, Madras and Allahabad, and in all these High Courts it has been laid down that only immediate reversioners can bring a suit of this nature either, unless the immediate reversioners are themselves fraudulently colluding with the female heir so that her protection of the estate for the reversioner is gone, or unless the immediate reversioner is herself only the holder of a life estate. In the present case the only lives between the plaintiff and this estate are the lives of the widow and her two daughters and in each of these cases these ladies only

take a life-estate. This very question was raised and decided in a carefully considered judgment of the Allahabad High Court in the case of *Balgobind v. Ram Kumar* (2). The learned Judges in that case, after considering the effect of the decision laid down by their Lordships of the Privy Council in the case which I have already referred to, came to the conclusion that the ruling laid down there had no application when the owner dies leaving between himself and the plaintiff only female relations who succeed to his estate taking a life-interest only, and that it was still open in such a case for the next male reversioner to bring a suit of this sort because he was the nearest male reversioner to the full ownership of the estate. Decisions to a similar effect are to be found in *Kandasami v. Akkummal* (3); *Abinash Chandra Mazumdar v. Harinath Shaha* (4); and although there is a decision of the Allahabad High Court in *Madari v. Malki* (5) which decides that a reversioner is not entitled to sue to set aside an alienation made by a Hindu widow when there stand between him and the property other female lives besides that of the widow; still that decision has been dissented from in a later case of the same High Court. That was the case of *Raja Dei v. Umei Singh* (6).

It would appear, therefore, that there is practically a consensus of opinion in the different High Courts that a reversioner who is not the immediate reversioner, but who is the immediate male reversioner, is entitled to sue for a declaration declaring the invalidity of transfers made by the widow, notwithstanding that there may be other female lives between him and the estate. This was practically the only question raised in this appeal, although it was contended that in the exercise of its discretion the Court ought not in such a case as this to grant the declaration asked for. It seems to me that there is nothing in that contention and once it is admitted that the transfer was not valid as against the reversioner, I think that this was a very proper case in which to make a declaration.

(1) 29 Ind. Cas. 293; 19 C. W. N. 641 (P. C.); 38 M. 466; 28 M. L. J. 535; 21 C. L. J. 515; 17 Bom. L. R. 468; 17 M. L. T. 435; 2 L. W. 596; (1915) M. W. N. 555; 42 I. A. 125.

(2) 6 A. 431; A. W. N. (1884) 155.

(3) 13 M. 195.

(4) 32 C. 62; 9 C. W. N. 25.

(5) 6 A. 428; A. W. N. (1884) 151.

(6) 13 Ind. Cas. 632; 34 A. 207; 9 A. L. J. 153.

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Perhaps, I ought to mention that although we were told at the outset that those I have mentioned were the only questions for determination in this appeal, the learned Vakil for the appellants did towards the end of his argument ask us to say that the Subordinate Judge was wrong in holding that an advance made to a Hindu widow for the contemplated marriage of her daughter was not an advance justified by legal necessity. I have already stated what the facts found were, viz., that there was no negotiation for the marriage at the time the advance was made and that certainly no enquiries were made by the mortgagee as to the necessity or otherwise for this advance before the advance was made. It seems to me quite clear that merely because you have a daughter who may, and in all probability will, at some future time be married, that is no reason why the mother should mortgage or alienate the family property merely to raise funds for that marriage, which may or may not—because the child may die or many things may happen—take place at some future date. I am quite satisfied that the learned Judge was quite right as a matter of law in deciding that there was no legal necessity for such a loan. This appeal, in my opinion, fails and must be dismissed with costs.

FOSTER, J.—I agree.

Appeal dismissed.

ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 99 OF 1916.

April 4, 1919.

Present:—Mr. Stuart, J. C., and

Pandit Kanhaiya Lal, A. J. C.

Babu NARAIN SINGH—DEFENDANT No. 1

—APPELLANT

versus

THE DEPUTY COMMISSIONER, PARTABGARH, AS MANAGER, COURT OF WARDS, KALA KANKAR ESTATE—

PLAINTIFF

SAH MADAN MOHAN DAS AND OTHERS—

DEFENDANTS Nos 2 TO 9—RESPONDENTS.

Grant of annuity—Gift of immovable property in

lieu of annuity—Suit to set aside gift—Annuity, whether must be restored.

By virtue of certain deeds defendant became entitled to receive an annuity generation after generation out of the profits of certain specified villages from the person in possession of the estate. The holder of the estate subsequently gifted certain other villages to the defendant in consideration of the latter relinquishing his right to the said annuity, on condition that if the gifted villages passed at any time out of the hands of the defendant, he would be entitled to have his right to the annuity restored to him. A subsequent holder of the estate sought to oust the defendant from the gifted villages:

Held, that the defendant could not be ousted from the gifted villages without the restoration to him of the annuity granted to him. [p. 361, cl 2]

Deputy Commissioner, Partabgarh v. Kishan Dayal, 49 Ind. Cas. 80; 5 O. L. J. 754, distinguished.

Appeal from the decree of the Subordinate Judge, Tahsil Mohanlalganj, Lucknow, dated the 20th May 1916.

The Hon'ble Syed Wazir Hasan and Syed Ali Mohammad, for the Appellant.

Mr. W. Wallach, the Hon'ble Dr. Tej Bahadur Sapru and Rai Nagendro Nath Ghoshal Bahadur, for Respondent No. 1.

JUDGMENT.—The dispute in this appeal relates to the villages Latifpur and Baulia, which originally formed part of the Rampur estate and belonged to Raja Hanwant Singh. On the 2nd April 1859 Raja Hanwant Singh executed a deed of gift in respect of his estate, with the exception of certain villages, in favour of his grandson, Raja Rampal Singh. Subsequent to the execution of the said deed of gift certain disputes arose between Raja Hanwant Singh and Raja Rampal Singh which led the former to institute a suit against the latter for the cancellation of the deed of gift. On the 1st September 1871 the two entered into a compromise, the effect of which was that the deed of gift aforesaid was cancelled and the estate was split up into two portions, Kala Kankar and Dharapur; the former was allowed to Raja Hanwant Singh for life without any power of alienation and the latter to Raja Rampal Singh for life in similar terms. The provision made by the compromise was that the former was to go to Raja Rampal Singh on the death of Raja Hanwant Singh for his life in case he survived him, with the remainder to Lachhman Singh and his heirs; and the latter to

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Musammat Dirgaj Kunwar on the death of Raja Rampal Singh, in case she survived him, with the remainder to Raja Hanwant Singh, if he survived both of them, or else to Lachhman Singh and his heirs. A decree was passed in terms of the compromise. As a result of the compromise the two villages in question, Latifpur and Baulia, and the three other villages Reoli, Janwaman and Natohi went to Raja Hanwant Singh and the village Agai went to Raja Rampal Singh.

Subsequently in consideration of some money due by Raja Rampal Singh to Raja Hanwant Singh, Raja Rampal Singh agreed to transfer the village Agai to Raja Hanwant Singh and to allow him full proprietary rights in the three villages Reoli, Janwaman and Natohi already in his possession. This arrangement was confirmed by an award of Major Hastings dated the 17th March 1873 (Exhibit 115). In pursuance of the award Raja Rampal Singh executed an agreement transferring the village Agai, forming part of the Dharupur sub division, to Raja Hanwant Singh, and allowing him full proprietary rights in the villages Reoli, Janwaman and Natohi, forming part of the Kala Kankar estate, already in his possession (Exhibit A3).

On the 30th August 1873 Raja Hanwant Singh transferred the four villages Agai, Reoli, Janwaman and Natohi by way of gift to his grandsons, Lal Ram Prasad Singh and Narain Singh, sons of Lachhman Singh, subject to the condition that out of the net profits, Rs. 5,000 per year were to go towards the payment of certain annuities, Rs. 810 per year were to be appropriated by the donees for their expenses in a certain fixed proportion, and the remainder was to be spent in the improvement of certain *wagf* property, which had been previously dedicated. The deed of gift expressly stated that neither of the donees shall have any power to transfer the gifted property (Exhibit 170). On the 18th December 1874 he supplemented the same by executing an agreement, declaring that out of the donees whoever shall be the owner of the Rampur estate shall have a personal right by virtue of that deed in the gifted villages (Exhibit A 17.). The agreement went on to say:—"As a

matter of fact he who shall be the heir or representative or adoptee or the owner and representative of the Rampur estate shall be the representative of this property also and the donees or their representatives shall be allowed a deduction out of the income of the gifted property in respect of Court expenses, expenses relating to the visitors of the village and village expenses, e. g., pay of the *Zildars* and *Sipahis* appointed." It further said:—"The amount payable annually to Babu Lachhman Singh, Lal Ram Prasad Singh and Babu Narain Singh under the deed executed and registered on the 3rd August 1873 shall be given to all the three persons and their heirs, generation after generation."

Raja Hanwant Singh died in 1831, and was succeeded by Raja Rampal Singh who held the entire estate till his death in 1909. The father of Raja Rampal Singh had been killed in the lifetime of Raja Hanwant Singh. Raja Hanwant Singh had another son, Lachhman Singh, who died in 1888, leaving two sons, Lal Ram Prasad Singh and Narain Singh, in whose favour the deed of gift above mentioned was executed. On the 5th January 1882 Raja Rampal Singh made a gift of the villages Latifpur and Baulia, to which he had succeeded on the death of Raja Hanwant Singh, in favour of Narain Singh in consideration of the latter giving up his share in the villages Reoli, Janwaman and Natohi which were transferred to him by Raja Hanwant Singh on the 30th August 1873 (Exhibit A-180). In these villages Raja Rampal Singh had, however, only a life interest under the compromise of the 1st September 1871. The deed of gift accordingly provided that if for any reason the said villages passed out of the possession of Narain Singh either during the lifetime of the donor or after his death, the former shall be at liberty to take back into his possession the villages Reoli, Janwaman and Natohi in terms of the deed of gift dated the 30th August 1873 executed by Raja Hanwant Singh. A corresponding deed of relinquishment was executed by Narain Singh in favour of Raja Rampal Singh on the 5th January 1882 in respect of the rights held by the former in the villages Reoli, Janwaman and Natohi (Exhibit A-179). Raja Rampal Singh took

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a similar deed of relinquishment from Lal Ram Prasad Singh in respect of his rights in Reoli, Janwaman and Natohi (Exhibit 216), giving him the villages Andhripur and Raja Kashipur in return (Exhibit A181).

Lal Ram Prasad Singh died in 1901, leaving three sons, the eldest of whom Ramesh Singh died in 1910. He left a son, Audesh Singh, who is in the present possession of the estate. The Court of Wards is in charge of the estate on his behalf. It seeks to oust Narain Singh from the villages Latifpur and Baulia, given to him by Raja Rampal Singh, without returning to him his interest in the villages Reoli, Janwaman and Natohi which he gave in exchange.

The Court below decreed the claim and the only point for consideration is whether the Court of Wards is estopped from impugning the arrangement entered into by Raja Rampal Singh which had the effect of benefiting the estate, and if not, can the arrangement be set aside without the Court of Wards being compelled to restore to the defendant-appellant the benefit which the estate had received from him in exchange.

We do not consider that any question of estoppel arises in this case, because Raja Rampal Singh could not have conferred by the exchange greater rights than he himself possessed. He did not possess more than a life-interest in the villages Latifpur and Baulia. Raja Audesh Singh, whose estate is in charge of the Court of Wards, does not derive his title from Raja Rampal Singh or through him. He claims a title which was conferred on his grandfather, Lachhman Singh, by the compromise.

He cannot, however, be allowed to impugn the arrangement made by Raja Rampal Singh and claim back what the defendant-appellant got by the arrangement without restoring to him what he gave in return. It is necessary, therefore, to enquire what rights the defendant appellant possessed by virtue of the deed of gift executed by Raja Hanwant Singh. The deed was described as a conditional deed and conferred no power on the donees to transfer the whole or any portion of the gifted property. It allowed Lal Ram Prasad Singh, one of the donees, to take Rs. 450 per year and Narain Singh, the other donee, to take Rs. 360 per year for their expenses out of the profits of the

property given and required both of them to devote the entire remaining income of the property to the payment of certain annuities and to the improvement of certain property which had been previously dedicated by the donor. In other words, the donees were not given any control over the corpus of the property. They were only allowed to appropriate a fixed portion of its income in consideration of certain obligations and to apply the rest of the income in the manner prescribed by the deed. It may be said that the restraint on alienation imposed by the deed of gift was void by reason of section 10 of the Transfer of Property Act (IV of 1922), but it is very doubtful whether the donees carried out the obligations imposed on them and if they did not, the donor had the power to revoke the gift and deal with the property in any other manner he liked.

In fact he executed another deed on the 18th December 1874, in which he recited that he was writing that deed by way of a settlement with the consent of the donees and declared that out of the donees whoever shall be the owner of the Rampur estate shall have a personal right by virtue of that deed in the gifted villages and shall hold those villages subject to a liability to pay to Lachhman Singh, Lal Ram Prasad Singh and Narain Singh and their heirs the amounts assured to them under the deed of the 3rd August 1873, generation after generation. The plaintiff, being the present owner of the Rampur estate and also the representative of one of the donees, is entitled to retain the villages in his possession and management, subject to the right of the defendant-appellant and his heirs, generation after generation, to receive Rs. 360 per year out of the income derivable from those villages. If those villages have been included in any valid trust, the defendant-appellant can receive that amount from the trustees.

The deed of relinquishment executed by the defendant-appellant was unconditional and absolute. The deed of gift executed by Raja Rampal Singh undoubtedly provided that if for any reason the defendant appellant lost possession of the villages Latifpur and Baulia, he shall be at liberty to take back into his possession the villages Reoli, Janwaman and Natohi as before, according to the terms of the deed of gift executed by Raja Hanwant Singh on the 30th August 1873.

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But that deed of gift read with the supplementary deed of the 18th December 1874, does not, as shown above, confer on the defendant-appellant, in case the estate passes to the other donee or his heirs, any higher right than that of receiving Rs. 363 per annum generation after generation from the person in possession of the three villages aforesaid. By his consent the defendant-appellant had waived every other right.

The learned Counsel for the plaintiff respondent has referred us to our decision in *Deputy Commissioner, Partabgarh v. Kishan Doyal* (1). But in that case the consideration for the grant of a perpetual lease was the relinquishment by the lessees of their office as trustees, which carried certain emoluments. The office was not hereditary; and no question of the restoration of the trusteeship or of the allowances attached thereto could, therefore, arise. In the present case the allowance of Rs. 360 per year was the measure of the benefit, which the defendant-appellant annually received from the profits of the villages. That allowance was hereditary. The supplementary deed extinguished his right to the joint possession of the villages with the other donee, if the other donee became the owner and representative of the Rampur estate. The only benefit which the defendant-appellant is thus entitled to have restored to him is the amount of the said hereditary allowance.

The appeal is, therefore, allowed in so far that the decree passed by the Court below for the possession of the villages Latifpur and Baulia will be subject to the condition that the defendant-appellant will be entitled to the restoration of the hereditary allowance amounting to Rs. 360 per year, to be paid out of the profits of the villages Reoli, Janwaman and Natohi from the date on which the plaintiff takes possession of the villages Latifpur and Baulia. As the plaintiff was not entitled to an unconditional decree, no mesne profits will be allowed to him for the period antecedent to the date of his getting possession. The parties will in the circumstances bear their own costs throughout.

Appeal partly allowed.

(1) 49 Ind. Cas. 80; 5 O. L. J. 754.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 62 OF 1916.

October 31, 1919.

Present:—Mr. Justice Scott-Smith
and Mr. Justice LeRoussignol.

PIYARE LAL AND OTHERS—DEFENDANTS—
APPELLANTS
versus

CHAKAR AND OTHERS—PLAINTIFFS AND
DEFENDANTS—RESPONDENTS.

*Custom—Alienation—Consideration, full payment of,
not proved—Sale, whether liable to be set aside.*

A sale should not be disturbed merely because the payment of an item of consideration set forth in the deed of sale has not been made or because its payment is doubtful, when the consideration even after the deduction of the doubtful item represents a reasonable sale price. [p 363, col 2.]

First appeal from the decree of the Sub-Judge, 1st Class, Lyallpur, dated the 2nd October 1915, decreeing the claim.

The Hon'ble Rai Bahadur Pandit Sheo Narain and Dewan Mahesh Das for the Appellant.

Lala Warir Chand and Lala Ram Chand Manchanda, for the Respondents.

JUDGMENT.—By deed of the 3rd June 1893 Mubarik, Bakar and Fazil sold some 1,627 *kanals* of land for Rs. 1,500 to the defendants, Piare Lal and Amir Chand. The suit out of which this appeal arises was instituted in April 1914 by the sons of Mubarik and Bakar. No allegations were made by the plaintiffs against the character of the vendors, nor was it suggested that they had effected this sale with the intention of prejudicing the plaintiffs. The plaintiffs contented themselves with a plea that the sale was made without necessity and consideration and that the alienors had no power to alienate. The trial Court has held that the sale of the land, so far as it was effected by Fazil, cannot now be disturbed inasmuch as that sale by Fazil was acquiesced in by Mubarik and Bakar, whose acquiescence binds their sons, the present plaintiffs.

With regard to the sale so far as it affects the shares of Mubarik and Bakar, the lower Court has held that one item of Rs. 300, which appears under the description of earnest money paid in cash and cattle, was never paid and it has given the plaintiffs a decree in respect of two-thirds of the land in dispute, directing that they shall take possession

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of that area, being the shares sold by Mubarik and Bakar, after their deaths and on payment to the vendees of Rs. 1,042-5-4, this sum being two thirds of Rs. 1,563-8-0 paid by the vendees to the vendors and an earlier mortgagee.

The vendees have appealed to this Court and urged that the plaintiffs' suit should have been dismissed *in toto*, whilst there is cross-objection on the part of the plaintiffs against the dismissal of their suit as to the share of Fazil in the property sold.

As has been mentioned above, the Court below finds that the vendees appellants in order to acquire this land have paid Rs. 1,563-8-0 in all. The purchase price according to the deed of sale is only Rs. 1,500 and the discrepancy between that price and the price actually paid is due to the circumstance that a portion of the purchase price was left in deposit with the vendees for the redemption of an earlier mortgage, and the vendees found subsequently that the incumbrance upon the property sold to them was of a heavier nature than had been imagined. Consequently before obtaining possession they found it necessary to disburse a larger sum of money than had been retained by them under that specific head at the time of the sale. Thus although the vendees have paid a larger sum than the sale price, the trial Court has rescinded the sale in respect of two-thirds of the area sold, solely on the ground that a sum of Rs. 300 set forth in the deed of sale as part of the sale price had not been paid. We have been taken through the evidence on the subject and as might be expected, after the lapse of so many years we find it very meagre both in quantity and quality and we cannot say that we are thoroughly satisfied that a sum of Rs. 300 was actually paid in advance as set forth in the deed of sale. At the same time we are quite satisfied that the transaction was a *bona fide* one. A large area of the vendors' land was already under mortgage, and by this sale they retrieved a portion of the mortgaged area and at the same time secured some cash and cattle. Whether they could have made a better bargain than they did is not for us to decide, nor would it be easy at this time to arrive at any precise conclusion. But the fact remains that the sale was effected by all the existing elders of the family and was never challenged for

many years. The sale has all the outward appearances of a genuine transaction, and we do not think that it should be rescinded merely because it is doubtful whether the sale price was paid in the details set forth in the sale-deed. It may be that the Rs. 300 shown as earnest money was the usual padding which is rarely absent from any Indian sale deed, or it may be that the uncertainty with regard to the amount which would be found payable to the previous mortgagee induced the parties to show the sale price as Rs. 1,100, although Rs. 1,200 had been decided between the parties, or still more probably this item of Rs. 300 was, by agreement between the vendors and the vendees left to meet the extra sums which it was foreseen would have to be paid to the mortgagee.

For these reasons we see no reason why the sale should not be upheld as a sale, and this will dispose of the cross objection regarding Fazil's share in the land sold. In this connection we may say briefly that had the sale of the shares sold by Mubarik and Bakar not been upheld, we could not have maintained the sale of the share sold by Fazil, for it is obvious that if the action of Mubarik and Bakar in the sale of their own shares was unjustifiable it would follow that their acquiescence in the sale of Fazil's share could not strengthen the position of the vendees in regard to that share. *Kesar v. Sundar Singh* (1) has been cited to us by the learned Counsel for the respondents, but the facts of that case are distinguishable from those which we are here considering. Moreover, there are many rulings of this Court to the effect that a sale should not be disturbed merely because the payment of an item of consideration set forth in the deed of sale has not been made or because its payment is doubtful, when the consideration even after the deduction of the doubtful item represents a reasonable sale price.

For these reasons we accept the appeal and dismiss the cross-objection, dismissing the suit with costs throughout.

Appeal accepted.

(1) 1 Ind. Cas 388; 27 P. R. 1909; 45 P. L. R. 1909; 33 P. W. R. 1909.

BALDEO DAS KEDAR NATH v. BOMBAY MERCANTILE BANK, LTD.

ODDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPEAL No. 24 of 1919.

August 20, 1919.

Present:—Mr. Lyle, A. J. C., and

Mr. Ashworth, A. J. C.

MESSRS. BALDEO DAS KEDAR NATH—

PLAINTIFFS—APPELLANTS

versus

THE BOMBAY MERCANTILE BANK,

LTD., AND OTHERS—DEFENDANTS—

RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, O. VII, r. 10—Execution of decree—Jurisdiction and power of executing Court, question as to, whether relates to execution—Plaint, whether can be returned for presentation to proper Court as application—Jurisdiction, question of, how to be decided—Maintainability of suit, whether must be determined before returning plaint—Procedure—Appeal heard by one Bench, whether can be re-heard by different Bench.

A question as to the legality of an execution Court's procedure or as to its jurisdiction or power to order a sale is a question falling under section 47, Civil Procedure Code. [p. 365, col. 1.]

Order VII, rule 10 (1), Civil Procedure Code, gives a Court power to return a plaint for presentation as an application in the Court having jurisdiction to accept it as an application. [p. 366, col. 1.]

There is nothing to prevent a Court ignoring a relief as being based on no shown cause of action and then proceeding to find that the other reliefs are outside its jurisdiction. [p. 366, col. 1.]

A case heard by one Bench can be re-heard by another Bench, i.e., a Bench composed of different Judges. [p. 366, col. 2.]

Appeal against the order of the Subordinate Judge, Unao, dated the 1st March 1919.

Babu Bisheshwar Nath Srivastava, for the Appellants.

The Hon'ble Pandit Gokaran Nath Misra and Pandit Jagmohan Nath Chak, for Respondent No. 2.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff-appellant on the following allegations and for the following reliefs:—

Allegations.

(a) That on the 1st of June 1909 the Ganges Sugar Works, Ltd., mortgaged certain immoveable property to the plaintiff firm.

(b) That on the same date the plaintiff firm assigned its rights as mortgagee to the Bank of Bengal.

(c) That prior to the 8th June 1917 the plaintiff firm had become entitled to

reconveyance and assignment of its mortgagee rights from the Bank of Bengal.

(d) That on the 8th June 1917 the Subordinate Judge of Cawnpore, in execution of a decree against the plaintiff firm without the consent of that firm, attached the mortgage-debt and on the 17th December 1917 sold the same.

(e) That on the 3rd April 1918 the Subordinate Judge of Cawnpore directed the Bank of Bengal to reconvey the mortgagee's title to the auction-purchaser, which was done by the Bank on the 16th May 1918.

(f) That for reasons (not set out) the attachment, sale and order to the Bank of Bengal by the Subordinate Judge of Cawnpore were wholly irregular, invalid and inoperative against the plaintiff firm.

Reliefs.

1. A declaration that the plaintiff firm on the 8th June 1917 (the date of attachment) and on the 17th December 1917 (the date of sale) was the sole mortgagee.

2. That all proceedings in connection with the sale be set aside.

3. That the so called assignment by the Bank of Bengal on the 16th May be cancelled.

5. That, if necessary, the Bank of Bengal be ordered to give the plaintiff firm a reconveyance of the mortgage.

5. That the auction-purchaser be directed to deliver up to the plaintiff firm the original indenture of mortgage.

This suit was instituted in the Court of the Subordinate Judge of Unao. He returned the plaint on the ground of want of jurisdiction. The learned Subordinate Judge has stated in his judgment that a suit in substance for a declaration that the plaintiff's position as mortgagee was not affected by an alleged illegal attachment and sale by the execution Court would ordinarily, under section 6 (d) of the Code of Civil Procedure, be maintainable in the Court where the mortgaged property was situated, that is to say in Unao, having regard to the definition of immoveable property in the General Clauses Act and to the definition of a simple mortgage in section 58 of the

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Transfer of Property Act. But he goes on to hold that, as in this case the execution Court was bound to deal with the mortgage debt as moveable property, a suit questioning the validity of the attachment and sale by that Court must be deemed a suit in respect of moveable property. The appellant's contention is that, although the execution Court had jurisdiction to attach the mortgage debt as moveable property, if it was desired to sell the rights of the mortgagee the decree should have been transferred for execution to the Unao Court where the mortgaged property was situated. The Subordinate Judge's reason for holding that the suit lay at Cawnpore does not seem to be correctly stated. To say that the execution Court had a right to sell the mortgage debt (or mortgagee's rights) is to assume a decision against the appellant of the very point which he desired to be decided by the suit. We are of opinion, however, that the Subordinate Judge's order can be sustained on the ground that the question whether the sale was within the powers of the execution Court was a question arising between the parties to the suit or their representatives and relating to the execution, discharge or satisfaction of the decree. Under section 47, therefore, of the Code of Civil Procedure it was a question which had to be decided by the Court executing the decree. This suit, therefore, so far as it calls in question the legality of the execution Court's procedure, was a question that was bound to be brought in the execution Court at Cawnpore under section 47. The language of section 47 is wide enough to include a question as to the jurisdiction of the execution Court and if the execution Court decided that question wrongly, the remedy would be by appeal and not by a separate suit. If the execution Court assumed a jurisdiction which it did not possess, it was open to the appellant to object at some stage or other of the proceedings in that Court and he cannot raise the question before any other Court. It may well be that now that the sale is concluded no remedy whatever is available to the appellant. The appellant's Counsel has attempted to show that section 47 read with Order XXI, Code of Civil Procedure, did not afford him any means of relief in the execution Court.

Whether this is so or not, we are of the opinion that section 47 is a bar to his obtaining his relief elsewhere. It is obvious that if the appellant had no relief whatever, the appellant's Counsel would have no difficulty in showing that he had no relief in the execution Court. But what the lower Court has in effect done, and we consider rightly, is to state that, without going into the question whether the appellant has any relief, that relief, if any, can be obtained from the execution Court or by an appeal from an order of the execution Court and in no other way.

The learned Subordinate Judge has rightly stated that the main relief claimed is the setting aside of the sale. He was justified in ignoring, for the purpose of considering jurisdiction, all merely incidental reliefs or superfluous reliefs or reliefs unmaintainable on the face of them. The first relief for a declaration that the plaintiff firm was sole mortgagee before attachment was obviously unmaintainable. Section 42 of the Specific Relief Act does not enable a declaratory decree to be given in respect of a right at some date previous to suit, especially when the plaint fails to set forth that that right has ever been denied by the defendants. Reliefs 3, 4 and 5 are obviously mere incidental to the setting aside of the sale.

We may notice two arguments of a somewhat dialectical character advanced by the learned Counsel for the appellant against the permissibility of upholding the learned Subordinate Judge's order by invocation of section 47 of the Civil Procedure Code. He submits that section 47 does not merely prescribe that questions as to the execution of a decree arising between the parties to the decree, or their representatives, "shall be determined by the Court executing the decree," but adds the words "and not by a separate suit". Hence if the case is governed by section 47, the plaintiff's relief was by application and not by the institution of a suit, in the Court executing the decree. The Subordinate Judge could not, therefore, under Order VII, rule 10 (1), of the Code "return the plaint for presentation to the Court in which the suit should have been instituted." To this argument subsection (2) of section 47, which allows the execution Court to treat a proceeding as a suit or a suit as a proceeding, would

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appear a sufficient answer. The Subordinate Judge was entitled to return the plaint for presentation to the execution Court, as that Court could either treat the plaint as a plaint or as an application. Even, however, apart from sub-section (2) of section 47, we think that Order VII, rule 10 (1), can be construed as giving a Court power to return a plaint for presentation as an application in the Court having jurisdiction to accept it as an application. The remark of Sir W. Scott quoted on page 117 of the 7th edition of Broom's Legal Maxims under the maxim "*de minimus non curat lex*" appears relevant. "The Court is not bound to a strictness at once harsh and pedantic in the application of Statutes". The second objection is that in ignoring the first relief claimed on the ground that it is devoid of cause of action we are going beyond the question of jurisdiction. This argument appears to ignore that a plaint may under Order VII, rule 10 (1), be returned on the ground of want of jurisdiction at any stage of the suit. There is nothing to prevent a Court ignoring a relief as being based on no shown cause of action and then proceeding to find that the other reliefs are outside its jurisdiction. A third argument is that before a Court returns a plaint for presentation to another Court, it is bound to come to an affirmative decision that the suit is maintainable in some form or other by the other Court. This argument also appears to ignore the force of the words "at any stage" in Order VII, rule 10, of the Code. A Court debarred from entertaining a suit by an express provision of law, such as section 47, is, in our opinion, entitled to return the plaint for presentation to a Court not so debarred without first determining the maintainability of the suit, and should do so when the question of maintainability is one that is likely to be strenuously argued. In such a case it would involve waste of the Court's time to consider the maintainability of the suit, when it could not entertain it if maintainable.

A preliminary objection was raised to the hearing of this appeal before this Bench, on the ground that the appeal had already been argued before a Bench composed of one of us and the Judicial Commissioner. The appellant's Counsel admit-

ted that he could not maintain that the Judicial Commissioner's order that the case be re-heard by a Bench (on the ground that the argument at the previous hearing was insufficient) was illegal. Nor could he maintain that the hearing of the appeal a second time by a Bench of different Judges was contrary to law. He only maintained that it was contrary to expediency and involved a waste of time, as it necessitated Counsel at the second hearing re stating what they had said at first hearing. We are of the opinion that it was within the discretion of the Judicial Commissioner to appoint what Bench he thought fit and that it is not open to us to question his discretion.

Accordingly we dismiss this appeal with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.
FIRST APPEAL FROM ORDER No. 178 OF 1918.
November 25, 1919.
Present:—Mr. Justice Lindsay and
Mr. Justice Ryves.
Khan Bahadur AHMAD NOOR KHAN
alias MANGAL KHAN—PLAINTIFF
—APPELLANT
versus
Khan Bahadur Raja ABDUR RAHMAN
KHAN AND OTHERS—DEFENDANTS—
RESPONDENTS.
*Civil Procedure Code (Act V of 1908), Sch. II,
para. 17—Arbitration, reference to—Arbitrator refusing
to act, effect of—Application to enforce agreement,
maintainability of.*

Where an arbitrator definitely refuses to act, no matter for what reason, the Court has no jurisdiction to entertain an application to enforce the agreement to refer the dispute to the arbitration of such arbitrator. [p. 367, col. 2.]

First appeal from the order of the Subordinate Judge, Pilibhit, dated the 5th June 1918.

Dr. S. M. Sulaiman, for the Appellant.
Dr. Tej Bahadur Sapru and Messrs. R. K. Malaviya, Iqbal Ahmad and N. Upadhyaya, for the Respondents.

AHMAD NOOR KHAN V. ABDUR RAHMAN KHAN.

JUDGMENT.—This appeal has arisen out of proceedings which were taken in the Court below under the provisions of paragraph 17, clause 1, of the Second Schedule of the Code of Civil Procedure.

It seems that there was some dispute between the members of two families descended from two brothers, Bala Khan and Ahmad Noor Khan. A suit relating to this dispute was filed in Court and while the suit was proceeding, the parties executed an agreement on the 20th of March 1915 agreeing to refer their dispute to the arbitration of Khan Bahadur Abdur Rahman Khan. The result of the execution of this agreement was that the suit was withdrawn and the arbitrator took upon himself the duty of investigating into and deciding the dispute between the parties. On various dates in the year 1916 the arbitrator examined witnesses and finally the case came up before him again on the 18th of March 1917. On that date he was informed that one of the parties to the dispute, namely, Akhtar ud-Din Khan, had died and it would appear that some application was made to him asking him to send notice to the legal representatives of Akhtar-ud-Din before any further proceedings were taken. The arbitrator sent out some notices and on the 25th of March 1917, he put in writing a definite refusal to go on with the arbitration. He said that as one of the parties to the reference had died, he had no legal authority to make the legal representatives of the deceased party parties to the proceedings. After this he returned the parties their documents and nothing more was done. On the 2nd of November 1917, the present plaintiff appellant filed this application under paragraph 17 of the Second Schedule of the Code of Civil Procedure, asking that the agreement to refer to arbitration might be filed in Court. In other words, the intention of the appellant is that the Court should order the arbitration proceedings to go on as before and should direct the arbitrator to carry out the settlement of this dispute.

The Court below has dismissed the application. It is not necessary for us to examine the various reasons which the Subordinate Judge has given in support of his order. It is sufficient to refer to his finding on the third issue, namely, that by reason of the refusal of the arbitrator to act, the deed of reference has become unenforceable.

If the appellant here cannot succeed in showing us that the finding of fact that the arbitrator refused to act is wrong, then the order of the Court below must be maintained. The learned Counsel for the appellant has not found it possible to argue that this finding of fact is erroneous, nor indeed would it have been easy for him to do so in view of the clear statement made by the arbitrator himself when examined as a witness in the case. In the course of his deposition he stated clearly that he had refused to go on with the arbitration, his reason being that one party to the reference having died, he considered that he had no authority to continue the proceedings. Whether or not the arbitrator was right in supposing that in these circumstances he had not authority to continue to act, is a matter with which we are not concerned. The fact remains that he definitely refused to act and that at the time this application was filed under paragraph 17 his refusal was still in force. It is quite true that in the course of his examination in Court the arbitrator expressed his willingness to resume his functions as arbitrator provided the Court would give him an order to that effect. In the first place, this offer, if it can be treated as an offer, was only qualified. In the next place, we do not think the Court had any jurisdiction to give the arbitrator any direction to carry on. The result, therefore, is that we have before us an application to enforce an agreement to refer a dispute to the arbitration of a gentleman who had already declined to act, and in these circumstances we hold that it would be quite impossible for the plaintiff to have an order such as he sought in the Court below.

Other points are set out in the memorandum of appeal here, but it has been agreed before us that the decision of the point which we have already determined is sufficient to dispose of the appeal. The result therefore, is that the appeal fails and is dismissed with costs. The costs in this Court will include fees on the higher scale.

Appeal dismissed.

MAHADEO PRASAD v. NASIBAN.

OUDEH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 440 OF 1918.
September 10, 1919.

Present:—Mr. Stuart, J. C.

MAHADEO PRASAD AND ANOTHER—
DEFENDANTS—APPELLANTS
versus

Musammam NASIBAN AND ANOTHER—
PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), s. 90—Presumption as to genuineness of document—Document thirty years old on date of arguments—Presumption, whether applicable.

A Court has a right to presume, under section 90 of the Evidence Act, the genuineness of a document which was not thirty years old either on the date of the suit or on the date of its production, but was thirty years old on the date when arguments were heard.

Appeal from the decree of the District Judge, Gonda, dated the 16th August 1918, upholding that of the Subordinate Judge, Bahraich, dated the 29th June 1918.

Babu Bisheshwar Nath Srivastava, for the Appellants.

Babu Daya Kishen Seth, for Respondent No. 1.

JUDGMENT.—The only point of importance in this appeal is whether the Courts below had the right to presume that the sale-deed of the 21st May 1888 was a genuine document which transferred two shops and a house to Imam Bakhsh, the presumption being made under the provisions of section 90 of the Indian Evidence Act (I of 1872). I think that they had a right to make this presumption. It is true that at the time when the suit was instituted the document in question was not thirty years old. It is also true that it was not thirty years old at the time of its production, but it was thirty years old when arguments were heard. As the Courts below, according to this finding, had a right to make the presumption, the finding of the learned District Judge to the effect that the two shops and the house were transferred to Imam Bakhsh is a finding of fact, which cannot be impugned in second appeal.

It is argued that the learned District Judge's finding is vitiated because he approached the evidence in the wrong manner. I do not find that he approached the evidence in the wrong manner, and I hold that his finding is a good finding of fact

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which cannot be impugned. I dismiss the appeal.

With reference to the office report that two declarations were sought, I find that only one declaration was sought and that the Court-fees were correctly calculated in the Courts below. The appellants will pay their own costs and those of the respondents.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1321 OF 18.

August 4, 1919.

Present:—Mr. Justice Chatterjee and Mr. Justice Panton.

BHUTNATH NAG AND ON HIS DEATH HIS
HEIRS AND LEGAL REPRESENTATIVES
RAMESH CHANDRA NAG AND OTHERS
—DEFENDANTS—APPELLANTS

versus

SATYA KINKAR NAG AND ON HIS DEATH HIS
HEIRS AND LEGAL REPRESENTATIVES
NIRMALA DAS AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O XXXII, r. 4 (2)—Guardian ad litem—Person appointed guardian who has failed to furnish security, whether can act as guardian ad litem—Minor, representation of.

Where upon the application of a person he is appointed the guardian of a minor conditional on his furnishing security in a specified amount, and he fails to furnish the security, in consequence of which the necessary certificate is not issued to him, he cannot be regarded as a proper guardian *ad litem* of the minor in a suit and the minor cannot be said to be properly represented in a suit by such person unless the latter is formally appointed guardian *ad litem* of the minor. [p. 369, col. 2.]

Appeal against the decree of the District Judge, Bankura, dated the 5th April 1918, affirming that of the Subordinate Judge of that district, dated the 28th of July 1916.

FACTS appear from the judgment.

Dr. D. N. Mitter (with him Babu Manindro Nath Banerjee), for the Appellant.—My first submission would be that the non-compliance with the Court's order to furnish security is not sufficient to prove that the defendant No. 2 was not a certificated guardian.

Referred to *Mungniram Marwari v. Gursahai Nand* (1).

Security may or may not be asked.

(1) 17 C. 347; 16 L. A. 195 (P. C.) 5 Sar P. O. J. 462

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The fact that security was not asked is not sufficient to prove that the guardian was not appointed.

Referred to section 39 of the Guardians and Wards Act.

In the plaint defendant No. 2 was described as a certificated guardian and it was not necessary for the Court to appoint a guardian. This Court is to be guided by the Code of 1832, section 443, corresponding to Order XXXII, rule 4, clause (2).

The non-appointment of the defendant No. 2 as the guardian *ad litem* is at best an irregularity which is curable.

Babu Dwarkanath Ohakaravarty (with him Babu Kalikankar Ohakravarty), for the Respondents.—In the previous suit out of which arose the present suit the defendant No. 2 was not described as a certificated guardian.

The Court below has come to a definite finding of fact that the minor's interest was not protected by the defendant No. 2 and on his non-compliance with the Court's conditional order to furnish security the appointment was a nullity.

Mungniram Marwari v. Gursahai Nand (1).

The non-appointment of defendant No. 2 as a guardian *ad litem* is an irregularity which is fatal to the trial of the case.

Walian v. Bankey Behari Pershad Singh (2).

No reply was called upon.

JUDGMENT.—This appeal arises out of a suit for a declaration that the decree obtained by the defendant No. 1 in a contribution suit was void and inoperative as against the plaintiffs and that the sale held in execution of that decree was not binding upon them.

In that suit the present plaintiffs were described as minors represented by their certificated guardian, the defendant No. 2. It appears, however, that when the defendant No. 2 applied for certificate of guardianship, the Court ordered that he might be appointed guardian provided he furnished security to the extent of Rs. 2,000. This security was never furnished by defendant No. 2, nor did he ever take out a certificate of guardianship. The defendant No. 2 was not appointed a guardian *ad litem*. The question is whether under these circumstances the

plaintiffs can be said to have been properly represented by defendant No. 2 in that suit.

The Courts below have concurred in answering the question in the negative and the defendant No. 1 has appealed to this Court.

Two contentions have been raised in this Court. First, it is contended that the mere fact that security had not been furnished or that the certificate had not been taken out does not go to show that the defendant No. 2 was not the certificated guardian. Reliance has been placed on the judgment of the Judicial Committee in the case of *Mungniram Marwari v. Gursahai Nand* (1).

That case, no doubt, lays down that "when a Court to which application has been made under section 3 of Act XL of 1853 for certificate, has adjudged the applicant entitled to have one, he then substantially obtains it although it may not be drawn up...at the time. Having obtained such an order, he has in substance complied with the terms of the Act in the same way as when a plaintiff has judgment that he shall have a decree in his suit, it may be said that he has then obtained his decree." That case, however, is distinguishable from the present; because in that case the order granting the certificate was not a conditional order. The applicant in that case had done all that was necessary to be done, and all that remained was that a formal certificate appointing him guardian was not drawn up. In the present case the order appointing him was conditional upon his furnishing security to the extent of Rs. 2,000. This was not given by the defendant No. 2 and, therefore, the certificate could not be issued to him.

The next contention is that although there was not formal order appointing the defendant No. 2 guardian *ad litem*, it was merely an irregularity because the defendant No. 2 appeared in the proceedings as guardian of the minors. We are referred to the case of *Walian v. Bankey Behari Pershad Singh* (2), where it is pointed out that under section 443, Civil Procedure Code (Act XIV of 1882), the Court is bound after satisfying itself of the fact of minority to appoint a proper person to act on behalf of a minor in the conduct of a suit; and this rule should be strictly followed, but where the Court by its action has given its

(2) 30 C. 1021 (P. C.); 30 I. A. 182; 7 C. W. N. 774; 5 Bom. L. R. 822; 8 Sar. P. C. J. 512.

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sanction to the appearance of a person as such a guardian, the absence of a formal order of appointment is not necessarily fatal to the proceedings. But in that case the mother of the minor defendants appeared throughout the proceedings in the suit as their guardian, the Court admitted the plaint in which she was described as guardian, and in the decree and execution proceedings the Court so described her and although no formal order appointing her guardian *ad litem* was drawn up, it was held that the minors were effectively represented in the suit by their mother and with the sanction of the Court. The absence of formal order in that case appointing her guardian *ad litem* was merely an irregularity of procedure, as there was nothing to suggest that the interests of the minors were not duly protected; the defect in the procedure did not prejudice them and, therefore, the error was not fatal to the suit.

In the present case, however, it has been clearly found by the Courts below that the minors had been seriously prejudiced, that the defendant No. 2 did not protect the interests of the minors, that he was under the influence of defendant No. 1, that property worth Rs. 1,000 had been sold only for Rs. 50 and that even assuming that the decree-holder took over the liability of paying the debts to the extent of Rs. 350, it does not appear that the minors were liable for that debt. It is further found that in the rent suit brought by the Maharaja of Burdwan against the defendant No. 1 and the plaintiffs, there was also the same defect. As a matter of fact the plaintiffs in that suit were described as minors represented by defendant No. 2 as their guardian (and not as certificated guardian). The learned District Judge points out that the contribution suit would have been dismissed as against the minors had the guardian of the present plaintiffs taken any appropriate defence. Having regard to the findings arrived at by the lower Appellate Court that the interests of the minors were not protected, we think that the non-compliance with the provision of the Code cannot be treated in the way we are asked to do on behalf of the appellant, and that the appeal must be dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.
CIVIL REVISION PETITION No. 22 OF 1919.
November 20, 1919.

Present:—Mr. Justice Lindsay.
L. RAMSARAN DAS—PLAINTIFF—
APPLICANT

versus

SAGAR MAL AND OTHERS—DEFENDANTS—
OPPOSITE PARTIES.

*Contribution, suit for—Costs, joint decree for—
Decree realised from one of several judgment-debtors—
Right to contribution.*

Where in the case of a joint decree against several defendants costs are awarded to the plaintiff, and these are realised from one defendant alone, that defendant is entitled to maintain a suit against his co-defendants for contribution. [p. 370, col. 2.]

Civil revision against the order of the Judge of the Court of Small Causes at Meerut, dated the 9th December 1918.

Mr. Kailas Chandra Maithal, for the Applicant.

JUDGMENT.—This application has been argued *ex parte*; no one appears for the defendants opposite parties. The suit as framed was a suit for contribution, the case for the plaintiff being that he and the defendants had been co-defendants in a partition suit. In that partition suit a decree for costs was passed against all of the defendants and in favour of the plaintiffs. The decree for costs was a joint decree and the result was that execution was taken out against the present plaintiff, who was obliged to pay the entire costs awarded by the decree. The suit with which I am now concerned has, therefore, been brought against the remaining defendants for the purpose of obtaining contribution. The Judge of the Court below has relied upon a ruling reported as *Mulla v. Jagannath* (1), which does not, in my opinion, govern the facts of this case. There is a ruling reported as *Nihal Singh v. Collector of Bulandshahr* (2), which seems to me to be in point. Applying the principle laid down in this latter ruling I hold that the plaintiff here was entitled to maintain the suit for contribution. It may also be observed here that the defendants did not in their written statement of defence raise any plea to the

(1) 6 Ind. Cas. 684; 7 A. L. J. 720 32 A. 585.

(2) 33 Ind. Cas. 165; 14 A. L. J. 275; 38 A. 237.

Application allowed.

JUDGMENT.—In this appeal the plaintiff appeals from a decree of the Subordinate Judge of Sultanpur dismissing his suit to enforce his alleged right of pre-emption in respect of ten villages, of which nine are alleged to be in a *mahal* called Bhadaian and one (G. eshaou Kachanti) in a *mahal* called Fazilpur. The counsel for the appellant during the course of arguing this appeal has withdrawn the appellant's claim to preempt the last named village. Consequently in this appeal we are not concerned with that village or with *mahal* Fazilpur and may disregard the evidence and the portions of the judgment of the lower Court dealing therewith. The vendor in this case is the 2nd defendant *Musammatt* Raj Bibi. The villages in question formerly belonged to one Sheodat Bahadur Singh, who was a *taluqdar*. On the 11th January 1904 he mortgaged them to the plaintiff and again on the 15th April 1905 to the defendant No. 2. Then on the 4th September 1905 he executed a deed of further charge in respect of these villages in favour of the plaintiff. The defendant No. 2

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brought a suit on the basis of her mortgage, obtained a decree, and when the villages were sold in execution thereof, herself purchased them subject to the two mortgages in favour of the plaintiff. Being unable to redeem these two mortgages, she executed on the 17th May 1915 what purports to be a sale deed in favour of defendant No. 1, without giving to the plaintiff the notice required by section 10 of the Oudh Laws Act (XVIII of 1876.) Accordingly the plaintiff has brought this suit to enforce his right of pre-emption on the ground that no due notice was given to him as required by the said section 10, this being ground (1) mentioned in section 13 of the Act for the bringing of a pre-emption suit. The plaintiff in his plaint has claimed a right to acquire the property in preference to the defendant No. 1, on the ground that he is a co-sharer of the *mahal* Bhadaian by reason of the purchase, previous to the sale deed mentioned above, of three villages Bansari, Sukarsi and Amari situated in *mahal* Bhadaian, it being alleged that the defendant No. 1 is a mere stranger, which means that he is not one of the persons mentioned in section 9 of the Oudh Laws Act. The defendants resisted the claim on the following grounds:—

(a) that the so-called *mahal* Bhadaian was not a *mahal* within the meaning of section 9 of the Oudh Laws Act,

(b) that the deed of the 17th May 1915 contained provisions in it inconsistent with its being regarded as a mere deed of sale and consequently the proposal to execute this deed did not give rise to any necessity of giving notice, nor did the transfer by this deed amount to a sale,

(c) that the plaintiff was not entitled to a decree for pre-emption, because prior to the suit defendant No. 1 had become a co-sharer in the *mahal* Bhadaian (assuming it to be a *mahal*) under a deed of exchange dated the 9th April 1916, and deeds of gift of that date and of the 13th April 1916,

(d) that the purchase by the plaintiff of the village Amari did not make the plaintiff a co-sharer in the *mahal* Bhadaian (assuming it to be a *mahal*).

The defendants also claimed that should the plaintiff be given a decree for pre-emption, he should be required to pay the costs hitherto incurred by the defendant No. 1

in instituting a suit against the plaintiff for redemption of the plaintiff's mortgage.

The learned Subordinate Judge found on defence plea (a) that there was no *mahal* Bhadaian within the meaning of section 9 of the Oudh Laws Act; on defence plea (b) that the deed of 17th May 1915 was not a mere sale-deed but that part of the consideration for the transfer was the promise of the vendee to do certain things which could not be done by the plaintiff if substituted as vendee; on defence plea (c) that the defendant No. 1 had become a co-sharer in the alleged *mahal* subsequent to the deed of sale of the 17th May 1915 but before the date of suit and that this put the defendant No. 1 on the same level with the plaintiff, so that the right to the property would depend on the drawing of lots under the last provision of section 9; and on defence plea (d), that the purchase of Amari did not help the plaintiff as it was subsequent to the deed of sale of 17th May 1915 but that the plaintiff was a co-sharer by reason of his purchases of the villages of Sakarsi and Bansari.

In argument in this appeal it is not denied by the respondents that the plaintiff would be a co-sharer of *mahal* Bhadaian if the local area called *mahal* Bhadaian can be said to be a *mahal* within the meaning of section 9, nor is it denied that the nine villages are also within that area. The questions then that arise for our decision are as follows:—

1. At the date of the sale in question, was the so-called *mahal* Bhadaian a *mahal* within the meaning of section 9 of the Oudh Laws Act?

2. Assuming the existence of such a *mahal*, did not the failure of the defendant No. 2 to give notice to the plaintiff of her intention to execute the deed of 17th May 1915 and her execution of that deed create a right of pre-emption on the part of the plaintiff?

3. Has the fact of the defendant No. 1 acquiring the position of co-sharer in the so-called *mahal* Bhadaian subsequent to the deed of 17th May 1915 but previous to the date of suit put the plaintiff and defendant No. 1 on a level and thus necessitated the casting of lots to determine who shall have the villages?

4. If the plaintiff is entitled to a decree for pre-emption, on what terms should he

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get it, and should he be required to re-pay the defendant No. 1 such costs as he has incurred in bringing the pending redemption suit against the plaintiff?

As regards the first question the plaintiff's contention is that the *mahal* Bhadaian is what is called a *taluqdari mahal*. To prove the coming into existence of such a *mahal* and its present existence he relies on certain exhibits and certain provisions of the law. Plaintiff's Exhibit 60 is a copy of a *sanad* of the year 1858 granted by the Chief Commissioner to two persons, Kamta Prasad and Bishnath Singh. This *sanad* is printed on page 200 of the appellant's paper-book. It confers on the persons mentioned the right and title and possession of the estate of Bhadaian consisting of villages stated in a list attached to the *sanad*. The *sanad* is incomplete, as this list of villages is not forthcoming. The plaintiff-appellant says that the list has been accidentally torn off or destroyed. The next document is a *kabuliat* dated the 1st December 1872, Exhibit 8. That is the date of the first regular settlement. In this the aforesaid Kamta Prasad and Bishnath Singh, who are described as *taluqdars* of *ilaka* Bhadaian comprising villages mentioned "on the back of this *kabuliat*," accept a revenue of Rs. 22,240. This document is also incomplete and does not show the villages. The next document is a *kabuliat* of the 19th October 1897, Exhibit 5, (referring to the recent settlement) by which Bishnath Singh described as *taluqdar* and *lambardar* of the *mahal* Bhadaian agrees to pay a revenue of Rs. 10,265 for 27 villages. The heading of the document shows that this agreement refers to "Bhadaian". Among the 27 villages mentioned Bhadaian village (not to be confused with Bhadaian *mahal*) is the sixth, Bansari the seventh and Sukarsi the nineteenth. Exhibit A68 and Exhibit 6 given on pages 197 and 198 of the appellant's paper-book are extracts from the copy of the register of villages comprised in the *mahal* Bhadaian. Pages 235 to 283 are the assessment statements of the various villages of the Bhadaian *mahal*. The *mahal* is described in each village as Bhadaian Bishnath Singh. Exhibits A24, etc., on pages 456 to 463

are certified copies of the Patwari's *khewats* for the year 1321 Fasli—1914—in respect of the villages forming the *mahal* Bhadaian. The headings of the *jamabandis* have also been produced as exhibits and are given on pages 309 and 310 of the appellant's paper-book. On pages 466 to 476 are the *khatauni jamabandis*. The most important paper is Exhibit A21, which is a report of the Tahsildar in a mutation case. It appears that the Government claimed to take the *taluqa* Bhadaian under direct management owing to non-payment of the revenue. This report is on page 313 of the appellant's paper-book and is dated the 27th July 1905. It explains that the *taluqa* of Babu Sheodat Bahadur Singh contains three *mahals* and that one of them is *mahal* Bhadaian, and goes on to state that the demand against each *mahal* is joint but the liability is confined to the revenue for each *mahal* and is not joint for the whole *taluqa*. At this date then there existed a Bhadaian *taluqa*, a Bhadaian *mahal*, part of Bhadaian *taluqa*, and a Bhadaian village, part of Bhadaian *mahal*. Exhibit A23 dated the 4th September 1905 on page 315 of the appellant's paper-book shows that the three *mahals* were taken under direct management. It appears to us that it is impossible to deny the existence of a *mahal* Bhadaian from the last settlement, even if it be held that the state of the documents produced before then is not such as to prove the existence of a *mahal* Bhadaian consisting of the villages now comprised in it at an earlier date. It is also clear that there is a joint liability for revenue extending over all the villages in this *mahal*. At the same time there is no evidence that any separate Record of Rights was ever in existence for this *mahal*. The Record of Rights consists of two registers—the *khewat* is the register of the proprietors who pay revenue, the *khatauni* is the register of actual cultivators of the ground. The *khewats* and *khataunis* of this *mahal* are drawn up for each village in it and not for the whole *mahal*. It appears to be agreed by both parties that in the case of a *taluqdari mahal* which consists of a great number of villages, it has never been the practice to draw up a single Record of Rights, that is to say, a single

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khewat or *khatauni* in respect of the whole *mahal*. The contention of the respondent's Counsel is that there can be no *mahal* within the meaning of section 9 unless the whole *mahal* has got a separate *khewat* and a *khatauni*. He would urge that if a *taluqdari mahal* never had such a separate Record of Rights, then section 9 of the Oudh Laws Act cannot be deemed to contemplate a *taluqdari mahal* as a *mahal* at all. He relies on the ruling of the Privy Council in the case of *Sheoraj Kunwar v. Harihar Bakhsh Singh* (1), as authority for the proposition that no area can be a *mahal* within the meaning of section 9 of the Oudh Laws Act unless for that area a separate Record of Rights is prepared. On pages 362 and 363* of that ruling a passage from Mr. Chamier's judgment is quoted. That passage is as follows:—

"Chapter V of the Revenue Act of 1876 shows that the word '*mahal*' means any parcel or parcels of land which have been separately assessed to or are held under a separate engagement for the revenue and for which a separate Record of Rights has been prepared, and this is the sense in which the word has been used by Revenue and Judicial Officers since the first regular settlement of the province. See Thomason's Directions to Revenue Officers, which was the guide-book of officers engaged in that settlement Each *mauza* or village is as a general rule a separate *mahal* but a *mahal* may consist of two or more *mauzas*, or parts of *mauzas* or only a portion of one *mauza*. It is clear that the villages assigned to Uman Prasad did not form a separate *mahal* in the ordinary sense. The *kabuliat* of the *taluqa* in which they are included, a copy of which is on the record, shows that each village in the *taluqa* was separately assessed to revenue, and that the *taluqdar* entered into one engagement for the payment of the revenue on all the villages. The whole *taluqa* is, therefore, what is called in the Act, a *taluqdari mahal*, consisting of a large number of villages, each of which is separately assessed to revenue and may be regarded as an inferior

(1) 7 Ind. Cas. 196; 32 A. 351; 14 C. W. N. 817 (P. C.); 12 C. L. J. 40; 12 Bom. L. R. 503; 8 M. L. T. 89; 13 O. C. 165; 7 A. L. J. 709; 20 M. L. J. 609; (1910) M. W. N. 351; 37 I. A. 24.

*Pages of 32 A.—Ed.

mahal (see section 100 (a) of the Revenue Act of 1876). The plaintiff is certainly not a co-sharer in the *taluqdari mahal* for the *taluqdar* has no co sharer. Nor, as I have already pointed out, is the plaintiff a co-sharer in any of the inferior *mahals* just referred to of which the *taluqa* is made up."

After this quotation the judgment runs.—

"Their Lordships think that the meaning which Mr. Chamier has attributed to the term '*mahal*' is the proper meaning of the word in the Oudh Laws Act, 1876, and that although Gadadhar and Ganesh may have been jointly liable to the *taluqdar* for the Government revenue plus *malikana*, as the rent of villages and *pattis* assigned to Bishe-shar and Uman under the compromise of 1854, Gadadhar and Ganesh were not at the date of the sale to Harihar co sharers in any sub division of the tenure in which the property in question was comprised or in the whole *mahal*."

The appellant's Counsel has argued that Mr. Chamier's definition of *mahal* is incorrect, so far as it requires that a *mahal* should have a separate Record of Rights. He has taken us through Chapter V of the Oudh Revenue Act of 1876 and through Thomason's Directions to Revenue Officers and shown that in neither is there any mention of such a necessity. He also points out that the term "Record of Rights" was never used in the Oudh Revenue Act of 1876. There appears to be much force in his contention that, if the Legislature when enacting the Oudh Revenue Act of 1876 had thought the definition of *mahal* given in the Agra Revenue Act of 1873 applicable to Oudh, it would certainly have incorporated that definition inasmuch as in the latter Act it incorporated several definitions of the earlier Act. He indeed suggests that Mr. Chamier's definition was due to an altogether unjustifiable reference to Acts and rulings applicable only to Agra. In order to understand the scope and meaning of their Lordships' remarks it is necessary to explain that in the case of *Sheoraj Kunwar v. Harihar Bakhsh Singh* (1) two under-proprietors had claimed a right of pre-emption on the ground that the *taluqdar* had made a private agreement with them whereby they should be jointly responsible for the payment of rent to the *taluqdar* in respect of the separate areas over which they were individually under-proprietors. They claimed that their joint

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responsibility for rent to the *taluqdar* in respect of these areas had the effect of making them co sharers in a *mahal* consisting of these areas. They also appear to have maintained alternatively that by reason of being under proprietors in certain villages in a *taluqa* they were entitled to be regarded as co-sharers of the *taluqdari mahal*. Mr. Wells, one of the Judicial Commissioners, had agreed to the first contention. It was rejected by Mr. (now Sir Edward) Chamier, who held that no arrangement between the under-proprietors and the *taluqdar* could have the effect of creating a *mahal* and that it was necessary that at the time of settlement the Settlement Officer should himself have indicated his intention to form an area into a *mahal* by assessing it as a single unit for the payment of the revenue to the *taluqdar*, for which the under proprietors of the several portions should be jointly liable. Mr. Chamier called the revenue payable by an under-proprietor to the *taluqdar* rent, but as pointed out by their Lordships of the Privy Council, an under-proprietor's rent is his share of revenue plus something extra, called *malikana*. Now it was not necessary for their Lordships to hold more than the correctness of Mr. Chamier's view as just stated, and it appears to us that the last part of the long sentence in which their Lordships approved of Mr. Chamier's view indicates that this was all that their Lordships thought it necessary to approve. We should not, therefore, feel bound by Mr. Chamier's definition of a *mahal* even so far as that definition applied to *mahals* other than *taluqdari mahals*. We feel still less bound by it in respect of a *taluqdari mahal*. Mr. Chamier in the same judgment from which the passage is quoted by their Lordships states: "The *kabuliat* of the *taluqa* shows that each village in the *taluqa* was separately assessed to revenue and that the *taluqdar* entered into one engagement for the payment of the revenue on all the villages. The whole *taluqa* is, therefore, what is called in the Revenue Act a *taluqdari mahal*, consisting of a large number of villages each of which is separately assessed to revenue and may be regarded as an inferior *mahal*." Later on he says that the fact that each village has been separately assessed to revenue is a fact which points to each village being a separate *mahal*. It is impossible to doubt that Mr. Chamier must have

known that in Oudh a separate *khewat*, etc., was not drawn up for a *taluqdari mahal* but only for the individual villages. He cannot have intended his definition to apply to a *taluqdari mahal*, though he did intend it to apply to an under proprietary *mahal*. When the Oudh Land Revenue Act of 1876 and the Agra Land Revenue Act of 1873 were replaced by a single Revenue Act for Agra and Oudh in 1901, the definition of *mahal* as it existed in the Agra Act (which was substantially the same as Mr. Chamier's definition) was changed and it was distinctly provided that, where a local area was held under separate engagement for the payment of land revenue and consisted of two or more villages, it would only be necessary that a separate Record of Rights had been framed for each of the component villages. In our opinion this provision was necessary in order to meet the circumstances of Oudh and in particular the circumstances of a *taluqdari mahal*. We are, therefore, of the opinion that the ruling relied on by the Subordinate Judge does not compel us to hold that Bhadaian was not a *mahal* merely because a single Record of Rights, i. e., *khewat*, had not been prepared in respect of the whole area. The proposition of the respondent's Counsel that section 9 of the Oudh Laws Act, when speaking of a *mahal*, did not contemplate a *taluqdari mahal* has not been supported by anything but mere conjecture. Section 100 (a) of the Oudh Land Revenue Act of 1876 speaks of a *taluqdari mahal*, and the Oudh Laws Act was passed in the same year. It is impossible, therefore, to suppose that when section 9 of the latter Act was drafted, the Legislature in using the term '*mahal*' did not have in mind a *taluqdari mahal*. In the Privy Council case referred to both Mr. Evans and Mr. Chamier assumed that a *taluqdari mahal* was a *mahal* contemplated by section 9 of the Oudh Laws Act. Consequently we are of opinion that at the date of the deed of 17th May 1915 Bhadaian was a *mahal*, that the plaintiff was a co sharer of it and that the nine villages in dispute in this appeal were villages comprised within that *mahal*.

As to question No. 2 the learned Subordinate Judge has taken up the position that

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because the sale-deed left all but Rs. 5,000 of the total consideration money stated, namely Rs. 1,45,000, in the hands of the vendee and provided that the vendee was to redeem the plaintiff's mortgage as economically as possible, the deed was something other than a sale. The Subordinate Judge has stated that if he granted the suit, he would have to substitute a foe for a friend and would have to leave the plaintiff to fight out the case against himself. In our opinion there is no provision in the deed of 17th May 1915 calculated to take it out of the category of a sale-deed. The fact that if the plaintiff's claim is decreed, a redemption suit will be unnecessary cannot, in our opinion, affect the nature of the transaction as it appears from the deed. Indeed as the appellant has given up all claim for pre-empting the village of Ganeshpur, it will still be necessary for the defendant No. 1 to redeem that village and in so doing he can question the amount of mortgage money claimed by the plaintiff. It has also been urged that the sale-deed of 17th May 1915 contains a statement as follows:—"The said vendee shall be entitled to all the sums of money and rights arising from the deed of 15th April 1905 against Babu Sheodat Bahadur Singh, his heirs, successors, transferees and prior or subsequent creditors." It is said that this provision means that the vendee was to get something more than the villages in suit, and it is suggested that he was to get some cause of action in addition to them. The Counsel for the appellant, however, has not been able to show us that this paragraph in the sale-deed meant more than that the vendee was to get the villages specified. The object of this statement in the deed of 17th May 1915 is nothing more than to refer back to the title-deed of the vendor. Again it is urged that the sale-deed is signed by the husband of *Musammatt* Raj Bibi as well as by herself. It does not appear, however, that the husband had any interest in the property sold. The respondent's Counsel also argues that it will be impossible to put the plaintiff in the same position as the vendee and indeed impossible to give a decree for pre-emption on any

specific sum. His argument is that the equity of redemption alone was sold by *Musammatt* Raj Bibi and that she has sold it for a sum which cannot be ascertained until after the completion of the redemption suit referred to in the deed. The deed in effect provides that she is to get Rs. 5,000 as shall not be expended on the redemption suit unless more than Rs. 1,45,000 shall be spent on the redemption suit, in which case she will have to return out of the Rs. 5,000 any excess sum so spent. We are asked how it can be possible to say that the plaintiff, who is the mortgagee of the property, should pay. It may be remarked that the deed does not purport to sell only the equity of redemption. It purports to sell, as is a very common practice in this country, the whole property and to leave the vendee with funds to redeem. In reality, however, only the equity of redemption passed, as that was all that remained to the vendor. The price of this equity of redemption was Rs. 5,000 more or less, more if the cost of redemption fell short of Rs. 1,45,000 and less if the cost of redemption exceeded that sum. This clearly meant that the parties estimated the value of the equity of redemption, so far as it could be ascertained at the time of executing the deed, at Rs. 5,000. We see no reason to doubt that this is as near the market value of the equity of redemption as could be ascertained. As in the event of the plaintiff being given a decree for pre-emption it will not be possible to determine precisely the value of the equity of redemption by waiting to see the cost of redeeming, we are thrown back on estimating the actual market value of the equity of redemption at the date of the deed of sale. The defendants cannot complain if we adopt the figure which they themselves adopted.

It is convenient here to deal with question No. 4. If the vendee defendant No. 1 had seen that the provisions of section 10 of the Oudh Laws Act were complied with and notice given, he would not have spent any money on the unnecessary institution of a redemption suit. Indeed there is strong reason to hold that the vendor's failure to give notice to the plaintiff was not merely with the concurrence of the vendee but at his instigation. In our

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opinion the vendee cannot take advantage of his own negligence or wrong-doing and is not, therefore, entitled to recover any sum spent by him on the redemption suit up to date.

As to the third question whether the vendee can resist the plaintiff's claim to pre-empt on the ground that he, the vendee, has since the sale of 17th May 1915 acquired an interest in the *mahal* Bhadaian by the transactions referred to above, we find that there has been some divergence of opinion prevailing in this Court on the legal question involved. We would refer to the cases of *Onkar Singh v. Bhagwan Dat Singh* (2), *Ratan v. Ram Niwaz* (3), *Manna Singh v. Bihari Singh* (4), *Sitla Bakhsh Singh v. Jagdat* (5) and *Jagan Nath Singh v. Mata Prasad* (6). These rulings deal also with the question whether a pre-emptor loses his right by ceasing to become a co-sharer at a date subsequent to the sale on which his claim is based. A similar divergence of opinion appears to have obtained in the Chief (now High) Court of the Punjab, where a pre-emption enactment on similar lines to that obtaining in Oudh is in force. We would refer to the cases of *Sanwal Das v. Gur Parshad* (7) and *Dhanna Singh v. Gurbakhsh Singh* (8). The balance of opinion appears to be against the view that a pre-emptor loses his right by reason of the vendee becoming a co-sharer before the pre-emption suit is brought in favour of the view that he loses his right by himself ceasing to be co-sharer before the suit is brought. These questions, so far as Oudh is concerned, must be decided solely with reference to the language of Chapter II of the Oudh Laws Act (XVIII of 1876).

The relevant portions of Chapter II are as follows:—

Section 6 runs as follows:—The right of pre-emption is a right of the persons hereinafter mentioned or referred to, to

acquire, in the cases hereinafter specified, immoveable property in preference to all other persons.

Section 7 enacts that there shall be a presumption of the right of pre-emption in all village communities.

Section 9 sets forth in order the persons entitled to the right.

Section 10 runs as follows:—When any person proposes to sell any property in respect of which any persons have a right of pre-emption, he shall give notice to the persons concerned of the price at which he is willing to sell such property.

Such notice shall be given through the Court within the local limits of whose jurisdiction the property or any part thereof is situate, and shall be deemed sufficiently given if it be stuck up on the *chaupal* or other public place of the village or city in which the property is situate.

Section 11 runs as follows:—Any person having a right of pre-emption in respect of any property proposed to be sold shall lose such right, unless within three months from the date of such notice he or his agent pays or tenders the price aforesaid to the person so proposing to sell.

Section 13 provides that a person entitled to a right of pre-emption may bring a suit to enforce such right on any of the following grounds:—

(a) that no due notice was given as required by section 10;

(b) that tender was made under section 11 or section 12 and refused;

(c) in the case of sale, that the price stated in the notice was not fixed in good faith.

Section 14 runs as follows:—If the Court finds for the plaintiff, the decree shall specify a day on or before which the purchase-money or the amount to be paid to the mortgagee shall be paid.

To clear the ground, we may point out that the provision about giving a general notice contained in sections 10 and 11 in one respect favours the pre-emptor and in another respect is unfavourable to him. If notice is not given, he is under no obligation to tender the money until he has got a decree for pre-emption. On the other hand if notice is given, he loses his right of pre-emption unless he tenders

(2) 25 Ind. Cas. 694; 17 O. C. 242.

(3) 36 Ind. Cas. 799; 19 O. C. 110; 3 O. L. J. 580.

(4) 37 Ind. Cas. 181; 19 O. C. 183; 3 O. L. J. 720.

(5) 41 Ind. Cas. 909; 20 O. C. 196; 4 O. L. J. 483.

(6) 50 Ind. Cas. 190; 22 O. C. 3; 6 O. L. J. 76; 1 U. P. L. R. (J. C.) 30.

(7) 4 Ind. Cas. 179; 90 P. R. 1909; 159 P. W. R. 1909; 147 P. L. R. 1909.

(8) 4 Ind. Cas. 337; 91 P. R. 1903; 161 P. W. R. 1909; 148 P. L. R. 1909.

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the price within three months. The provision about notice appears otherwise to have no effect on the relation between the parties. We construe this chapter to mean that the persons, who in section 9 are described in a proleptic or anticipatory sense as having a right of pre-emption, are invested with an actual right to pre-empt as soon as a sale to a stranger takes place. In other words, up to the date of sale the pre-emptor has merely the right to be preferred, which is a potential or imperfect right. This potential right gives place, on the happening of the sale to a stranger, to an actual or perfect right to be substituted for the vendee. We are unable to understand how such an actual right can be defeated by any act of the vendee after the right has accrued. It is to be noted that section 14 makes no exception and allows no discretion. If the Court finds for the plaintiff, a decree must be given. In this respect and also because the decree is to enforce a statutory right that has accrued and not a contract, the case of specific performance is not analogous. Again it is a fundamental principle of law that a person cannot take advantage of his own wrong-doing. A purchaser who purchases property, without ascertaining that it has been offered first to a person having a preferential right of purchase, is assisting the vendor in evading his obligation to give notice under Chapter II of the Oudh Laws Act. If then such a purchaser might by subsequent purchase plead that his first purchase was unassailable, the law would be permitting him to benefit by his own wrong-doing. Our conclusion, therefore, is fortified by the principle mentioned. In this case it may be mentioned that, to prove himself now a co-sharer, the respondent vendee is relying on two transactions of a very colourable nature. In one he got a lady who owns land in the village of Bhadaian to exchange 4 *bighas* odd with him: in another the same lady has made a gift to him of one share out of 2,304 shares in the village Bhadaian. These two deeds, which are Exhibits A1 and A3 dated both the 9th April 1916 and printed on pages 100 and 102 of the respondents' paper book, need only to be read and it will be seen that the transactions were merely entered into for the purpose of this particular case. On grounds of public

policy it seems most undesirable that a pre-emptor, who had gone to the expense of taking all the steps necessary for bringing a suit for pre-emption, should lose his trouble and money at the eleventh hour by reason of a purchase by the vendee of a few yards of land in the *mahal* in question.

In accordance with these findings we grant the appeal and allow the plaintiff's claim with costs in both Courts against defendant No. 1. The form of the decree will be that, if the plaintiff pays to the vendee within three months Rs. 5,000 less Rs. 1,300=Rs. 3,700, the proportionate value of the excepted village Ganeshpur Kaithauli, he will be put in possession of the nine villages in the Bhadaian *mahal* in suit. If he fails to deposit this sum within the three months' time specified, the suit will stand dismissed with costs throughout to the defendants.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 915
OF 1918.

May 6 1919.

Present:—Justice Sir Asutosh Chandhuri, Kt.,
and Mr. Justice Cuming.

JAGIR PRAMANIK—PLAINTIFF—
APPELLANT

versus

SUBID MOLLA AND OTHERS—DEFENDANTS—
RESPONDENTS.

Muhammadan Law—Gift subject to condition which derogates from grant, validity of—Condition to maintain donor, whether makes gift inoperative—Musha, doctrine of, applicability of.

Under the Muhammadan Law where a gift is made subject to a condition which derogates completely from the grant, the condition is void and the gift takes effect as if no condition is attached to it. [p. 380, col. 2.]

A *hebanona* containing a condition in the nature of a trust to maintain the donor during her life does not make the gift inoperative. [p. 380, col. 2.]

Where a *hebanama* purports to give one-half of certain plots of land, there is no likelihood of any confusion being created, and the gift does not come within the mischief of the rule of *musha*. [p. 380, col. 1.]

JAGIR PRAMANIK v. SUBID MOLLA.

Appeal against the decree of the Subordinate Judge, 2nd Court, Pabna, dated the 21st January 1918, modifying that of the Munsif, Additional Court at Pabna, dated the 14th of August 1916.

FACTS appear from the judgment.

Babu Krishna Kamal Moitra, for the Appellant.—There is no dispute that the plaintiff is an heir of Katu Bewa, who executed the *hebanama*. The lower Appellate Court has held that as the *hebanama* did not indicate which part of the properties the lady wanted to give away, the matter came under the rule of *musha*. I submit that the learned Judge is in error, regard being had to the circumstances of the case. The rule of *musha* cannot affect the present case at all. How could the plaintiff prove that he tilled half of the lands in his personal capacity after the *hebanama* as he tilled these lands before the death of the lady and after the execution of the deed? How could he show that he was tilling the land for himself and not for both? The whole thing depends upon the intention as disclosed by the *hebanama* and the attendant circumstances. The plaintiff is entitled to the whole of the land in Schedule *kha* under the deed of gift and as heir to half of the remaining lands in Schedule *ka*. The evidence of possession is in favour of the plaintiff. He has been possessing the land for a considerable length of time. There is no indefiniteness about the gift by the lady as her own conduct is clear on the point.

The point taken by the other side that inasmuch as the gift is a conditional gift it is inoperative, is untenable. Refers to *Muhammad Abdul Majid v. Fatima Bibi* (1).

Babu Dinesh Ohandra Roy, for the Respondents.—The *hebanama* cannot take effect on account of indefiniteness. There is no specific mention in the deed as to which portion of the property the plaintiff is to take. Moreover, the plaintiff has not been able to prove the nature of his possession, —was it on behalf of himself or for himself and also the lady? There was a condition in the deed which makes it ineffectual. There is also a condition in the document

in the nature of trust to maintain the lady during life.

Babu Krishna Kamal Moitra briefly replied.

JUDGMENT.—The questions before us arise out of a *hebanama* by a Muhammadan lady named Katu Bewa. It has been found by the learned Subordinate Judge that the plaintiff has failed to prove that he is the sole heir of Katu Bewa. Having regard to that, it has been rightly held that the plaintiff is entitled to 8 annas of the property mentioned in Schedule *ka*. The other 8 annas, therefore, is to go to the defendants.

With regard to the deed of gift, he agrees with the learned Munsif that it was duly executed and that the donor intended to give the plaintiff the quantity of land mentioned in the deed. But he held that as the deed of gift did not show which portion she intended to give away, the matter came within the mischief of the rule of *Musha*. It is, however, to be noticed that the deed purports to give half of the quantity of land mentioned therein. In one plot reference is made to 5 *cottas* only. But it appears from the evidence that that 5 *cottas* is half of the 10 *cottas* which was owned by the lady, the plot being one *bigha*. It has also been found that the plaintiff was brought into the house of Katu Bewa, some years before her death, that he used to cultivate all her lands during her lifetime. The *heba* was executed in Kartik 1321. So during these several years the plaintiff lived with her in the same house and cultivated all her lands. The lady died in Pous 1321, shortly after the execution and the registration of the *hebanama*. The learned Subordinate Judge finds that the same state of things continued up to the death of the lady and he, therefore, thinks that as there is no evidence of change in the character of possession, the rule of *Musha* affects the gift and that the plaintiff is not entitled to the quantity of land given to him by the lady. We find, however, that the plaintiff immediately after the death of this lady paid rent of the land to the landlord. It was a payment by him. No doubt the lady paid rent of the earlier period. We think it is absolutely

(1) 12 I. A. 159; 8 A. 39 (P. C.); 4 Sar. P. C. J. 670.

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impossible for any man in the position of the plaintiff to prove that he was cultivating half of the land in his personal capacity after the deed, as his was the hand which titled these lands before the death of the lady and he continued to till the lands after the execution of the deed. How was he to show that he was tilling the land for himself and not for both, or that he was tilling one portion for himself and the other portion for the lady? The period between the execution of the document and the death of the lady being a very short one, it was very difficult for the plaintiff to give any further evidence than what he has given. We are unable to accept the inference drawn from that by the learned Subordinate Judge. There was clearly an intention to give. The man was living with her for a considerable number of years. He was looking after her and she died shortly after the execution of the documents, and we think it is fair to infer from these circumstances that when there was an intention to give, full effect was given to that intention by the lady, and the fact that he tilled the land ought to be taken in his favour and not against him. A liberal interpretation has to be given, having regard to the decisions of the Privy Council, of gifts of this character, and we think that it would be doing great injustice to the plaintiff if we held, there being clear evidence of acts of possession being exercised by the plaintiff on his own behalf, that the deed was ineffectual. We think the evidence of possession ought to be construed in favour of the plaintiff and effect given to the deed. Having regard to the fact that the document purported to give one-half of certain plots, we do not think that there is likelihood of any confusion being created. It is not a gift of small quantities of land out of a larger quantity and, therefore, difficult to ascertain. There is no difficulty in ascertaining the half and we do not think that it matters much whether the right half or the left half was given. Regard ought also to be had to the nature of the defence in this case, namely, that the document was not properly executed and various other grounds taken of that character which have all failed.

We think that the gift ought to be upheld and the plaintiff is declared entitled to the whole of the land in Schedule *kha* under the deed of gift and as heir to half of the remaining lands in Schedule *ka*.

With regard to mesne profits it is conceded that the plaintiff is entitled to mesne profits of the portion of which he was kept out of possession, that is, the 16 annas of Schedule *kha*.

A point was also taken that the gift was a conditional gift and is, therefore, inoperative. But the Muhammadan Law as it stands is this, that when a gift is made subject to a condition which derogates completely from the grant, the condition is void and the gift will take effect as if no condition is attached to it. See Baillie's Muhammadan Law, 547, and the case of *Muhammad Abdul Majid v. Fatima Bibi* (1). There is also a condition in the document in the nature of a trust to maintain the lady during her life. That does not make the gift inoperative. In one portion of the document the lady speaks of an immediate gift and in another portion of the gift she says that she would have "power to possess during her lifetime." But the earlier portion is the operative portion by which an immediate gift was made, and in the later portion she wanted to say that if the conditions were not fulfilled she would claim to take the property back herself. Therefore, from every point of view the document seems to us to be a proper one and, therefore, effect should be given to it.

The appellant is entitled to his costs of this appeal.

The cross objection is dismissed without costs.

Plaintiff is to be given *khas* possession with regard to the lands in Schedule (*kha*). His title is declared with regard to 8 annas share of the remaining lands of (*ka*).

Appeal accepted.

RAGHUNATH v. GANESH.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 35 OF 1919.

November 27, 1919.

Present:—Mr. Justice Tudball and
Mr. Justice Ryves.RAGHUNATH—PLAINTIFF—APPELLANT
versusGANESH AND OTHERS—DEFENDANTS—
RESPONDENTS.*Agra Tenancy Act (II of 1901), s. 202—Jurisdiction of Civil and Revenue Courts—Ejectment of trespasser, suit for, whether cognisable by Civil Court—Tenancy, plea of—Procedure.*

A suit in which the plaintiff seeks to eject the defendant on the ground that he is a trespasser and not a tenant, is cognizable by a Civil Court and not by a Revenue Court. If in such a suit the defendant pleads that he is a tenant of the plaintiff, the procedure laid down in section 202 of the Agra Tenancy Act should be followed. [p. 382, col. 1.]

First appeal from the order of the Subordinate Judge, Banda, dated the 19th December 1918.

Mr. Pearey Lal Banerji, for the Appellant.

Mr. Kailas Nath Katiu, for the Respondents.

JUDGMENT.—The facts of this appeal are as follows:—The plaintiff is the owner of a two-anna share out of an eight-anna share in a certain village in the District of Hamirpur. His father died leaving him a minor and one Musammatt Peari, apparently his mother, looked after his affairs. She mortgaged his share. Subsequently proceedings were taken under the Encumbered Estates Act, Bundelkhand. The creditor was paid off by Government and Musammatt Peari proceeded to re-pay Government by instalments. After she had paid up a part of the debt she died. Another sarbarahkar was appointed in her place and then the owners of the eight-anna share gave a *zar-i-peshgi* lease to the defendants-respondents before us of the whole eight annas. The plaintiff's sarbarahkar was a party to this lease. The plaintiff has now come of age and he has brought the present suit to eject the defendants-respondents from his two-anna share and to obtain possession thereof for himself. An examination of the plaint will show that he has treated the transaction, under which the defendants obtained possession, as a lease. He has alleged, however, that his sarbarahkar Toraiyan had no power

whatsoever to grant a lease of his property or to transfer it in any way. He, therefore, pleads that the lease is not binding upon him and he seeks to eject the defendants as trespassers on the property. The suit was instituted in the Court of the Munsif at Hamirpur. The defendants' written statement may be boiled down to this. First of all, that the sarbarahkar had full power to grant the lease, and, secondly, that even if he had not, still the plaintiff on coming of age had confirmed the lease and had accepted rent under it; though in definite terms the defendants did not plead that they were the plaintiff's tenants, yet the whole sum and substance of their defence is that they are his tenants and furthermore they clearly plead that the suit was not cognizable by the Civil Court but was cognizable only by the Revenue Court. The Court of first instance held that the suit was not cognizable by the Civil Court but instead of returning the plaint to be filed in the proper Court, it dismissed the suit. From this decree the plaintiff filed an appeal as he was fully entitled to do. He urged in the grounds of appeal that the suit as it stood was cognizable by a Civil Court and should have been entertained by the Munsif. At the time that the appeal was argued it was further urged that even if the Munsif's decision was a correct one, his decree dismissing the suit was bad and the plaint should be returned for presentation to the proper Court. The Appellate Court agreed with the Munsif that the suit was not cognizable by the Civil Court. It agreed with the appellant that the Munsif ought to have returned the plaint and not to have dismissed the suit; and accepting this contention, it ordered the plaint to be returned to the plaintiff. The plaintiff has come here on appeal from this order. A preliminary objection was taken that no appeal would lie from the order of the Court below on the ground that if the Court of first instance had done its duty and passed a proper order, no second appeal could have lain against an order passed by the lower Appellate Court on appeal from the Munsif's order. We do not think that there is any substance in this point, as we have to take the facts as they are and not as they ought to have been, and the case is very similar to that of *Behari*

NEELATOORU VENKATARANGACHARLU v. NEELATOORU SAMPATH KUMARA AIYANGAR.

Lal v. Khub Chand (1). We must come to the merits of the appeal. In substance the plaint is an allegation by the plaintiff that the defendants are not his tenants. He distinctly pleads that they are trespassers and that he seeks to eject them. On the plaint, as it stands, we do not think that the suit could have been instituted in the Revenue Court. Neither section 58 nor section 34 of the Tenancy Act, to which we have been referred, will enable the plaintiff to file his present plaint in the Revenue Court and claim to have a decision on it. We have not been referred to any other section of the Tenancy Act which would enable him to bring this suit under that Act. In substance the defendants' plea is that they are the tenants of the plaintiff under the lease in question and that it is a valid and binding transaction. It seems to us, therefore, quite clear that in these circumstances the Civil Court ought to have entertained the suit and ought to have taken action under section 202 of the Tenancy Act, and the question of the defendants' tenancy would then really be decided by a Revenue Court. The Courts below have merely erred in the procedure adopted by them, but still the procedure laid down by law must be followed. It must be noted that there has been no previous litigation between the parties either in the Revenue or Civil Court in respect of the matter in dispute in this suit. The rulings in *Ram Singh v. Girraj Singh* (2) and *Sher Khan v. Debi Prasad* (3) do not apply to the present case, for in each of the suits with which those decisions are concerned, there was (in the end at least) an admitted tenancy and the plaintiffs were merely making an attempt to get round a decision of the Revenue Court already passed. In this view we allow the appeal. We set aside the orders and the decrees of the Courts below. We direct that the record be returned to the Court of first instance through the lower Appellate Court with directions to re-admit the suit on its original number and to proceed to hear and decide it according to law, keeping in view our remarks in respect of the use of section 202 of the Tenancy

Act. Costs of this appeal as well as the costs so far incurred up to the present date by the parties in all Courts will abide the result of the suit.

Appeal allowed.

MADRAS HIGH COURT.

CIVIL APPEAL NO. 61 OF 1919.

August 21, 1919.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Burn.

NEELATOORU VENKATARANGA-
CHARLU AND OTHERS—DEFENDANTS
Nos. 1 TO 4—APPELLANTS

versus

NEELATOORU SAMPATH KUMARA
AIYANGAR—PLAINTIFF—RESPONDENT.

Partition suit—Costs of preliminary decree—
Practice.

In a partition suit instituted for the purpose of effecting a partition between the members of a family, where neither party has been guilty of any unfair contention, the costs till the preliminary decree should, as in the case of administration suits, be ordered to come out of the estate. [p. 383, col. 1.]

Dildar Ali Khan v. Bhawani Sahai Singh, 34 C. 878; 5 C. L. J. 642 and *Ambica Prasad Singh v. Pardip Singh*, 28 Ind. Cas. 446; 42 C. 451; 19 C. W. N. 233, considered.

Appeal against the decree of the Court of the Temporary Subordinate Judge, Nellore, in Original Suit No. 13 of 1918 (Original Suit No. 71 of 1917, on the file of the District Court, Nellore).

Messrs. S. Varadhachariar and K. S. Champakesa Aiyangar, for the Appellants.

Messrs. A. Krishnasami Aiyar and K. Krishnasami Aiyangar, for the Respondents.

JUDGMENT.—[After dealing with the questions of fact arising in the case their Lordships proceeded as follows—*Ed.*]

* * * * *

The only remaining question we have to consider is the question of costs. Though the two decisions reported in *Dildar Ali Khan v. Bhawani Sahai Singh* (1) and *Ambica Prasad Singh v. Pardip Singh* (2) follow the English rule and an old case reported in the Weekly Reporter and decide that costs in a partition suit up to the preliminary decree

(1) 6 A. 48.

(2) 26 Ind. Cas. 731; 37 A. 41; 12 A. L. J. 1252.

(3) 28 Ind. Cas. 552; 13 A. L. J. 364; 37 A. 254.

(1) 34 C. 878; 5 C. L. J. 642.

(2) 28 Ind. Cas. 446; 42 C. 451; 19 C. W. N. 233.

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should be left to be borne by the respective parties, we think that, where a partition suit has to be brought for the effecting of a partition between the members of a family and neither party has been guilty of any unfair contention, the costs till the preliminary decree should, as in the case of administration suits, come out of the estate. As regards the costs in appeal, as the defendants have partially failed and partially succeeded, the parties will pay and receive proportionate costs.

M. C. P.

Decree modified.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 766 OF 1919.

November 1, 1919.

Present:—Sir Henry Rattigan, Kt.,
Chief Justice.

GANGA SINGH—PLAINTIFF—APPELLANT
versus

Musammat DHANNO AND OTHERS—
DEFENDANTS—RESPONDENTS.

Restitution of conjugal rights—Refusal of wife to live with her husband—Legal ground—Danger to health or safety of wife.

A husband is undoubtedly entitled to the society and companionship of his wife just as a wife is entitled to the society and protection of her husband. But before a Court can be asked to compel a reluctant wife to return to her husband's custody, it must be shown that there is no legal ground to justify the wife's refusal to live with her husband. One such ground is that the health or safety of the wife is likely to be endangered if she is forced to return to her husband's house. [p. 384, col 1.]

Second appeal from the decree of the District Judge, Hoshiarpur, dated the 20th February 1919, reversing that of the Senior Subordinate Judge, Hoshiarpur, dated the 7th May 1918.

Mr. Manohar Lal, for the Appellant.

Lala Fakir Chand, for the Respondents.

JUDGMENT.—The parties are Jats of Garh Shankar Tahsil, Hoshiarpore District, and the plaintiff, Ganga Singh, sues for restitution of conjugal rights as against his wife, Musammat Dhanno, and for an injunction against Musammat Dhanno's brother Ram Chand, her mother Musammat Kirpo, Bela Singh (who stood surety for Musammat

Dhanno in a criminal case), Ganga Singh (Bela Singh's relative) and Pala, maternal uncle of Musammat Dhanno. It appears that Musammat Dhanno was originally married to one Harnama, the brother of Ganga Singh; that Harnama died some four years before suit, and that after his death Ganga Singh married Musammat Dhanno by *karewa*. Ganga Singh is also married to Musammat Uttam Dai, the younger sister of Musammat Dhanno, and at the time of her marriage with Ganga Singh, Musammat Dhanno was a minor, about 16 years old.

In the present suit the defendants denied that any marriage had taken place between Musammat Dhanno and the plaintiff Ganga Singh, but both Courts have agreed in finding against defendants on this point. At the same time it is quite clear from the materials on the record that the relations between plaintiff on the one side and his wife and her family on the other side have been exceedingly strained for some considerable time past. In November 1917 plaintiff lodged a complaint in the Criminal Courts, alleging that he had been assaulted by Musammat Dhanno, her mother and her brothers and that during the assault his wife jeered at him and also struck him. His complaint was made under section 352, Indian Penal Code. Subsequently plaintiff and his friends were convicted of rioting, and in those proceedings it was alleged and found established that he had endeavoured to carry off his wife by force. The conviction took place on the 10th of October 1918 and the present suit was instituted on the 6th of February. In his complaint in this case plaintiff alleges that his wife had taken with her, when she left him, cash and ornaments. Upon these facts the District Judge refused to grant plaintiff a decree for restitution of conjugal rights, holding that there was a reasonable apprehension that her safety would be endangered if a decree was passed against her and she was compelled to return to her husband.

Plaintiff has appealed to this Court, and it has been argued on his behalf that though the District Judge had a discretion to grant or withhold the relief sought for, such discretion must be exercised in accordance with judicial principles and that in the present case there was no reasonable ground for refusing plaintiff a decree. On the other

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hand Mr. Fakir Chand for the respondents has contended that the District Judge was fully justified in dismissing the suit inasmuch as it could not be expected that the husband would fail to take his revenge when he found the young wife, who is the cause of all the struggle, once again in his power. It was also pointed out that Musammot Dhanno was married to the plaintiff when she was of tender age and that it is exceedingly doubtful, as the District Judge remarks, whether she ever lived with the plaintiff who is married to her younger sister. I have carefully considered the case and the arguments addressed to me, and the conclusion at which I have arrived is that no sufficient cause has been shown to justify my interference with the order of the lower Appellate Court. A husband is undoubtedly entitled to the society and companionship of his wife, just as a wife is entitled to the society and protection of her husband. But before a Court can be asked to compel a reluctant wife to return to her husband's custody, it must be shown that there is no legal ground to justify the wife's refusal to live with her husband. Such grounds may be of various kinds, and one is that the health or safety of the wife is likely to be endangered if she is forced to return to her husband's house. In the present case there is, I regret to say, reason to believe that Musammot Dhanno's position, if she returned to the plaintiff, would be fraught with danger to herself. It can hardly be expected that the plaintiff would overlook all that has occurred and his conduct towards his wife has been undoubtedly vindictive, even if it can be said that it has been not altogether unjustifiable.

I must accordingly dismiss this appeal with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.
CIVIL MISCELLANEOUS No. 427 OF 1919.
November 6, 1919.

Present:—Mr. Justice Piggott and
Mr. Justice Dalal.

In the matter of THE NATIONAL
INSURANCE AND BANKING COMPANY,
LD, IN LIQUIDATION.

*Companies Act (VII of 1913), ss. 3, 164, 200—
Winding-up referred to District Court—Contributories
residing within jurisdictions of different High Courts
—Procedure.*

An order for the winding up of a company was made by the Punjab Chief Court, and under section 164 of the Companies Act, subsequent proceedings were taken in the Court of the District Judge of Lahore against contributories residing in districts within the jurisdiction of the Allahabad High Court. On an application to the Allahabad High Court by the Official Liquidator to enforce these orders:

Held, that the High Court had jurisdiction to enforce the orders by proceedings in execution before itself, or to authorise the Official Liquidator to apply to the various District Courts in respect of each of the persons against whom orders for contribution had been passed; and that as the balance of convenience was in favour of the latter course, the Official Liquidator was authorised to proceed accordingly.

JUDGMENT.—This is an application by the Official Liquidator of the National Insurance and Banking Company, Ltd., which is now in liquidation. The winding-up order was made by the Chief Court of the Punjab, and under section 164 of the Indian Companies Act VII of 1913, proceedings subsequent to that order are now being had in the Court of the District Judge of Lahore. According to this petition, which is supported by affidavit, the District Judge of Lahore has passed a number of orders against contributories residing at various places within the jurisdiction of this Court. The prayer in this application is that this Court should make an order under section 164 aforesaid, permitting these subsequent proceedings to be had in the various District Courts specified at the foot of the application. Under section 200 of Act VII of 1913 the orders made by the District Judge of Lahore require to be enforced by the Court which would have had jurisdiction in respect of the company concerned if the registered office of that company had been situated at the places where execution is sought. Under section 3 of the Act, the Court having jurisdiction at the various places specified at the

* ABDUL GAFUR v. ASHAMATH BIBI.

foot of the plaint is this High Court. Referring back, however, to section 200 we find that this Court has authority to enforce the orders of the District Judge of Lahore in the same manner and in all respects as if these orders had been made by this Court itself. If the orders in question had been made by this Court itself, we could undoubtedly direct under section 164 of Act VII of 1913 that subsequent proceedings be had in a District Court. It is, therefore, merely a question of convenience whether the proceedings in execution should all be had in this Court, or whether the Official Liquidator should be authorised to apply to the various District Courts specified at the foot of his application in respect of each of the persons against whom orders for contribution have been passed by the District Judge of Lahore. The balance of convenience is obviously in favour of allowing proceedings to be taken in the District Courts. Our order, therefore, under the sections to which reference has been made, is that proceedings to enforce the orders passed by the District Judge of Lahore may be instituted on the application of the Official Liquidator, and the aforesaid orders may be enforced according to their tenure in the Courts of the various District Judges specified at the foot of this application and shown in the margin (foot-note)* of this order; proceedings in each Court being taken according to the place of residence of the person against whom orders for contribution have been made, or according to the situation of the property against which execution is sought.

Order accordingly.

* Allahabad, Benaras, Badaun, Ghazipur, Mirzapur, Aligarh, Bulandshahr, Etah, Hamirpur, Muradabad, Mainpuri and Muttra.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS Nos. 895, 896 and 1276 OF 1918.

August 8, 1919.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Moore.

Sowdagar Sheik ABDUL GAFUR AND OTHERS
—DEFENDANTS—APPELLANTS

versus

ASHAMATH BIBI AND OTHERS—PLAINTIFF
AND HER LEGAL REPRESENTATIVES

—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 144—Alienation by co-parcener—Adverse possession—Limitation.

The entry of an alienee from a co-parcener into the property alienated is adverse to the other co-parceners from the very moment of that entry. [p. 286, col. 2.]

Muttusami v. Ramakrishna, 12 M. 292, *Secretary of State v. Vira Rayan*, 9 M. 175 at p. 183 and *Bharao v. Rakhmin*, 23 B. 137 (F. B.), followed.

Second appeals against the decrees of the District Court, Ganjam at Berhampore, in Appeal Suits Nos. 23, 24 and 25 of 1917, preferred against the decree of the Court of the Temporary Subordinate Judge, Berhampore, in Original Suit No. 69 of 1915.

FACTS.—A Muhamadan brother and his sister owned certain property as co-sharers and were living together in common enjoyment of the income. The appellants were alienees of the property from the brother alone. The District Judge, following the case of Hindu co-parceners as reported in *Muthukrishniengar v. Sankara Narayana Aiyar* (1), held that the suit by the sister for partition of the property and setting aside the alienations made by the brother was not barred.

Mr. T. Prakasam for the Appellants.—*Muthukrishniengar v. Sankara Narayana Aiyar* (1) does not apply as it was a case of a Hindu co-parcenary. The only question in the present case was whether there was any special relation between the person in possession and the person claiming which should compel the former to prove exclusive possession to the knowledge of the latter. Being only an alienee there is no such liability. His possession is adverse and in his own right.

[SESHAGIRI AIYAR, J., remarked that there was no finding by the lower Court as regards knowledge of exclusion.]

(1) 25 Ind. Cas. 573; 27 M. L. J. 600; 16 M. L. T. 196; 1 L. W. 699; (1914) M. W. N. 708.

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The finding is unnecessary, as the appellant has been in possession for over the statutory period. See *Muthuraku Thevan v. Orr* (2), *Vasudeva Padhi Khadanga Garu v. Maguni Devan Bakshi Mahapatrulu Garu* (3), *Nachiyappa Ohetty v. Ramasami Ohetty* (4), *Secretary of State v. Vira Rayan* (5), *Madhava v. Narayana* (6).

Mr. V. Ramadoss, following.—An alienation by a co-parcener is always adverse. *Bhavrao v. Rakhmin* (7).

Possession is *prima facie* adverse. See *Muttusami v. Ramakrishna* (8).

Mr. C. Madhavan Nair (with him Mr. C. Sambasiva Rao), for the Respondents in both appeals.—The facts are that the alienations were made secretly while the sister was away. The mere fact that an alienation is made does not take away the fraud which was intended to be and was committed on the sister. I submit that fraud vitiates the whole set of transactions.

Farther an alienee cannot get a title better than that of the alienor. The alienor's possession was not adverse to the respondents. See also *Jogendra Nath Rai v. Baladeo Das* (9).

JUDGMENT.—This is a suit by a Muhammadan sister for partition against her brother and for setting aside alienations made in favour of the other defendants by that brother. The alienations in question were made more than 12 years before suit. Both the lower Courts have held that, as it had not been proved that the plaintiff had knowledge of those alienations, her claim was not barred by limitation. Apparently the view which found favour with them was that, as a co-parcener cannot be prescribed for exclusive possession without setting up notoriously and to the knowledge of other members of the family his intention to hold adversely, the alienee from the

co-parcener is affected by the same disability. In this Court also Mr. Madhavan Nair forcibly argued in support of this contention. But in the very case relied on by him and by the Courts below, namely, *Jogendra Nath Rai v. Baladeo Das* (9), Mr. Justice Mookerjee points out the distinction between the possession of a co-parcener and that of a stranger. In *Muttusami v. Ramakrishna* (8) Muthusami Aiyar and Wilkinson, JJ., decided this very point. They say that the entry of an alienee from a co-parcener is adverse to the other co-parceners from the very moment of that entry. This and the observations in *Secretary of State v. Vira Rayan* (5) [which though distinguished by the Judicial Committee on certain points follows the decision of Fry, J., in *Rains v. Buxton* (10)] is very explicit and direct. A Full Bench of the Bombay High Court has taken the same view: see *Bhavrao v. Rakhmin* (7). We must, therefore, hold that the view taken by the Courts below is untenable.

The further question is, whether the case must be sent back. Mr. Prakasam drew our attention to statements in the two judgments indicating that there was no participation in the income after 1892 by the sister. Mr. Madhavan Nair, on the other hand, referred to the statements of the District Judge that the plaintiff recovered her share of the profits upto 1914. This latter statement by itself would not be effective to save limitation but may be some evidence of the alienation having been concealed from the plaintiff. However, as the question of adverse possession has proceeded on a wrong view of the law, we think the safe course is to reverse the judgments of the Courts below and remand the suit to the Court of 1st instance for disposal in the light of our observations. There will be no fresh evidence. Costs will abide. Refund Court-fees. The memo. of objections are dismissed with costs.

M. C. P.

*Appeals allowed;
Case remanded.*

(2) 10 Ind. Cas. 575; 35 M. 618 at p. 622; 21 M. L. J. 615; 10 M. L. T. 12.

(3) 24 M. 387; 3 Bom. L. R. 303; 5 C. W. N. 545; 28 I. A. 81; 7 Sar. P. C. J. 819.

(4) 26 Ind. Cas. 383.

(5) 9 M. 175 at p. 183.

(6) 9 M. 244.

(7) 23 B. 137 (F. B.).

(8) 12 M. 292.

(9) 35 C. 961 at p. 968; 12 C. W. N. 127; 6 C. L. J. 735.

(10) (1880) 14 Ch. D. 537; 49 L. J. Ch. 473; 43 L. T. 88; 28 W. R. 954.

MAHESH PRASAD SINGH v. BUDHWANTI.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 56 OF 1919.

November 28, 1919.

Present:—Mr. Justice Tudball and

Mr. Justice Ryves.

Raja Sardar MAHESH PRASAD SINGH

—PETITIONER—APPELLANT

versus

Musammat BUDHWANTI—OPPOSITE

PARTY—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 152—
Amendment of decree—Appeal, whether lies.

There is no appeal from an order passed under section 152 of the Civil Procedure Code.

Appeal from an order of the Subordinate Judge, Mirzapur, dated the 7th March 1919.

Drs. S. N. Sen and J. N. Misra, for the Appellant.

Messrs. H. K. Mukerjee and S. O. Chaudhuri, for the Respondent.

JUDGMENT.—A preliminary objection is taken that no appeal lies. The facts may be briefly stated. A decree was passed and put into execution. That decree had been confirmed on appeal in this Court. The respondents discovered an error in the decree by reason of which they had been deprived of property in execution, to which they were on the face of the judgment entitled. They applied to the Court below for amendment of the decree. Objections were taken. The Court granted the application and amended the decree. Another application after the amendment was made for restitution. That is the subject-matter of a connected appeal. But in this appeal it is urged that no appeal lies from an order passed under section 152, Civil Procedure Code. The truth and the force of this contention are practically admitted and the Code is perfectly clear on the subject that no appeal lies. We are asked to treat the appeal as an application in revision, but this we must decline to do for admittedly there are no merits whatsoever in the appellant's case. The error in the decree was admittedly there and justice has been done, and we see no ground whatsoever to accede to this request. The result is that the appeal is rejected with costs to the opposite party including fees on the higher scale to the extent of Rs. 62-8-0.

Appeal rejected.

GHULAM MUHAMMAD v. BURA.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1153 OF 1919.

November 18, 1919.

Present:—Mr. Justice Petman.

GHULAM MUHAMMAD—DEFENDANT

—APPELLANT

versus

BURA—PLAINTIFF—RESPONDENT.

Custom or personal law—Arains of Jullundur city—Presumption—Alienation, restriction on powers of—Burden of proof.

In order to apply the initial presumption against the power of alienation in the case of families claiming to be governed by customary law, it is necessary to prove not merely that the family belongs to an agricultural tribe but also that its main occupation is agriculture. [p 388, col. 2]

No such presumption exists in the case of a family which, though belonging to an agricultural tribe, has altogether drifted away from agriculture as its main occupation and has settled for good in urban life and adopts trade, industry or service as its principal occupation and means and source of livelihood. [p 388, col. 2.]

Muhammad Hayat Khan v. Sandhe Khan, 55 P. R. 1908; 105 P. W. R. 1908, followed.

There is no presumption that Arains of Jullundur city are governed by custom. [p. 388, col. 2.]

Taj Muhammad v. Sayad Muhammad, 34 Ind. Cas. 126; 122 P. R. 1916; 94 P. W. R. 1916; 48 P. L. R. 1917, distinguished.

Second appeal from the decree of the District Judge, Jullundur, dated the 18th February 1919, reversing that of the Munsif, 1st Class, Jullundur, dated the 22nd July 1918, dismissing the suit with costs.

Lala Fakir Ohand, for the Appellant.

Lala Jagan Nath, for the Respondent.

JUDGMENT.—The facts in this case are that one Umar Din, an Arain living in Mohalla Khadian, in the city of Jullundur, sold his rights of residence in and the materials of a house in that Mohalla on the 21st August 1909 for Rs. 99-14-0. The site belonged to the proprietary body of that Mohalla. Umar Din died recently and his brother, the plaintiff, sued for possession of the house on the grounds that the house was ancestral and that the sale was without consideration or valid necessity. The vendee, defendant, pleaded that as Umar Din was a non-agriculturist, the plaintiff could not object to the sale and that in any case the sale was for consideration and valid necessity. The trial Court dismissed the suit, holding that the house was ancestral and that the plaintiff and his deceased brother were governed by custom but that the sale was for consideration

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and valid necessity. The plaintiff appealed and the lower Appellate Court has held :—

(1) that the plaintiff and his brother Umar Din were Arains and though living in a city were presumably governed by customary law and that the presumption had not been rebutted ;

(2) that the plaintiff's evidence that the house was ancestral had not been rebutted and, therefore, the plaintiff had a right to contest the alienation; and

(3) that there was no valid necessity for the sale.

The lower Appellate Court, therefore, accepted the appeal and decreed the plaintiff's claim.

In setting out the facts of the mortgages the lower Appellate Court erred in stating that not only the first mortgage for Rs. 30 but the second mortgage for Rs. 90 was in favour of one Sandhu, and this no doubt led to the framing of ground No. 2 of this appeal. As a fact the second mortgage was in favour of the vendee. As explained in *Devi Ditta v. Saudagar Singh* (1) the onus on the vendee would be greater in the latter case.

For the appellant it is contended that after setting the issue as to custom so as to place the onus on the plaintiff of proving that his family was governed by custom, the lower Appellate Court erred in turning round and deciding the point on a presumption to the contrary. It is contended that no certificate is necessary as the present is not an appeal with regard to the onus which was rightly placed, but if the onus was wrongly placed the defendant should have had an opportunity to meet the new case.

It is unnecessary to go into this complaint or into the questions of consideration and necessity, because in my opinion the lower Appellate Court has drawn a wrong presumption. It is admitted that the family does not follow agricultural pursuits and it is not shown that it ever did so. The deceased vendor earned his living as a labourer and as a servant. The decision in *Taj Muhammad v. Sayad Muhammad* (2), which also related to Arains

in Jullundur city, is distinguishable in that in that case it was proved that the ancestors of the family were agriculturists who had migrated to Jullundur. There is no such evidence in the present case. Apparently the head-note in that case states the findings too generally. In *Fakhar-un-nissa v. Malik Rahim Bakhsh* (3) it was held that there was no such presumption in the case of Arains living in the Sabzi Mandi at Delhi and again in *Muhammad Hayat Khan v. Sandhe Khan* (4) it was held that no such presumption existed in the case of Rajputs. I quote the following remarks from the latter judgment :—

"It appears to me that in order to apply the initial presumption against the power of alienation laid down by the Full Bench judgment in *Gujar v. Sham Das* (5) it is necessary to prove not merely that the family belongs to an agricultural tribe but also that its main occupation is agriculture. As further explained in *Ramji Lal v. Tej Ram* (6) the presumption in favour of a restricted power of alienation applies to members of agricultural tribes who are members of village communities. But where a family, though members of an agricultural tribe, has altogether drifted away from agriculture as its main occupation and has settled for good in urban life and adopts trade, industry, or service as its principal occupation and means and source of livelihood, I am not inclined to hold that any initial presumption would exist or apply that the power to alienate ancestral immoveable property by the members of such family is necessarily restricted."

In the present case it is not shown that the family ever followed agricultural pursuits or how they became possessed of the house in question. It may have been bought.

I also quote the following from the same judgment:—

"Even, however, if it were held that Ghulam Muhammad and his two sons being Rajputs had a restricted power of alienation respecting landed property, I am inclined to agree with the learned District

(1) 65 P. R. 1900; P. L. R. 1900, p. 322.

(2) 122 P. R. 1916; 34 Ind. Cas. 126; 94 P. W. R. 1916; 48 P. L. R. 1917.

(3) 23 P. R. 1897.

(4) 55 P. R. 1908; 105 P. W. R. 1908.

(5) 107 P. R. 1887.

(6) 73 P. R. 1895 (F. B.).

KUTUMATT PUTHEN VARIATH SEKHARA VARIER v. KOTAKAT.

Judge that the rule does not apply to house property of the class in dispute in the present case. I agree with him that the rule would apply to property connected with ancestral lands, and not to house property altogether unconnected and which was acquired in a town or city as a means of investment."

There is no evidence relating to the history of this house, and it cannot be assumed that the rights in it were acquired in connection with ancestral agricultural land. But even if, as suggested in Ellis' Customary Law (page 199), the above principle has since been extended to all ancestral property, a proposition which is denied by Counsel for the appellant, I am of opinion that the plaintiff has failed to prove that Umar Din had only a restricted power of alienation. On this finding it is unnecessary to consider the findings of the lower Appellate Court regarding necessity.

I, therefore, accept the appeal and reversing the judgment and decree of the lower Appellate Court, dismiss plaintiff's suit with costs throughout.

Appeal accepted.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 830 OF 1917.

September 25, 1919.

Present:—Mr. Justice Seshagiri Aiyar
and Mr. Justice Moore.

KUTUMATT PUTHEN VARIATH
SEKHARA VARIER (DECEASED) AND OTHERS—DEFENDANTS NOS. 1, 3 AND 31 AND LEGAL
REPRESENTATIVE OF THE DECEASED APPELLANT

No. 1—APPELLANTS

*versus*KOTAKAT *alias* THYATHILLATH
KESAVAN MUSAD AND OTHERS—PLAINTIFF

AND DEFENDANTS NOS. 12, 13, 15 TO 28,

30, 32 AND 33—RESPONDENTS.

Malabar Law—Appointment of heir—Succession to estate of appointee—Rights of relations of natural family—'Ananthira avakasham,' meaning of.

According to the customary law of Malabar the relations of the natural family from which an heir is constituted are entitled to succeed to that heir if he dies sonless. The appointment of an heir is very different from an adoption. [p. 390, col. 2.]

The expression '*ananthira avakasham*' only means the right of heirship, and the appointment of a person with '*ananthira avakasham*' rights enables his natural relations to succeed to his property. [p. 390, col. 2.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Palghat, at Calicut, in Appeal Suit No. 292 of 1916 (Appeal Suit No. 447 of 1916 of the District Court), preferred against the decree of the Court of the District Munsif, Walluvanad, in Original Suit No. 99 of 1913.

This second appeal came on for hearing before Seshagiri Aiyar, and Phillips, JJ., on the 21st November 1918.

Mr. C. V. Anantha Krishna Aiyar, for the Appellants.

Mr. C. Madhavan Nair, for the Respondents.

JUDGMENT.—The last two members of a Nambudri Illom, known as the Kotakkat Illom, were Kesavan, and Nangeli. In 1849 one of them, Kesavan, mortgaged the property in dispute by Exhibit B to the Tarwad of defendants Nos. 1 to 12. He died after 1852. In 1855 the only surviving member Nangeli appointed one Narayana Moosad as the heir to the properties of the Tarwad. In 1856 she appointed Damodaram during the lifetime of Narayana. In 1858 Narayana brought a suit to redeem the Kanom executed by Kesavan in 1849. Damodara intervened and disputed Narayana's title. There was a compromise (Exhibit E) in 1859 by which Damodara's right was recognised by Narayana and the suit was dismissed. There was a Kanom by Damodara in 1859, which is Exhibit A, to the Tarwad of defendants Nos. 1 to 12. Damodara died in 1896. Damodara prior to his being appointed heir belonged to a Tarwad known as Thiyyath Tarwad. Damodara died issueless and the present suit is by his natural brother to redeem Exhibit A. The two Courts below have found that Damodara was legally and validly appointed heir by Nangeli. They have also found that Exhibit A is genuine.

The question which was strenuously argued before us was whether the present plaintiff is the heir of the deceased Damodara. The District Munsif was inclined to the view that the members of Thiyyath and Kotakkat Illoms were related to each other as Dayadees. The Subordinate Judge has expressed no opinion on that question. It was suggested by Mr. Madhavan Nair, who appeared for the respondents, that paragraph 30 of the lower Court's judgment must

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be regarded as a finding on the question of relationship. In that paragraph the Subordinate Judge refers to his having found that the plaintiff was recognised as the legal representative of Damodara in a number of transactions and concludes by saying: "I find the issue for the plaintiff." In paragraph 25 wherein he discusses this recognition there is not a word about the relationship between the two Tarwads. There is considerable body of evidence on the question and, therefore, we cannot regard that the Subordinate Judge applied his mind to the consideration of the facts bearing on it.

It was then argued by the learned Counsel for the respondents that under Exhibit D, which was executed by Nangeli to Damodara on the occasion of his appointment as heir, not only Damodara but all his relations were taken into the Kotakkat Illom. The expression on which great reliance was placed is 'Ananthira Avakasham'. Neither in the Munsif's Court nor before the Subordinate Judge was any reliance placed upon these words as constituting the plaintiff as the heir to Damodara.

There is no definition of the word 'Ananthira Avakasham' in any of the treatises on Malabar Law or in any of the judgments of Courts. There are observations in *Vasudevan v. Secretary of State* (1) which rather suggest that this expression is synonymous with heirs. However, we do not desire to express any definite opinion on the question. If there is any evidence on record upon which a finding can be given regarding the meaning of this expression, we may ask the lower Appellate Court to consider the evidence and to submit a finding. We are not inclined to allow fresh evidence to be taken on the question, because if the plaintiff relied upon this expression in Exhibit D as constituting him the heir to the Tarwad, he ought to have examined witnesses in that behalf.

There can be no doubt that in a large number of proceedings to which the defendant was not a party but which were instituted by the plaintiff he has been recognised by Courts and by the parties

to those proceedings as the heir to Damodara. There is also the fact that the Government, which contemplated at one time a claim to the property as escheated to the Crown, recognised the plaintiff as the heir. These various proceedings tend to show that according to the customary law of Malabar the relations of the natural family from which an heir is constituted are entitled to succeed to that heir if he dies issueless. There is also the fact which is well recognised in Malabar that the appointment of an heir is very different from adoption. The very fact that Nangeli, an unmarried woman, was considered to have properly appointed Damodara as heir to the property of the Tarwad to which she belonged, shows that there is a difference between adoption and the appointment of an heir. Therefore, it is possible that although Damodara was regarded as an adopted son and his natural relations of the Tarwad from which he came may not be his heirs, his appointment as heir from the Tarwad would not preclude such relations from succeeding to his property. That is again a matter upon which the Subordinate Judge has expressed no definite opinion.

There is also the further question whether the plaintiff has not acquired title to the properties of the Tarwad by adverse possession. That would depend upon how far to the knowledge of the defendants he set up his right. This aspect of the question also has not been considered by the Subordinate Judge. We must, therefore, ask for findings upon the following questions:—

(a) Were the members of the Kotakkat Tarwad and those of the Thiyyath Tarwad related to each other? And if so, how?

(b) Whether under the customary law of Malabar the natural relations of an appointed heir are entitled to succeed to the appointee's properties?

(c) Whether the appointment of a person with 'Ananthira Avakasham' rights enables his natural relations to succeed to his property?

(d) Whether the plaintiff has acquired title to the property by prescription?

The findings must be submitted within two months and 7 days will be allowed for objections. No fresh evidence.

In compliance with the above order in the judgment the Temporary Subordinate Judge

(1) 11 M. 157 at p. 189.

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at Ottapalam submitted the following FINDINGS—I am asked to submit findings with reference to the evidence on record on the following points:—

1. Were the members of the Kotakkat Tarwad and those of the Thiyyath Tarwad related to each other? And if so, how?

2. Whether under the customary law of Malabar the natural relations of an appointed heir are entitled to succeed to the appointee's properties?

3. Whether the appointment of a person with 'Ananthira Avakasham' rights enables his natural relations to succeed to his property?

4. Whether the plaintiff has acquired a title to the property by prescription?

2. *1st Issue.*—The evidence relating to the question of relationship between the two Illoms is that furnished by Exhibit XXVIII and the deposition of the present plaintiff in this litigation. Exhibit XXVIII is the record of the evidence of the late Damodaran Moosad in Original Suit No. 503 of 1890 on the file of the District Munsif, Angadipuram. Damodaran Moosad then stated that he had been adopted into the Kotakkat Illom and that he had no right to the property of Thiyyath Illom. He has amplified these statements by a reference to the question of pollution between the Illoms. According to him he would observe pollution for ten days on the death of any member of the Thiyyath Illom, but that the members of Thiyyath Illom did not observe pollution when Nangeli Manayamma who adopted him died in Andu 1036 (1860—1861). Apparently, his idea was to keep open his connection with his natural Illom for his own purposes while seeking to make out that the converse was not the case.

3. Then there is the evidence of the present plaintiff, which is to the effect that the members of his family are *attalatakam* heirs of Kotakkat Illom having ten days' death pollution. This definite statement, it may be pointed out, stands uncontradicted, no effort having been made to displace it by any testimony to the contrary.

4. As between Damodaran Moosad and his brother, the plaintiff in this case, I think that the statement made by the latter should be preferred. Any weight that might otherwise be due to the evidence given by Damo-

darán Moosad is taken away by the fact that in 1891, when he was examined in Original Suit No. 503 of 1890, he was trying to establish his status as adopted heir. He was naturally, therefore, inclined to attribute all the results of a regular orthodox adoption to his case and in consequence he seems to have thought that he would strengthen his position by disclaiming mutual ties of relationship between the two Illoms. Self-interest of another kind, however, made him careful in safeguarding his own rights in his natural Illom. On this ground I consider that literal effect should not be given to his statements of the year 1891. The plaintiff's evidence is not vitiated by any such motives and if his assertion were untrue, it is not easy to see why the defendants made no effort at all to establish their present suggestion. Moreover, Damodaran's own evidence shows that the two Illoms were of the same *gotram* and that he claimed to be *attalatakam* heir to the Thiyyath Illom only in the character of a member of the Kotakkat Illom. But this could only be on the footing that the members of the two Illoms were *dayadis*. That his testimony as a whole cannot be accepted at its face value can be judged from his pretended ignorance as to whether the two families had relationship through pollution between each other.

5. I think it is reasonably clear that the members of the Kotakkat and Thiyyath families were related to each other as *dayadis*, having what is known as ten days' impurity or pollution; or in other words, *sapindas* of each other. I answer the first question accordingly.

6. *2nd Issue.*—The question is whether under the customary law of Malabar the natural relations of an appointed heir are entitled to succeed to the appointee's properties. In *Kumaran v. Narayanan* (2) it was held that the son of a daughter married in the Sarvaswadanom form may inherit to his father's Illom as an *attalatakam* heir, although his father would have no right at all in regard to the properties of the wife's Illom. This ruling shows that in case of an adoption there may be ultimate rights of succession on failure of the ordinary line of heirs. In the present case what happened was that the plaintiff's brother Damodaran

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Moosad was not regularly adopted into the Kotakkat Illom by its last representative, Nangeli, but that he was merely appointed heir to the Illom (*Vide* Exhibit D). In such a case it seems to be clear on the authorities that Damodaran would not lose the rights possessed by him in his own natural family [Mayne's Hindu Law, section 204; *Vasudevan v. Secretary of State* (1)].

7. The above proposition was not controverted by Mr. K. P. Raman Menon, but his argument was that although Damodaran might have had rights in his natural Illom, the plaintiff is not possessed of the converse right of succession as heir to Damodaran in regard to the properties of the Kotakkat Illom. The line of argument adopted by Mr. Raman Menon was that Exhibit D evidences an adoption in the *kritrima* form and that as such all the incidents of such an adoption as stated by Mr. Mayne in regard to the Mithila country should be held to apply to Damodaran's appointment. But the argument overlooks the fact that the affiliation of an heir to a Nambudri Illom by appointment, such as that of Damodaran under Exhibit D, resembles the *kritrima* adoption of Mithila only in this respect that both are based on purely secular motives and that in both no particular form or ceremony of adoption is a prerequisite to its validity. Beyond this, I do not think it would be safe to push the analogy.

8. The decision in *Vasudevan v. Secretary of State* (1) continues to be the leading case on the subject of adoption or affiliation among Nambudiris. Mr. Mayne's observations regarding adoptions by Nambudiris are almost wholly rested on the remarks to be found in the judgment of the High Court. That judgment, however, is very cautiously worded with regard to this matter. Their Lordships say: "It may well be that the power to appoint an heir is *equivalent to kritrima...adoption*" (the italics are mine), and not, be it noted, that it is an actual *kritrima* adoption. All that appears from the discussion of the evidence and the observations in the above judgment is that there are three kinds of adoption among Nambudiris, that the first two of them are regular adoptions with some kind of religious ceremony accompanying them, and that the third is a mere affiliation by appointment without any religious ceremony whatever.

Exhibit D is an instance of the third class. But I do not find any warrant anywhere for foisting upon it all the various legal incidents attaching to the *kritrima* adoption of Mithila.

9. A single illustration will suffice to show the untenable nature of the argument. In Mithila, a *kritrima* son can be adopted to the mother alone or to the father alone, while both are alive, and will then take only the property of the person adopting. But I do not think that anyone can be found to assert that a Nambudiri wife can make a valid adoption to herself alone in the Mithila sense and without reference to her husband or to the Illom of which they are members. On the other hand, such evidence as there is in this case goes a great way in supporting the plaintiff's contention.

10. In 1892 Damodaran Moosad together with his brother Kesavan Moosad, the present plaintiff, executed the document Exhibit XII in respect of some of the properties belonging to Thiyyath Illom. This is evidence showing that notwithstanding the appointment under Exhibit D, Damodaran was exercising all the rights of a member of his natural Illom, and it also forms a basis for inferring that the properties belonging to Damodaran and his brothers were treated by them as joint so as to be capable of being taken mutually by right of succession.

11. Then there are documents showing public recognition of the usage under consideration. Exhibits P and BB are judgments of the Court of first instance and the Court of Appeal, respectively, in a litigation in which Damodaran Moosad was the plaintiff. He obtained a decree but died before putting it in execution. On his death the present plaintiff's nephew Govindan Moosad applied for and was granted the succession certificate, Exhibit Q, for realising the decree amount as heir to Damodaran. Exhibit R is the execution petition presented by Govindan Moosad and the present plaintiff jointly. It is noteworthy that no point was then taken that these were not the heirs of Damodaran in regard to the Kotakkat Illom.

12. The next series of documents are Exhibits H, H1, XIII and H2. These relate to a litigation by Narayanan Moosad, who claimed to be the earlier and real appointee of Nangeli. To this litigation

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the present plaintiff and his nephew Govindan Moosad were impleaded as defendants Nos. 2 and 3.

13. The next document, Exhibit T, is specially important. It is an order of the Tahsildar of Walluvanad for transferring the Patta for the Kotakkat Illom properties to the present plaintiff's name as being Damodaran's heir. The order shows that Government desisted from enforcing their right of escheat, as contemplated by them, because on enquiry they were satisfied that the plaintiff succeeded to the Kotakkat properties as *attalatakam* heir.

14. The foregoing will show the acceptance by Government and other third parties of the rights of the plaintiff as heir to the Kotakkat Illom properties of Damodaran Moosad. Exhibit XI shows that the present contesting defendants were well aware of the rights claimed by the plaintiff in the litigation evidenced by Exhibits X series and XIII. Until now they have never thought of impugning the plaintiff's status as heir and this conduct on their part attracts the importance it deserves.

15. On a general survey of the authorities dealing with the subject of adoption among Nambudiris and the facts disclosed by the evidence in this litigation, I think that the appointment of an heir by the last member of a Nambudiri illom constitutes the appointee the successor to the Illom properties but without cutting off his rights in his own family. The result would be that while he would take the properties of the Illom into which he is affiliated, he retains his position in his own Illom for purposes of succession and inheritance. In other words, while the form of the affiliation may be compared to the *kritrima* adoption of the Sanskrit texts, the legal status conferred by the affiliation resembles more nearly that of the *dwymushyayana* son. In saying so, I wish to guard myself against being supposed to attribute to the affiliation all the incidents of *dwymushyayana* adoption any more than all the incidents of a *kritrima* adoption as now understood in Mithila. The procedure by which an affiliation is effected among Nambudiris and the legal effects flowing from it are entirely matters of special usage as existing among them, and it is only in a loose

or general sense that the act by which an heir is constituted can be classified and labelled under one or other of the recognised heads of adoption enumerated in the Hindu Law books.

16. My opinion on the point raised is that on the facts in evidence in this case the natural relations of an appointed heir are entitled under the customary law of Malabar to succeed to the appointee's properties.

17. *3rd Issue.*—The question raised by this issue falls under the previous issue. The expression '*Ananthira Avakasham*' means nothing more than the right of heirship and no special or technical significance attaches to it. This was conceded by the learned and experienced Nair Vakils on either side that argued the case in this Court. I may also refer to Logan's Manual of the Malabar District (page 245), where the word '*Ananthbravar*' is rendered as 'successor' or 'heir'. The expression as occurring in Exhibit D was conceded by the learned Vakils on both sides to mean only that Damodaran was to take the properties as heir to the Illom after Nangeli. I would, therefore, find the issue in the affirmative.

18. *4th Issue.*—I think the plaintiff must be considered to have acquired by prescription the right claimed by him, *viz.*, that he is heir to whatever properties Damodaran Moosad left. For this the main piece of evidence is Exhibit XI. There was a keen dispute between the present plaintiff and the present contesting defendant No. 1 and Narayanan, Moosad already referred to and a fourth man, with regard to the properties of a Devaswom attached to the Kotakkat Illom. The contest then took the shape of rival claims to registration of name in the Revenue Register. The Special Deputy Collector's order contains the following:—
"A civil suit appears to have been instituted by Narayanan Moosad in which the Uraima question may probably be decided and all the four parties express their willingness to have the registration of titles postponed until its disposal." Although in the result the Deputy Collector ordered registration to be made in the names of all four claimants in respect of such properties as they were holding

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individually, the order shows that the fight as regards Damodaran Moosad's properties was considered to lie between Narayanan Moosad on the one hand and the present plaintiff on the other. The other parties, including the present contesting defendant, were content to abide by the result of the civil litigation. Narayanan Moosad's suit ended adversely to him. Thereafter the present plaintiff's claim as heir to Damodaran Moosad was not further challenged by any one. That claim was publicly put forward to the knowledge of the contesting defendants, and it was of a nature which imported all the elements of an exclusive and hostile title. It seems to me that it is too late in the day for the defendants to question the plaintiff's general right to the Kotakkat Illom properties as Damodaran Moosad's heir.

This second appeal coming on for final hearing after the receipt of the findings of the lower Appellate Court upon the issues referred by this Court for trial, the Court delivered the following

JUDGMENT.—On the finding that the plaintiff is the Attalatakam heir which we accept, the second appeal fails and is dismissed with costs. (Separate set to 32nd defendant and the plaintiff.) Time for redemption, three months from this date.

M. . P.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 964 OF 1917.

June 19, 1919.

Present:—Justice Sir Ernest Fletcher, Kt., and Mr. Justice Cuming.

GOLAPJAN BIBI WIFE OF Sheikh UJIR MAMUD alias JAMIR MAMUD—
PLAINTIFF—APPELLANT

versus

Sheikh DIL MAMUD AND OTHERS—
RESPONDENTS.

Landlord and tenant—Occupancy holding, non-transferable—Transfer by tenant in favour of heir

without giving up possession—Landlord, right of re-entry of.

A tenant of a non-transferable occupancy holding purported to transfer the holding by two documents, one in favour of his wife and the other in favour of his daughter. Notwithstanding these documents, however, he remained on the holding and resided at the house erected on a portion thereof down to the date of his death. His wife and daughter were living with him and on his death became entitled to the holding as his heirs:

Held, that the possession of the widow and daughter was lawful possession as heirs and that the landlord did not acquire a right of re-entry and was not entitled to disturb their possession and that the mere fact that the tenant executed two invalid documents in their favour did not alter the character of their possession. [p. 395, col. 1.]

Appeal against the decree of the Subordinate Judge, 3rd Court, Mymensingh, dated the 5th of January 1917, affirming the decree of the Munsif of Iswar-gunj, dated the 10th of January 1916.

FACTS appear from the judgment.

Babu Birendra Kumar De, for the Appellant.—The *raiya*t was in possession of a non-transferable occupancy holding. He purported to transfer it by two documents and so the landlord was entitled to claim re-entry. The landlord can have *khas* possession under the circumstances, in spite of the fact that the *raiya*t lived on the land up to his death. Of the aforesaid holding one portion was transferred by *hiba bil ewaz* and the other by sale. The learned Subordinate Judge says that the *hiba-bil ewaz* was not a sale but a gift for exchange. I submit it is not so and the landlord can come in. *Hiba-bil ewaz* is a sale. As there is a sale of the entire holding, the landlord can certainly come in. The learned Subordinate Judge says there was no transfer of the entire holding. And further as the transferees are in possession, no delivery of possession is at all necessary. The moment the *raiya*t has transferred his holding, the landlord can get *khas* possession. The transfer is operative between parties, but it does not bind the landlord.

Babu Kali Kinkar Chakerbutty, for the Respondents, was not called upon.

JUDGMENT.

FLETCHER, J.—I think in this case the conclusion arrived at by the learned Judge of the lower Appellate Court is correct, although all the reasons that he has given may not appear to be sound. The question turns on this: did the landlord acquire a

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right of re-entry to a non-transferable occupancy holding? The landlord's right of re-entry is supposed to have arisen by reason of Abdul, the tenant, having executed two documents, one in favour of his wife and the other in favour of his daughter. The facts found were these: That notwithstanding these two documents, Abdul remained on the holding and resided at the house erected on a portion thereof down to the date of his death. He died on this holding. At that time his wife and daughter were living with him and, therefore, immediately on Abdul's death, his wife and daughter became entitled to the property as his heirs and the mere fact that he purported to give them two invalid documents during his lifetime did not alter the character of their possession. Their possession was a lawful possession and one which the landlord was not entitled to disturb. I think the decision arrived at by the learned Subordinate Judge is correct. The present appeal, therefore, fails and must be dismissed with costs.

CUMING, J.—I agree.

Appeal dismissed.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 172 OF 1918.

November 21, 1919.

Present:—Mr. Justice Lindsay.RAM LAGAN PANDE AND ANOTHER—
DEFENDANTS—APPLICANTS*versus*MUHAMMAD ISHAQ KHAN AND ANOTHER
—PLAINTIFFS—OPPOSITE PARTIES.*Pre-emption suit—Decree directing payment of certain amount and awarding costs—Plaintiff, whether entitled to deduct costs.*

Where a pre-emptor is directed to pay into Court a specific sum of money and is awarded costs, he is entitled to deduct the amount of the costs so awarded from the sum he is directed to pay into Court. [p 396, col. 1.]

Civil revision against the decision of the Munsif, Ghazipur, dated the 26th August 1918.

Mr. K. K. Varma, for the Applicants.

Mr. S. N. Mukerjee, for the Opposite Parties.

JUDGMENT.—It appears that the plaintiffs-opposite party in this case brought a suit for pre-emption and on the 30th

of May 1918 got a decree. According to the decree the plaintiffs were liable to pay a sum of Rs. 100, and the decree provided that in default of payment within one month from the date of the decree the suit should stand dismissed. It is also apparent that the decree awarded a sum of Rs. 9 odd to the plaintiffs by way of costs payable by the defendants. What followed was this: Within the prescribed period of one month the plaintiffs deposited a sum of Rs. 99. Why this sum was deposited is not altogether clear, but for the purpose of deciding this case it is not necessary to examine this question. Later on it was noticed that the full amount of Rs. 100 mentioned in the decree as the purchase-money had not been deposited. On the 26th of August 1918 the plaintiffs made an application to the Court praying for extension of the time in order that the deficit of one rupee might be paid into Court. The lower Court thereupon passed an *ex parte* order extending the time. The Court professed to act under section 151 of the Code.

This application has been filed here for the purpose of obtaining a revision of the lower Court's order. A preliminary objection was raised to the hearing of this application on the ground that the order of the first Court was appealable, but in view of the Full Bench decision reported as *Suranjan Singh v. Rambahal Lal* (1) this argument cannot prevail. It was there held that an order such as has been passed by the Court below in the present case was not appealable and could only be made the subject of revision. There is no bar, therefore, to the entertaining of this application. The other question is whether the order of the Court below can be disturbed in revision. It has indeed been held in various cases in this Court that, in cases where a decree for pre-emption is passed in the terms laid down in Order XX, rule 14 of the Code of Civil Procedure, it is not open to the Courts to extend the time fixed for payment. That principle was laid down in *Suranjan Singh v. Ram Bahal Lal* (2) and was affirmed by the Full Bench ruling to

(1) 21 Ind. Cas. 585; 35 A. 582; 11 A. L. J. 950.
(2) 17 Ind. Cas. 912; 10 A. L. J. 520.

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which I have already referred. It has, however, been argued here that although the plaintiffs pre-emptors deposited only a sum of Rs. 99 within the period fixed, there was nevertheless a full compliance with the direction contained in the decree, and it is sought to make good this argument by referring to the fact that under the decree the plaintiffs were entitled as against the defendants to a sum of Rs. 9 odd by way of costs. The learned Counsel for the opposite party has referred me to several cases in support of this contention. One of these is mentioned as *Bechai Singh v. Shami Nath* (3). It was a case decided by Mr. Justice Banerji on the 25th of April 1911. I have had the record of the case before me. It is Second Appeal No. 91 of 1911 [*Bechai Singh v. Shami Nath* (3)]. It was there held by Banerji, J., in accordance with other rulings of this Court that in a case like the present where the pre-emptor plaintiff was entitled to costs, he was entitled to deduct any portion of the purchase-money unpaid from the amount of costs owing to him. It follows, therefore, that this principle has been accepted and it must be held in the present case that the plaintiffs complied substantially with the terms contained in the decree. I observe that this ruling of Mr. Justice Banerji was affirmed in Letters Patent Appeal on the 27th of July 1911. I have also been referred to another ruling of a Bench of this Court to be found reported as *Ali Husain v. Amin Ullah* (4). There it was laid down that where a pre-emptor deposited in Court the sum he was required to pay by the decree to the vendee less the costs awarded to him, he had completely complied with the order of the Court. In this ruling the decision of Mr. Justice Banerji to which I have referred above was quoted. It seems to me, therefore, that on the authority of these cases it is not possible for me to hold in favour of the applicants here that there was a failure to comply with the terms of the decree and that being so, it is not competent to me to interfere with the order of the Court below, although it may be that the Munsif was not, as a matter of law, entitled to extend the time and

pass the order which he actually passed. If it appears that there was substantial compliance with the terms of the decree, then the order ought to be allowed to stand although it may be conceded to be wrong in form. The result is that I dismiss this application with costs to the opposite party.

Application dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2157
OF 1917.

June 16, 1919.

Present:—Mr. Justice Chatterjea and
Mr. Justice Duval.

NARENDRA NATH KUTI AND OTHERS—
DEFENDANTS—APPELLANTS

versus

SATYADHAN GHOSAL AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), s. 52—Landlord and tenant—Rent, abatement of—Tenant, whether includes one of several tenants—One of several tenants, whether can claim abatement of rent—Appeal, abatement of.

It is not open to one of many tenants to claim abatement of rent without making all the joint landlords and his co-sharers in the tenancy parties to the suit. [p. 397, col. 2.]

The expression 'tenant' in section 52 of the Bengal Tenancy Act does not include the case of a mere co-sharer tenant who has only a fractional share in the tenure: it means the tenant of the tenure and not one of many tenants. [p. 397, col. 2.]

In a suit for rent by some co-sharer landlords the tenant defendants claimed abatement of rent, and their claim was allowed by the Court of first instance. On appeal by the landlords the lower Appellate Court reversed that decree and held that the defendants were not entitled to an abatement of rent as all the landlords were not parties to the suit. Against that decision the tenant defendants preferred a second appeal to the High Court during the pendency of which one of the tenants died, and his legal representatives were not brought on the record:

Held, that in the absence of the legal representatives of the deceased tenant-appellant the remaining tenants were not entitled to claim abatement of rent, and that consequently the whole appeal abated. [p. 397, col. 2.]

Bhoopendra Narain Dutt v. Ramon Krishna Dutt, 27 C. 417; 4 C. W. N. 107, relied upon.

Bhosai v. Aminuddi, 57 Ind. Cas. 847; 25 C. L. J. 469 at p. 471; 21 C. W. N. 371, distinguished.

(3) 10 Ind. Cas. 454; 8 A. L. J. 27 (Notes).

(4) 15 Ind. Cas. 337; 10 A. L. J. 153; 34 A. 596.

NARENDRA NATH KUTI v. SATYADHAN GHOSAL.

Appeal against the decree of the Subordinate Judge, 2nd Court, Hooghly, dated the 18th June 1912, reversing that of the Munsif, 2nd Court at Uluberia, dated the 16th March 1916.

FACTS appear from the judgment.

Babu Monmathanath Roy (with him Babu Jamini Ranian Mookerji), for the Appellants.—I submit that the whole case should abate, as one of the legal representatives of the defendants was not made a party to the suit though he died more than six months ago. *Bhosai v. Aminuddin* (1).

Babu Broja Lal Chuckerbutty, for the Respondents.—The case reported as *Bhoopendra Narain Dutt v. Romon Krishna Dutt* (2) was a case under section 52 of the Bengal Tenancy Act, but here the claim depends upon the contract between the parties. My submission is that the appeal does not abate.

Babu Manmathanath Roy, in reply.—Here all the tenants are parties and the effect of the death of one of them has vitiated the appeal.

Bhoopendra Narain Dutt v. Romon Krishna Dutt (2) is the only authority against me but that is distinguishable.

Refers to *Bhosai v. Aminuddi* (1).

JUDGMENT.—One of the defendants-appellants died more than six months ago, and no application was made for the substitution of his legal representatives. That being so, the appeal abates so far as that appellant is concerned.

The question, however, is whether the whole appeal must fail by reason of the abatement of the appeal with respect to one of the appellants.

The appeal arises out of a suit for arrears of rent instituted by some co-sharer landlords against the tenants. The tenant defendants claimed abatement of rent. That was allowed by the Court of first instance. On appeal by the landlords, the lower Appellate Court reversed that decree and held that the defendants were not entitled to an abatement of rent as all the landlords were not parties to the suit. Against that decision of the lower Appellate Court, the present appeal was preferred.

As stated above, one of the tenants (who were the appellants) died and his legal

representatives were not substituted. That being so, the question to be considered is whether the remaining tenants are entitled now to claim abatement of rent. Upon that question, we may refer to the case of *Bhoopendra Narain Dutt v. Romon Krishna Dutt* (2) where the learned Judges pointed out that "the expression 'tenant' in section 52 of the Bengal Tenancy Act does not include the case of a mere co-sharer tenant who has only a fractional share in the tenure, it means the tenant of the tenure and not one of many tenants". We entirely agree with the view taken in that case. If it were otherwise, it would be open to every co-sharer landlord and every co-sharer tenant to litigate the question of abatement of rent in separate suits and would result, as pointed out in that case, in "much confusion and almost endless litigation." As observed by Mr. Justice Banerjee, "there is no real hardship in the case so far as the tenant defendant is concerned. It is always open to him to bring a suit for abatement of a rent, making all the joint landlords and his co-sharers in the tenancy parties to the suit."

The learned Pleader for the appellants relied upon some observations in the case of *Bhosai v. Aminuddi* (1). That was not a suit for abatement of rent but a suit for recovery of rent by a co-sharer landlord under a *kabuliat*. The other co-sharer landlord was made a *pro forma* defendant. The plaintiff prayed that the *pro forma* defendant might be joined as plaintiff if she desired to do so and a decree might be passed for the entire rent if it was found that the rent due to her was still left unpaid on taking additional Court-fee from the plaintiff. There was no question of any excess area or of fresh adjustment of rent inconsistent with the terms of the original tenancy. The rate of rent was fixed for the whole area at the inception of the tenancy and the tenant agreed to pay rent for the entire lands on the happening of the contingency mentioned in the *kabuliat*. The suit was really to recover rent upon an ascertainment of the rent payable in accordance with the terms of the original letting, and it was held that the case did not come within section 52 of the Bengal Tenancy Act, but was maintainable under the general law, as the co-sharer landlord

(1) 37 Ind. Cas. 847; 25 C. L. J. 469 at p. 471; 21 C. W. N. 371.

(2) 27 C. 417; 4 C. W. N. 107.

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who had not joined as plaintiff was made a party to the suit. We do not think that that case helps the appellant in any way.

We are accordingly of opinion that the present appeal must fail and is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1613 OF 1917.

November 13, 1919.

Present:—Mr. Justice Lindsay.

BAZMIR KHAN AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

RUSTAM KHAN AND OTHERS—DEFENDANTS
—RESPONDENTS.

Possession, title by, nature of—Possessory title, whether heritable.

A person in possession of property, however imperfect his title may be, has good title as against the whole world, except the true owner, and such title is capable of descending by inheritance to his heirs. Until the true owner comes forward to assert a claim to the property, such heirs are entitled to continue in possession. [p. 399, cols. 1 & 2.]

Second appeal against the decree of the District Judge, Budaun, dated the 18th May 1917.

FACTS appear from the judgment.

Mr. *Ibin-i-Ahmad*, for the Appellants.—Admittedly *Musammât Muhammadi Begam* was in possession of the property till her death, whether she was rightful owner or not does not affect the case. Had the defendants been the real owners they would have been justified in ousting the plaintiffs and obtaining possession. It is found by the Courts below that the defendants are not real owners. That being so, they are not entitled to dispossess the plaintiffs and the plaintiffs under the circumstances are entitled to get back the possession from the defendants.

The heirs of the last person in possession of the property have got good title against the whole world except the real owner and can claim possession. It was also submitted that such title, however imperfect, was heritable and transferable. Reliance was placed on various authorities.

Mr. *Iqbal Ahmad* (with him Mr. *Mangal Prasad Bhargava*), for the Respondents, submitted that it was the Revenue Court which ordered mutation of names and that the order

should not be set aside. He further submitted that the purchasers from *Rustam Khan* were *bona fide* purchasers and their possession should not be disturbed. He referred to section 41 of the Transfer of Property Act.

JUDGMENT.—This appeal, in my opinion, must prevail. The facts may be briefly stated as follows:—The dispute relates to a small parcel of Zemindari property which admittedly belonged at one time to a lady called *Muhammadi Begum*. She died in the year 1911.

It is now admitted that before her death, that is to say, in the year 1907, *Muhammadi Begam* made a gift of her property to two persons, *Inayat Khan* and *Rustam Khan*. *Rustam Khan* is the principal defendant-respondent in this appeal.

According to the finding of the lower Appellate Court the history of *Inayat Khan* and *Rustam Khan* is this:—They were foundlings who were discovered in the Bazar at Peshawar by the husband of this lady *Muhammadi Begum*. They were brought to *Muhammadi Begum's* house and were reared as her children, she having no children of her own. It is found, however, that there was no blood relationship between *Inayat Khan* and *Rustam Khan*.

Inayat Khan died in 1909 and at the time of his death he had become the owner by gift of the property now in dispute. Claims for mutation in respect to this property were put forward by *Muhammadi Begam* on the one hand and by *Rustam Khan* on the other hand. The Revenue Court decided in favour of *Muhammadi Begam*, and the property continued to be recorded in her name down till the time of her death in the year 1914. After the death of the lady there was another dispute regarding mutation. The present plaintiffs-appellants *Bazmir Khan* and others claimed mutation on the ground that they were legal heirs to the estate of *Muhammadi Begam*. *Rustam Khan*, the principal respondent, also claimed as an heir on the ground that he was the brother of *Inayat Khan* and was the true owner. The result of this dispute was that the Revenue Court awarded mutation in favour of *Rustam Khan*, and so we have the present suit in which the plaintiffs claiming as heirs of *Muhammadi Begam* came into Court and asked for recovery of possession. The

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Courts below have dismissed the plaintiffs' claim.

I have already referred to the fact that the story put forward by Rustam Khan that he was the brother of Inayat Khan and consequently his heir has been exploded. It is clear, therefore, that Rustam Khan has no right to this property on the ground that he is an heir of Inayat. On the other hand, it is admitted that the plaintiffs are the rightful heirs of Muhammadi Begam. The learned Judge of the Court below, however, has taken a peculiar view of the case. He says in his judgment that after the death of Inayat Khan who had acquired this property by gift, Muhammadi Begam had no right to possession of the property and consequently as she had no right and as Rustam Khan has no right to the property, it has escheated to Government; and so he says that the plaintiffs, although he finds them to be the rightful heirs of Muhammadi Begam, have no claim to be put in possession on the ground that Muhammadi Begam had no title to the property herself. It is clear that this opinion of the lower Appellate Court is wrong. While it may be the case that Muhammadi Begam had no title as heir to this property after the death of Inayat Khan, it is nevertheless clear that she was at least in possession without title and her possessory title was capable of being disposed of either by transfer or by inheritance. The law on this subject has been well settled and I need not refer to the long series of authorities. The case specially relied upon by the learned Counsel for the appellants is reported as *Gobind Prasad v. Mohan Lal* (1). That case followed the well known case of *Asher v. Whitlock* (2). Another case has been referred to in this connection, an unreported case, Second Appeal No. 1399 of 1913 decided by Sander Lal, J., on the 3rd of July 1914. There can be no doubt that at the time of her death Muhammadi Begam had a title which though perhaps imperfect was nevertheless capable of descending by inheritance to her heirs, who are the plaintiffs, and until the true owner of this property comes forward to assert a claim, the heirs

of Muhammadi Begam are entitled to possession. I say nothing regarding the rights of Government in this matter. If the property has escheated to Government, it can come forward and assert its claim if so advised. All that is necessary to say here is that Rustam Khan, who has no title of any kind to the property, cannot be maintained in possession to the exclusion of the plaintiffs who are the heirs of Muhammadi Begam.

The learned Counsel for the respondents in arguing his case referred to the provisions of section 41 of the Transfer of Property Act. I take it that his intention was to suggest that the defendants in this case other than Rustam Khan were entitled to be maintained in possession notwithstanding the status of the plaintiffs as heirs of Muhammadi Begam. Their case was that they were *bona fide* purchasers for value from Rustam Khan whose name was entered in the *khewat*. That plea is no answer to the plaintiffs' case. If Rustam Khan had no title whatever to this property, he could not by sale or otherwise convey any title to this property to other defendants. As to section 41, it cannot help the case of these defendants purchasers, unless indeed they could show that there was something in the conduct of the present plaintiffs entitling them to say that their purchase could not be avoided by the plaintiffs. Section 41 covers the case of the transfer of property by an ostensible owner, that is to say, by a person who has been in ostensible possession with the consent express or implied, of the true owner. No such case can be set up here, however, for in view of the facts which have been set out before, there is nothing to suggest that the present plaintiffs ever stood aside and consented, either expressly or by implication, to Rustam Khan's holding himself out as the owner of this property. On the contrary it was shown that they fought with Rustam Khan in the mutation Court and lost their case there. No question of consent, express or implied, arises and so section 41 has no application. I have dealt now with all the points which have been raised in the course of argument and the result is that I find in favour of the plaintiffs and the suit will accordingly be decreed with costs in all the three Courts, including in this Court

(1) 24 A. 157.

(2) (1865) 1 Q. B. 1; 35 L. J. Q. B. 17; 11 Jur. (N. S.) 925; 13 L. T. 254; 14 W. R. 26.

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fees on the higher scale. The appeal is allowed and the decree of the Court below is set aside accordingly.

Appeal allowed.

LAHORE HIGH COURT.

CIVIL MISCELLANEOUS CASE No. 330 OF 1919.

CIVIL APPEAL No. 285 OF 1915.

October 17, 1919.

Present:—Mr. Justice Scott-Smith and
Mr. Justice Wilberforce.

Musammatt SATTO AND OTHERS—PETITIONERS
versus

AMAR SINGH AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 110, 149—Appeal, dismissal of, for insufficiency of Court-fee—Affirmation of decree of lower Court—Leave to appeal to Privy Council—Substantial question of law—Refusal to allow deficiency of Court-fee to be made up, whether question of law.

A decree of the High Court dismissing an appeal on account of insufficiency of Court-fee is one affirming the decree of the 1st Court within the meaning of section 110 of the Civil Procedure Code.

A refusal by the High Court to show any indulgence under section 149, Civil Procedure Code, and allow the deficiency in Court-fee to be made good is not a question of law within the meaning of section 110, Civil Procedure Code.

Petition, under Order XLV, rule 3, Civil Procedure Code, for leave to appeal to His Majesty in Council, against the judgment and decree passed on 7th April 1919 by this Court in Civil Appeal No. 285 of 1919, printed as 53 Ind. Cas. 256.

The Hon'ble Mr. *Fazl-i-Husain*, for the Petitioners.

The Hon'ble Pandit *Sheo Narain*, R. B., and Mr. *M. L. Furi*, for the Respondents.

ORDER.—In this case plaintiffs' suit was dismissed by the first Court and an appeal to this Court was dismissed on the ground that the memorandum of appeal bore insufficient Court-fee, the Court-fee payable on appeal being obviously the same as in the first Court. It was held that considering the general circumstances and in view of the absence of any *bona fide* mistake the Court would not in its discretion under section 149, Civil Procedure Code, allow the deficiency to be made up on the day of hearing. Against this decision a petition is preferred for leave to appeal to their Lordships of the Privy Council. The

petition is contested on the ground that the decree of this Court affirmed the decision of the lower Court and that the appeal did not involve any substantial question of law. Counsel for the petitioners contended in a lukewarm fashion, with no authority to support him, that the dismissal of an appeal on account of insufficiency of Court-fee did not amount to the affirmation of the decree of the first Court and that a question of law was involved in the refusal by this Court to allow any indulgence under section 149. On the other hand, Counsel for the respondents cited *Krishnasami Panikondar v. Ramasami Chettiar* (1) and *Ram Karan v. Madhukar Prasad* (2) as authorities that the judgment of this Court dismissing the appeal must be considered as one affirming the decision of the Court below. Counsel for the respondents also referred to *Krishnasami Panikondar v. Ramasami Chettiar* (1), *Muhammad Abdul Ghafur Khan v. Secretary of State for India* (3) and *Bhagat Singh v. Jai Ram* (4) as instances in which similar petitions were held not to involve any substantial question of law. We have no hesitation in holding that the decree of this Court affirmed the decision of the lower Court, and that the appeal to the Privy Council does not involve any substantial question of law.

Counsel for the petitioners in ground 4 (c) of the petition asks for decision whether the Court fee was correctly levied in the first Court. We may note in this connection that no objections on this point were made against the order of the first Court either in that Court or in the grounds of appeal to this Court. The petition, moreover, does not even now contest the correctness of the order of the first Court. The point is clearly not one of those at issue.

For the reasons given above we dismiss the petition with costs.

Petition dismissed.

(1) 16 Ind. Cas. 486; 23 M. L. J. 219; 12 M. L. T. 260; (1912) M. W. N. 962.

(2) 29 Ind. Cas. 469; 13 A. L. J. 623.

(3) 23 Ind. Cas. 532; 36 A. 325; 12 A. L. J. 451.

(4) 26 Ind. Cas. 402; 22 P. R. 1915; 66 P. L. R. 1915; 19 P. W. R. 1915.

WALIMAHOMED V. EMPEROR.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION NO. 69
OF 1918.

September 26, 1919.

Present:—Mr. Pratt, J. C., and Mr. Kemp,
A. J. C.WALIMAHOMED AND ANOTHER
versus
EMPEROR.*Criminal Procedure Code (Act V of 1898), s. 250,
construction of—Compensation, liability to pay, extent
of—"Information," meaning of.*

Section 250 of the Criminal Procedure Code is a penal section and must be construed strictly. Words ought not to be introduced into it which would extend the liability to pay compensation to any person beyond the actual complainant or person who gives the information on which the case is instituted.

Per Pratt, J. C.—"Information" in section 250 of the Criminal Procedure Code is limited to the information given and entered in the cognizable register under section 154 of the Code.

Application for revision against the order of the Court of the Additional City Magistrate, Karachi.

Mr. Motiram Idanmal, for the Applicants.

Mr. T. G. Elphinston, Public Prosecutor
for Sind, for the Crown.

JUDGMENT.

KEMP, A. J. C.—This is an application in revision against the order of the Additional City Magistrate, Karachi, ordering the applicants each to pay a fine of Rs. 50 to the accused under section 250, Criminal Procedure Code.

It transpired that the information report of offences under section 454 and 380, Indian Penal Code, against the accused was made by a City Police Constable No. 69, who acted on the false information of the applicants that the accused had committed the offences. The applicants gave the information to him as witnesses. The case was not instituted within the meaning of section 250, Criminal Procedure Code, upon their information to the Sub Inspector but upon the information of the Police constable. The applicants are not, therefore, the persons against whom an order of compensation under section 250 can be passed.

It is, however, contended that the information given by the applicants was

information given to a person who was by law bound to transmit it to the proper authority to institute criminal proceedings against the accused, and reliance is placed upon the Full Bench case of *Sessions Judge Tinnevelly v. Sivan Chetty* (1) in support of that contention. It is to be noted, however, that in *Sessions Judge, Tinnevelly v. Sivan Chetty* (1) one of the three Judges, who constituted the Full Bench, dissented from the view there adopted, and the earlier ruling of the Madras High Court in *Ohinna Ramana Gowd v. Emperor* (2) was against the view adopted by the majority of the Judges constituting the Full Bench in *Sessions Judge, Tinnevelly v. Sivan Chetty* (1). Now section 250, Criminal Procedure Code, is a penal section and must be construed strictly. There is, therefore, no authority for introducing into it words which would extend the liability to pay compensation to any person beyond the actual complainant or person who gives the information on which the case is instituted, i. e., the Police constable in this case. I think the point is not free from doubt, but I incline to the view that the order of the learned Additional City Magistrate is wrong.

Under the circumstances, it is unnecessary to discuss the other objections that have been taken to the order. I would, therefore, reverse the order of the learned Magistrate and direct the amount, if paid, to be refunded.

PRATT, J. C.—I agree. The word 'information' in section 250 is, I think, limited to the information given and entered in the cognizable register under section 154, Criminal Procedure Code. We have held in *Emperor v. Sumar* (3) that a person who abets the giving of information to the Police cannot be dealt with under section 250, and similarly a person who gives information on which such information is recorded is not within the section.

As pointed out by my learned colleague, the section is a penal section and should be construed strictly. The wider construction would enable the Magistrate to order compensation to be paid by a person who

(1) 1 Ind. Cas. 187; 32 M. 258; 5 M. L. T. 269; 9 Cr. L. J. 170.

(2) 31 M. 106; 18 M. L. J. 573; 9 Cr. L. J. 77.

(3) 48 Ind. Cas. 980; 20 Cr. L. J. 100; 12 S. L. R. 76.

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had appeared in the case, and this cannot be the intention of the section.

Order reversed.

ALLAHABAD HIGH COURT.
CRIMINAL APPEAL No. 857 OF 1919.
November 17, 1919.

Present:—Mr. Justice Piggott and
Mr. Justice Dalal.

SITAL PRASAD AND OTHERS—
APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 361—Lawful guardian, who is—Person in temporary charge, whether lawful guardian—Hindu Law—Minor—Nearest male, whether entitled to custody of minor girl.

For the purposes of the First Explanation to section 361 of the Penal Code, a person in temporary charge of a minor cannot be regarded as the lawful guardian, as against the guardian at civil law. [p. 403, col. 2.]

The fact that a person happens to be the nearest major male relative of a minor girl does not, under the Hindu Law, give him an absolute right to the custody of the girl. [p. 404, col. 1.]

Criminal appeal against the order of the Additional Sessions Judge, Jaunpur, dated the 3rd of July 1919, convicting the appellants under section 366 of the Indian Penal Code and sentencing them to three years' rigorous imprisonment.

Mr. J. M. Banerji, for the Appellants.

The Government Pleader, for the Crown.

JUDGMENT.

DALAL, J.—Sital Prasad, Ram Sawarath and Ram Tawakkal, Brahmans by caste, have appealed from their conviction of an offence under section 366, Indian Penal Code. The charge against them was one of kidnapping a minor girl, Musammât Rajpatia, eight years of age, from the custody of her lawful guardian, Musammât Chanderkali, in order to compel her to marry a person against her will. The willingness or otherwise of a minor Hindu girl to marry a particular person is not a matter for consideration at the time of her marriage, so it will be difficult to make a distinction between a marriage by

the agency of a kidnapper and a marriage with the help of her relations so far as her own personal desire and consent are concerned. This, however, is a point of small significance, because in the event of the taking away of the girl being proved the persons found guilty of kidnapping her would be guilty of an offence under section 363, Indian Penal Code, which provides for a substantial punishment. Musammât Rajpatia is a sister of Musammât Chanderkali's deceased husband Bikarmajit, and her father and the father of Ram Tawakkal, appellant, were own brothers. The fathers of both Musammât Rajpatia and Ram Tawakkal are dead. There are two minor brothers of Musammât Rajpatia alive. The case for the prosecution was that the three appellants went to the apartment of Musammât Chanderkali on the night of the 28th of April last, picked up the minor girl Musammât Rajpatia who was sleeping by her aunt's side and ran away, that the appellants were pursued by the villagers, who caught the appellants Sital Prasad and Ram Sawarath, and that these two appellants were promptly taken to the Police Station Bamnion, where a report was made by Musammât Chanderkali at 7 A. M. on the 29th of April. It was said that Ram Tawakkal made good his escape and that the appellants put down or let go the hold of the minor girl when they were pursued and before they were caught at a short distance from the girl's house. Ram Tawakkal surrendered himself in the Magistrate's Court on the 14th of May, when he presented to the Court a written statement charging the other appellants with the crime of kidnapping. This defence he subsequently abandoned for one in line with that of the other appellants. The other appellants, who are brothers and residents of Sirauli, a village at some distance from Pariat where Ram Tawakkal, the minor girl and Musammât Chanderkali lived, have throughout the proceedings put forward a consistent story. They stated that the girl's marriage was settled to take place with their younger brother, Ram Prasad; that the agreement was entered into with Ram Tawakkal, who acted on behalf of Musammât Chanderkali, on a consideration of Rs. 200 to be paid to Musammât Chanderkali by these two

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appellants; that Rs. 100 had been previously paid to *Musammât Chanderkali* by the hand of *Ram Tawakkal*, and that on the 28th of April in the afternoon these appellants went to the village of *Pariat* to the house of *Musammât Chanderkali* and *Ram Tawakkal* with the balance of the money to fetch the minor girl by way of a *dola* ceremony of marriage. They added that at the house further negotiations took place between them and *Musammât Chanderkali*, on whose behalf the prosecution witness *Ram Das* was the spokesman at the time; that she demanded payment of an additional sum of Rs. 100 over and above the amount agreed upon between the parties and that on their refusal to submit to this exaction, a false charge of kidnapping was got up against them. I have read the evidence on the record and considered the circumstances of the alleged arrest of the appellants *Sital Prasad* and *Ram Sawarath*. I am satisfied that the prosecution story of the taking away of the girl is false. If the appellants had laid a plan for the carrying away of the girl, it is not likely that they would have been caught so easily after a short pursuit on a dark night. To all accounts the appellants had a good start, because the villagers first went to the house of *Musammât Chanderkali*, discovered from her in which direction the kidnappers had gone and then started in pursuit. The prosecution witness *Jagerdeo* made in the Committing Magistrate's Court an incredible statement that *Sital Prasad* appellant dragged the girl along as he ran, as if a small child of six could not be carried by the appellants. It must be remembered that the appellants are all men of under thirty-five years of age. The prosecution witness *Sukhnandan* deposed in the Court of the Committing Magistrate that *Sital Prasad* and *Ram Sawarath* appellants were caught with the girl. Obviously when the enquiry prior to commitment was proceeding, all the details of an imaginary occurrence were not settled and this conflict of testimony, subsequently removed in the Sessions Court, confirms me in my distrust of the prosecution story based on its improbability. It is probable that *Ram Tawakkal* may himself have desired a share in the money which was to be extorted from the other appel-

lants. I am not concerned with that aspect of the case. What I believe is that the appellants *Sital Prasad* and *Ram Sawarath* have in the main told the truth. *Musammât Chanderkali* is not without friends to help her. The prosecution witness *Ram Das* is a partisan of hers and the girl, *Musammât Rajpatia*, has deposed that on the way to the Police Station they stopped at the house of a presumably influential man of the locality, *Munshi Adya Saran*. I hold that there was no taking away of the minor girl from the custody of *Musammât Chanderkali*. The charge, therefore, fails and the appellants are entitled to an acquittal. A learned Judge of this Court referred this case to a Bench on a point of law raised by the appellants' learned Counsel during argument. It was argued that *Ram Tawakkal* was the guardian of the girl under the law applicable to Hindus in this Province, and that, therefore, the taking away of the girl by him and his associates from the custody of *Musammât Chanderkali* did not amount to kidnapping as defined in section 361, Indian Penal Code. I would accept the inference of law under the Indian Penal Code, if *Ram Tawakkal* were proved to be the girl's guardian under the Hindu Law. The First Explanation to section 361, Indian Penal Code, which defines lawful guardian, extends the accepted definition of these words under the civil law governing the minor. The definition does not exclude the person who would be the minor's guardian under the civil law applicable to the minor. This precaution of extending the meaning of the words lawful guardian under the criminal law was taken to preclude persons other than the civil law guardian from raising the technical plea that the legal relation of ward and guardian did not exist between the minor and the person from whose actual custody the minor may happen to be taken away. The person in temporary charge of the minor cannot, however, take advantage of this definition given in the First Explanation to section 361, Indian Penal Code, as against the guardian at civil law. If I had been satisfied that *Ram Tawakkal* was the guardian of the minor girl *Musammât Rajpatia* at civil law, I would not have enquired further into this case. Such a relationship would have saved him and the other appellants from prosecution under section 363, Indian Penal

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Code, even in the case of the taking away of the girl being proved. I am of opinion that Ram Tawakkal is not the guardian of *Musammatt Rajpatia* under the Hindu Law. "There was not, even before the passing of Act VIII of 1890, any one other than the father or mother who had an absolute right to the custody of a Hindu minor. This was decided in the case of *Kristo Kissor Neoghy v. Kadermoye Dossee* (1)," [Trevelyan and Stevens, JJ.], *Musammatt Bhikuo Koer v. Musammatt Ohamela Koer* (2)]. Under the Hindu Law Ram Tawakkal has not an absolute right to the custody of *Musammatt Rajpatia* on the sole ground that he happens to be the nearest major male relation of the girl. It was open to the defence to prove that Ram Tawakkal was appointed a guardian either by a Court of law or by the brotherhood or that he had actually assumed such responsibility without any objection being raised by the blood relations or by the brotherhood. If such proof had been forthcoming, it could have been presumed that *Musammatt Chanderkali* had custody of the girl *Rajpatia* in the capacity of an agent of Ram Tawakkal. There is no such proof on the record. At the trial it was abundantly proved that *Musammatt Chanderkali* acted and was acknowledged as the guardian of the minor girl, and not Ram Tawakkal. Ram Tawakkal is separate from the minor children of his uncle and the guardianship of the children has been undertaken by *Musammatt Chanderkali* the eldest and only major member of the divided family, using the word family in its general sense and not in the restricted sense of a collection of males under the Hindu Law. That such is the fact is indicated even by the nature of the defence set up by the appellants. The defence of the appellants Sital Prasad and Ram Sawarath was that the marriage negotiations were carried on between them and *Musammatt Chanderkali* who acted through her agent Ram Tawakkal. It was never suggested that Ram Tawakkal had consented to the marriage and that such consent was sufficient for the performance of the marriage contract. Ram Tawakkal himself, when he surrendered in the Court of the Committing Magistrate, tried to save himself by taking the part of

Musammatt Chanderkali. On the facts, therefore, I would set aside the conviction and sentence passed on the three appellants.

PIEGOTT, J.—I concur generally, and more particularly with regard to the facts. The appellants were in this difficulty, that Ram Tawakkal was never frank with the Court and that Counsel on his behalf eventually took up a position, at least by way of an alternative defence in this Court, which had never been suggested in the Court below, as regards the two appellants other than Ram Tawakkal, I have no doubt that, whatever they did (and I do not believe they did precisely what the prosecution witnesses have stated), was done in the *bona fide* belief that the consent of *Musammatt Chanderkali* had been obtained to the proposed marriage of the minor girl.

Ram Tawakkal's plea that, even on the findings of fact recorded by the learned Sessions Judge, he was entitled to an acquittal, labours under this difficulty, that his own defence in the trial Court involved a virtual admission of *Musammatt Chanderkali's* position as the *de facto* guardian of the minor. I am, however, satisfied that, on the existing state of the record, it is impossible to feel sufficient confidence in the prosecution evidence to find any of the appellants guilty.

BY THE COURT.—We accept the appeals of all three appellants, set aside the conviction and sentence against them, and acquit them of the offence. As they have been released on bail, their security bonds will be discharged.

Appeal accepted.

MADRAS HIGH COURT

CRIMINAL REVISION CASE No. 451 OF 1919.

CRIMINAL REVISION PETITION No. 384 OF 1919.

November 11, 1919.

Present :—Mr. Justice Seshagiri Aiyar
and Mr. Justice Moore.

In re KARUPPIAH PILLAI AND OTHERS

—ACCUSED Nos. 2, 5, 6, 7 AND 8—

PETITIONERS.

Criminal Procedure Code (Act V of 1893), ss. 337.

(1) 2 C. L. R. 583.

(2) 2 C. W. N. 191 at p. 192.

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423—Magistrate, failure of, to write proper judgment
—Appeal - Procedure.

Where in an appeal to the Court of Session, the Judge finds that the Magistrate has not written a judgment in conformity with the provisions of section 367 of the Criminal Procedure Code, the correct procedure is to accept the appeal and to remand the case for hearing *de novo*. Section 423 of the Code does not authorise the retention of an appeal on the file of the Sessions Judge when asking for a judgment which the Magistrate has failed to record. [p. 406, col. 1.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Sessions Judge, Madura, in Criminal Appeal No. 2 of 1919, preferred against the order of the Court of the Sub-Divisional Magistrate, Melur Division, in Calendar Case No. 61 of 1918, transferred from the Court of the 2nd Class Magistrate, Madura, in Calendar Case No. 171 of 1917.

FACTS appear from the judgment.

The Hon'ble Mr. T. Richmond, for the Petitioners.—The Sub-Divisional Magistrate acted contrary to law in simply passing sentence when the case was sent up to him for orders under section 106, Criminal Procedure Code. He should have written a judgment in conformity with the provisions of section 367. His functions under section 349 are not narrowed to the mere recording of sentence. He has larger powers. The whole case is open before him. It was quite open to the Sub-Divisional Magistrate to find the accused not guilty or that the case was not a fit one for proceeding under section 106. He was bound to hear the accused.

The Sessions Judge, who first heard the appeal, should have quashed the conviction and remanded the case for a *de novo* trial. He had no powers under section 423 to retain the case on his file.

The Public Prosecutor, for the Crown.—Under section 349, Criminal Procedure Code, the Divisional Magistrate need only pass sentence. The wording of the section indicates that the writing of a separate judgment is unnecessary. In any event there is no case for interference by the High Court in revision, as Mr. Booty, the Sessions Judge, has examined the facts fully and has come to the conclusion that the Sub-Divisional Magistrate was right.

ORDER.—There is something more than a mere technicality in the objection raised by Mr. Richmond in the petition. Originally the case was tried by the 2nd Class Magistrate of Madura but he, having been of opinion that the deceased should be required to execute bonds under section 106, Criminal Procedure Code, sent the case to the Sub-Divisional Magistrate of Melur under section 349, Criminal Procedure Code. The reason given by the 2nd Class Magistrate for submitting the proceedings to the Sub-Divisional Magistrate are: "The accused have created serious disturbance by taking the law into their own hands and their object in forcibly entering into the temple is to establish their rights. I find the accused Nos. 2, 5, 6, 7 and 8 guilty of the offences under sections 147 and 323, Indian Penal Code. I think that the accused are likely to commit further breaches of the peace and I am of opinion that they ought to be required to execute a bond for a heavy sum under section 106, Criminal Procedure Code. I, therefore, submit proceedings with records to the Divisional Magistrate, Melur, under section 349, Criminal Procedure Code." The Sub-Divisional Magistrate on receipt of the records simply passed sentence on the accused without writing any judgment. Thereupon there was an appeal to the Sessions Judge. Mr. Coleridge, who was then the Sessions Judge, passed this order: "I think the accused are entitled to a full judgment by the lower Court and I remand the case back to the District Magistrate to direct the Sub-Divisional Magistrate to write a full judgment dealing with the facts and the law." Apparently what the Sessions Judge did was to retain the appeal on his file and to ask for a fresh judgment from the Divisional Magistrate. That is clear from the entries in the diary of the Sessions Judge. When the papers went back to the Divisional Magistrate, he wrote a long judgment. Thereupon a day was fixed by Mr. Booty, Mr. Coleridge's successor, for hearing the appeal. Mr. Booty was of opinion that the procedure adopted by Mr. Coleridge was not right. He said that the absence of the conjunctive principle in section 349, Criminal Procedure Code, which speaks of "judgment, sentence or order" is an indication that all that the

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Divisional Magistrate need have done was to pass a sentence and to make up his mind whether the accused were guilty or not. In that the learned Sessions Judge is clearly wrong. The only limitation upon the powers of the Sub-Divisional Magistrate under section 349 is that he should not inflict a more severe punishment than he is empowered to impose under sections 32 and 33, Criminal Procedure Code. On the papers being received from the 2nd Class Magistrate the Sub-Divisional Magistrate could have come to the conclusion that the accused were not guilty, he could have come to the conclusion that the accused should have been convicted of some other offence, he could have made up his mind that it was not a fit case for requiring the accused to execute a bond, all these things were open to him and he was bound to have exercised his independent judgment in the matter. It is not necessary that he should have written a lengthy judgment, especially as he had the judgment of the Subordinate Magistrate before him, but he ought to have written a judgment which should have conformed to the requirements of section 367, Criminal Procedure Code. In our opinion Mr. Booty was wrong in that the Divisional Magistrate was not bound to do anything more than to record sentence when the records were received from the 2nd Class Magistrate. After stating this Mr. Booty proceeded to examine the facts of the case, and he has come to the conclusion that the view taken by the Divisional Magistrate was right.

In this Court it is contended that the proper procedure which Mr. Coleridge should have adopted was to reverse the appeal and remand the case for hearing *de novo* to the Divisional Magistrate. We think that the learned Counsel is right in this contention. There is no power under section 423, Criminal Procedure Code, to retain the case on the file when asking for a judgment which the Magistrate has failed to record. The correct procedure to have adopted was to have disposed of the appeal and to have remanded the case to the Divisional Magistrate for hearing *de novo*. This not having been done, we must hold that there was no appeal legally on the file of the Sessions Judge

which Mr. Booty could have disposed of. Under these circumstances we think we must set aside the order of the Sessions Judge and send the whole case back to the District Magistrate, with directions to send it to some other First Class Magistrate than the Sub-Divisional Magistrate (Mr. Meenakshisundaram) who tried the case.

It is desirable to point out, having regard to what took place before Mr. Meenakshisundaram, that, on remand, the accused are entitled to be heard and to satisfy the Magistrate, if they can, that there is no case against them.

M. C. P.

Order set aside.

ALLAHABAD HIGH COURT.
CRIMINAL REFERENCE No. 660 OF 1919.
October 27, 1919.

Present :—Mr. Justice Piggott.
KANHAIYA LAL AND OTHERS—
PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Stamp Act (II of 1899), s. 62—Dishonest intention to evade payment of stamp duty—Offence—Intention, proof of.

In order to secure a conviction under section 62 of the Stamp Act there must be a dishonest intention to evade the payment of stamp duty. Where the facts and circumstances of a case show that there was no such intention, a conviction under that section is bad in law. [p. 407, col. 1.]

Criminal reference by the Sessions Judge, Meerut, dated the 20th September 1919.

FACTS appear from the following Order of Reference by the Sessions Judge:—

Lala Hardeo Prasad, his wife Musammat Chandrawati and his minor son Sham Behari Lal, aged 4 years, with five others have been convicted under section 62 of the Indian Stamp Act and sentenced to pay a fine of Rs. 30 each. They have come to this Court in revision under section 437, Criminal Procedure Code.

The facts giving rise to the present conviction briefly stated are as follows:—

The above eight persons arranged to start a small bank, and with that object got

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the memorandum of association prepared by a local legal practitioner, B. Brij Nath, B.A., LL. B. The latter, having drafted the memorandum, despatched it to the Registrar, Joint Stock Companies, Lucknow, on the 8th May last. The ordinary practice is that the memorandum of association is first drafted, printed and then submitted to the Registrar for approval, as alterations and additions are generally made. In the present case the memorandum was typed and sent with a covering letter. It may be noted that the executants of this memorandum, obviously in order to make them sure and confident of the transaction, affixed their signatures to the document. The Registrar, finding the document duly signed, impounded it as he thought that it ought to have been engrossed on a stamp paper of Rs. 40. The matter was reported to the Collector, who made it over to the Stamp Officer for a report. This latter officer reported on the 13th of June 1919 that the stamp duty of Rs. 40 *plus* the penalty of Rs. 120 were already paid by the executants, but that they should be prosecuted under section 62 of the Stamp Act. The District Magistrate accepted this report and prosecution was started, which resulted in the conviction of the applicants.

Babu Brij Nath, Vakil, is a respectable person, and it is inconceivable how he should have sent the document as an original one. His evidence on the record shows that by sending it to the Registrar as it was he meant to obtain his approval before getting it faired out, printed and finally submitted to His Excellency the Viceroy in Council for a licence as provided by a Special War Enactment. Even the trying Magistrate has found that the applicants never intended to evade payment of duty. In his opinion, however, intention of evading payment was not at all necessary for the purposes of section 62. In my opinion this view is wrong. The provision attached to section 43 of the Stamp Act is very clear. It lays down that after the payment of the deficiency and the penalty, if the Collector be of opinion that the stamp duty was evaded intentionally he may order prosecution. In this case it is obvious from the District Magistrate's report and the Collector's order that the latter never ruled that there was any dishonest intention to evade

payment. The lower Court has refrained from coming to a finding as to the applicants' *mala fides* in this matter. It only relied on the sanction given by the Collector. No sooner the applicants were informed of the deficiency than they deposited the Rs. 40 and the penalty, Rs. 120, five times. It may be a case of mere oversight on the part of the Pleader who sent the papers to the Registrar, and the applicants do not seem to be in any way liable. At any rate, the minor applicant Sham Bihari, who too has been fined Rs. 30, is not in any manner responsible, *vide* section 83 of the Indian Penal Code. Under the circumstances I think that the prosecution and conviction both are unwarranted by law. The exaction of Rs. 120 as penalty was quite sufficient to safeguard the interest of Government revenue. I would, therefore, recommend to the Hon'ble Court that the conviction and sentence be set aside and the fines, which have been paid, be refunded.

JUDGMENT.—I accept the reference of the learned Sessions Judge. For the reasons stated by him I set aside the convictions and sentences in this case and acquit the accused persons of the offences charged. The fines if paid will be refunded.

Reference accepted.

POU DH JUDICIAL COMMISSIONER'S!
COURT.

CRIMINAL REVISION No. 29 OF 1919.

April 11, 1919.

Present:—Pandit Kanhaiya Lal, J. C. JAGAN NATH AND OTHERS—OPPOSITE PARTY—APPLICANTS

versus

CHANDRIKA PRASAD--COMPLAINANT--
OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 133—Obstruction to public river causing damage to owners—Order directing removal of obstruction, legality of—Public river—Riparian owners, rights of.

An order directing the removal of a dam constructed across a public river, which amounts to unlawful obstruction of the river and causes damage to, the lower riparian owners, is justified under

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the provisions of section 133 of the Criminal Procedure Code.

No riparian owner is entitled to obstruct a public river.

Revision against the order of the Magistrate, 1st Class, Gonda, dated the 11th January 1919.

Mr. R. F. Bahadurni, for the Applicants.

Mr. G. H. Thomas, for the Opposite Party.

JUDGMENT.—The order, the propriety of which is challenged here, required the applicants to remove a Band or dam constructed by them across the river Burha Rapti. The allegation of the complainant was that he held a lease of several villages down-stream and that the construction of the said dam had injured his crops. He further alleged that no such dam existed before. The applicants did not allege that the river was a private river. Their plea was that such dam used to be constructed whenever water was required for the purpose of irrigation and that the complainant had no right to have the dam removed.

The trying Magistrate came to the conclusion that the dam in question had been newly constructed, that no such dam existed there before and that its erection was tantamount to an unlawful obstruction of the river and caused damage to a large class of people. The trying Magistrate and the parties evidently treated the river as a public river, which no riparian owner was entitled to obstruct. The complainant alleged that he suffered damage by the obstruction and the trying Magistrate found that similar damage was possible to all the riparian owners down-stream. In these circumstances the order passed is thoroughly justified. The decision in *Maharana Shri Jaswatsangji Fatesangji, In re* (1) does not apply, because each riparian owner there claimed that the part of the stream adjoining his village was his private property. In *Murad v. Emperor* (2) there was a *bona fide* assertion on the part of one of the riparian owners of a right to divert the water, which flowed through the back-water of the river Chenab. From the finding arrived at here, namely, that the dam was new, it is difficult to say that there

was a *bona fide* assertion of a right to obstruct the river, each riparian owner being entitled to its benefit.

The application is, therefore, rejected,
Revision rejected.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 489 of 1919.
November 13, 1919.

Present:—Mr. Justice Ryves.
MAHADEO SAHU AND OTHERS—
APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code Act V of 1898, s. 476—Penal Code (Act XLV of 1860), ss. 14, 421—Insolvency proceedings—Fraudulent transfer by insolvent—District Magistrate, direction by, to prosecute insolvent under s. 421, Penal Code—Order, legality of.

Upon an examination of the records of an insolvency proceeding the District Judge discovered that the insolvents and others had been guilty of fraudulent transfers. He brought the matter to the notice of the District Magistrate with a view to the persons being prosecuted under sections 421 and 421/114 of the Penal Code. Criminal proceedings were accordingly initiated against them. On revision:

Held, that the proceedings must be quashed, as there was no authority in the Criminal Procedure Code for the procedure adopted.

Criminal revision against the order of the District Magistrate, Gorakhpur.

Mr. Nihal Chand, Dr. S. M. Sulaiman and Mr. Shiva Prasad Sinha, for the Applicants.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—The circumstances of this case are somewhat peculiar. Two persons Ramanand and Naurangi Lal applied in the Court of the District Judge of Gorakhpur to be declared insolvents as long ago as the 8th of October 1913 and were declared insolvents on the 26th of August 1914. A Receiver was appointed, who reported on the 31st of March 1915 that certain property, among others, in the possession of Mahadeo and Jagrup under the sale deed of the 1st of July 1911 was really the property of the insolvents and had

(1) 22 B. 988.

(2) 2 P. R. 1903 Cr.

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been fraudulently transferred in order to defeat their creditors. The then District Judge of Gorakhpur found that the transfer was a fraudulent one, and this order was confirmed by the High Court on the 15th of May 1917 and the property was then sold by the Receiver. Some time in May 1919 it appears that the file of the insolvency case was before the present District Judge of Gorakhpur. There is a docket on the record before me, dated the 31st of May 1919, which was sent by the District Judge of Gorakhpur to the District Magistrate of Gorakhpur. It starts: "Sir, I have the honour to bring to your notice certain facts against Ramanand, son of Padarath, and Naurangi, son of Sheo Dihal, of Dhibra Police Station, Belghat, two insolvents, and Bindeshri Sahu, son of Nepal Sahu of Maghar, Ram Charan Sahu, son of Gajadhar of Manikpore, Police Station Rawanpar, District Azamgarh, Jagrup Sahu, son of Sheodihal, Mahadeo Sahu, son of Sheodihal, residents of Maghar, Police Station Khalilabad, in Basti District, transferees from them." It goes on to state various facts which apparently had come to the knowledge of the District Judge from the records of the insolvency case but which were not of course known to him personally, and it then sets out several transfers which appeared to him from the record to have been fraudulent. It goes on to say: "These fraudulent transfers, made with the intention of preventing the distribution of property according to law among the creditors of Ramanand and Naurangi, are offences under section 421, Indian Penal Code. Not more than three of these offences committed within one year can be tried at one trial. To simplify the case one transfer might be tried at one time. The strongest case is perhaps that of the transfer of July 11th 1911, whereby the shares in some seven villages were said to be transferred to Jagrup and his brother Mahadeo for Rs. 2,900, of which Rs. 800 was due under a prior book debt and Rs. 2,100 was paid before the Sub-Registrar. Ramanand and Naurangi made the transfer, and Jagrup and Mahadeo, to whom it was made, should be prosecuted for abetment." It goes on to give various other directions as to what evidence should

be called and winds up as follows: "I have the honour to ask you to take proceedings against the persons named by me on charges under section 421, Indian Penal Code, and section 421/114, Indian Penal Code. The case is one of importance in the interest of commercial morality and should be enquired into or tried by an experienced Magistrate." It appears that on receipt of this document the learned District Magistrate transferred the case to the Court of the Joint Magistrate, Mr. York, who issued summons to the accused. They applied to this Court to quash the criminal proceedings and their application was admitted by a learned Judge of this Court, who ordered all proceedings to stay meanwhile. I do not understand under what section of the Criminal Procedure Code the District Judge of Gorakhpur made this report. It cannot have been made under the provisions of section 476 of the Code of Criminal Procedure, because that section does not apply to a charge under section 421, Indian Penal Code. Inasmuch as the learned District Magistrate seems to have regarded this as an order under section 476, I think all proceedings upto date must be quashed. But that does not end the matter. I am not prepared to hold that this document is not a "complaint" within the wide definition of the term in section 4 of the Criminal Procedure Code. In this view of the matter it will be open to the District Magistrate to take such further action as he may be advised after having followed the procedure laid down in Chapter XVI of the Code. Let the papers be returned to the District Magistrate with a copy of my order.

Papers returned.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 338 OF 1919.

November 4, 1919.

Present:—Mr. Justice Seshagiri Aiyar and
Mr. Justice Moore.

MUTHU GOUNDAN AND OTHERS—

PRISONERS Nos. 1, 3, 4 AND 7—

APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 227,

MUTHU GOUNDAN v. EMPEROR.

228, 229—Sessions trial—Charge, material alteration in, at close of trial, legality of—Sessions Court, power of, exercise of—Prejudice to accused.

Where upon the trial of an accused person upon specific charges in a Court of Session, it is found at the conclusion of the trial that the charges as framed disclose no offence against the accused, it is illegal and prejudicial to the accused to alter or amend the charges and to convict him thereon without affording him an opportunity of meeting the altered or amended charges. The fact that the accused cross-examined the prosecution witnesses to prove the unsustainability of the charges as originally framed, is no ground for holding that by substantially altering the charges the accused was not prejudiced. [p. 41, col. 1.]

A Court of Session is not a Court of original jurisdiction, and, though vested with large powers of amending and adding to charges, can only do so with reference to the immediate subject of the prosecution and committal, and not with regard to matter not covered by the indictment. [p. 41, col. 1.]

Criminal appeal against the order of the Court of the Sessions Judge, Salem District in Case No. 16 of the Calendar of 1919.

FACTS appear from the judgment.

Mr. G. Krishnaswami Aiyar, for the Appellants.—The Sessions Judge acted with material irregularity in altering the charges at the end of the trial. The alteration was in a material particular. The first charge framed was that the accused formed themselves into an unlawful assembly to annoy Muthu Goundan. The charge as amended was that the accused formed themselves into an unlawful assembly to beat Muthu Goundan. Similarly with respect to the other charges. The accused were certainly prejudiced by this alteration and they were given no opportunity to meet the altered charge.

The Public Prosecutor, for the Crown.—The accused knew what the real charge against them was. They cross-examined the prosecution witnesses to show that they did not take part in the assault. They were not prejudiced by the amendment. Even if the Sessions Judge acted in an irregular manner, it was not a material irregularity so as to vitiate the trial.

JUDGMENT.—We regret we are obliged to quash the entire proceedings in this case because of the procedure adopted by the learned Sessions Judge in altering the charge at the end of the trial. The prosecution case was that the deceased was returning from the field, where he had gone to do work, that he was waylaid by the accused and beaten to death and also that injuries were inflicted

by the accused upon the mother and the brother of the deceased. The Committing Magistrate framed a charge in these terms:—
“That you (referring to 7 accused persons) on the 10th day of October 1918 at Kindrakola Manickam village were members of an unlawful assembly and prosecuting the common object of such assembly, viz., in waylaying and beating to death one Muthu Goundan, son of Kolandai Goundan, and causing grievous hurt to P. W. No. 1, namely, Palani Goundan son of Kolandai Goundan and causing grievous hurt to Chinna Pillai and his brother P. W. No. 2, daughter of Sengodian and thereby committed offences punishable under sections 147, 302, 325 and 145, Indian Penal Code.” Before the trial commenced the Sessions Judge split up this charge into six charges. The first is the most important of the charges. It was that, on the 10th day of October 1918, at Kondrakola Manickam “you formed yourselves into an unlawful assembly with the common object of annoying one Muthu Goundan, son of Kolandai.”

The second charge was “that at the same time and place you or some of you used force and violence to the said Muthu Goundan, his brother Palani Goundan and his brother Chinna Pillai in prosecution of the common object.” It is not necessary to refer to the other charges. The trial proceeded on these charges. At the end of the case when the defence Vakil argued that on the charges as framed no offences could be imputed to the accused, the learned Sessions Judge proceeded to alter them. The first charge was altered as follows:—

“That on the 10th day of October 1918 at Kondrakola Manickam you all formed yourselves into an unlawful assembly with the common object of beating one Muthu Goundan, son of Kolandai, and such other persons as might come to his help.” The second charge was altered as that “in the pursuance of the said common object at the same time and place you all used force and violence to the said Muthu Goundan son of Ramiah and the said Muthaya Pillai Goundan, to his brother Palani Goundan and his mother Chinnapillai.” The subsidiary charges were also altered.

The objection was taken before the Sessions Judge that these alterations were material and that the accused should not be convicted on these altered charges without

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an opportunity given to them to meet them. The Sessions Judge in his order says that the original charge as originally framed by him did not impute any offence at all and that the accused cross examined the witnesses with the intent of showing that they did not take part in the assault or in the beating, they were not prejudiced by the subsequent alteration. We are unable to follow the reasoning. The mere fact that the accused cross-examined the witnesses examined by the prosecution to prove the alleged unsustainable charges, is not a ground for holding that by substantially altering the charges they were not prejudiced. As was pointed out in *Birendra Lal v. Emperor* (1), the Sessions Court is not a Court of original jurisdiction and, though vested with large powers of amending and adding to charges, can only do so with reference to the immediate subject of the prosecution and committal and not with regard to matter not covered by indictment; that is exactly what has happened in this case. The first charge in the original indictment does not refer to the beating and to the causing of hurt. Simply because the accused have chosen to examine the witnesses for the purpose of proving that they were not the aggressors and that they were acting in self defence, it would not follow that they were not prejudiced by the specific charges which had been made against them at the close of the trial. If we may say so, the charge framed by the Magistrate is in many respects more specific, whether it was sustainable or not is not a matter which we need go into at present. Then as to the charges which the Sessions Judge framed at the beginning of the trial. It was the duty of the Sessions Judge in a case where several persons were charged with the serious offence to have drawn up the charges with care and framed specific charges against the accused. Even the amended charges are vague and we are not satisfied that on the amended charges objection cannot be taken by the accused. However that may be, we must draw the attention of the Sessions Judge to the fact that he was wrong in holding that the accused were not prejudiced by the course adopted by him in altering the charge in material portions of it at the close of the trial.

(1) 32 C. 22; 8 C. W. N. 784; 1 Cr. L. J. 794.

We are obliged, therefore, to quash the whole proceedings and to send the case back to the Sessions Judge for trial *de novo*. We expect him to frame specific charges with reference to the order of committal and to put the accused on trial on these charges.

M. C. P.

Proceedings quashed.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 664 OF 1919.

November 26, 1919.

Present :—Mr. Justice Ryves.

CHANDER SHEKHAR—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 107, 439—Order requiring security to keep the peace made without enquiry, legality of—Accused willing to give security, effect of—Revision, maintainability of.

It is illegal to make an order requiring a person to furnish security to keep the peace, without any inquiry as to whether he was likely to commit a breach of the peace, or was otherwise a proper subject for proceedings under section 107 of the Criminal Procedure Code. [p. 412, col. 1.]

The fact that a person has, in obedience to an order, expressed his willingness to furnish the security demanded to keep the peace, is no bar to his moving the High Court to set that order aside. [p. 412, col. 1.]

Criminal revision against the order of the Magistrate, First Class, Basti, dated the 26th August 1919.

Mr. B. N. Vyas, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—On the 13th June 1919 Mathra, the complainant, made a report at the Police station in which he charged three persons with simple assault. On the 16th June he filed a complaint in Court, in which he stated that the three persons whom he had already named at the Police station together with the applicant in the present case and a large number of their servants had attacked the complainant, had forcibly taken away his ox and begun to beat him and when the complainant's aunt came to rescue him, they beat her and stole her ornaments and decamped with the ox and the ornaments.

ROHAN V. EMPEROR.

The charge which was originally against three persons only of simple assault had grown into a full fledged dacoity against a large number. When the matter came up for enquiry before the learned Magistrate, he proceeded to examine the complainant Mathra and then recorded the following order:—"In the first report complainant named only a very few persons and as the Police had not challaned, it was for them to adduce evidence. I have examined Mathra complainant and I have noticed his aversion to state facts against accused. The parties have colluded and it would be futile to proceed with the trial. Under the circumstances, the prosecution will fail to give evidence in support of their version and I would, therefore, only bind down the selected accused under section 107 of the Criminal Procedure Code. The accused summoned will be discharged under section 253 of the Criminal Procedure Code."

He there and then issued notice to three of the accused, who are Zamindars, calling on them to show cause why they should not furnish security to keep the peace for one year. On being asked what each of them had to say as to the notice served on them they replied that they were prepared to furnish the securities as demanded. One of these persons, namely, Chandra Shekhar, has moved this Court in revision against that order. I admitted the application and sent for the record. It seems to me that the order of the Magistrate was wholly illegal. There was no enquiry as to whether these persons were likely to commit a breach of the peace or were otherwise proper subjects for proceedings under section 107 of the Code of Criminal Procedure. I do not think the fact that the applicant and his co-accused were prepared to give the securities demanded in any way prevents them from moving this Court. Following the cases reported as *Ram Ohandra Haldar v. Emperor* (1) and *Mul Ohand v. Emperor* (2), I set aside the orders under section 107 of the Code of Criminal Procedure. If the securities have been given they must be cancelled.

Order set aside.

(1) 35 C. 674; 8 C. L. J. 68 8 Cr. L. J. 128.

(2) 26 Ind. Cas. 652; 12 A. L. J. 1262; 37 A. 30; 16 Cr. L. J. 61.

ODDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 68 OF 1919.

June 17, 1919.

Present:—Pandit Kanhaiya Lal, J. C.

ROHAN—ACCUSED—APPLICANT

versus

EMPEROR—PROSECUTOR—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 110—
Defence witnesses caste-fellows of accused—Evidence,
value of.*

The mere fact that some of the witnesses produced by a person against whom proceedings have been instituted under section 110 of the Criminal Procedure Code, are his caste-fellows, is not by itself a sufficient reason for discrediting their testimony. [p. 413, col. 1.]

Criminal revision against the order of the District Magistrate, Kheri, dated the 7th May 1919, upholding that of the Magistrate, First Class, Kheri, dated the 5th March 1919.

Babu Har Narain Das, for the Applicant.

The Government Pleader, for the Crown.

JUDGMENT.—The applicant, Rohan, is a co sharer in the village Barkhar. He has been bound over to be of good behaviour for a period of one year. He is described as a habitual thief and burglar, but it is admitted that his name never found a place in the history sheet.

The Sub-Inspector in charge of the Police station Mohamdi states that from a year the character of the applicant has been generally assailed and that he found reason to suspect him in connection with two dacoities, in which the evidence was not strong enough to enable him to send him up for trial. He admits, however, that he investigated only one of the dacoities and that in connection with it the applicant was not named in the report made to the Police. The grounds on which he is said to have been suspected are not forthcoming.

The evidence of the people belonging to the village and its neighbourhood is of a very varied character. Some of them, who have been produced for the prosecution, state that from 10 or 11 months they have been hearing complaints against the applicant, but others have been produced on behalf of the defence who give him a good character. Ram Ratan, the headman of the village Barkhar, is the only resident of Barkhar produced on behalf of the

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prosecution. He admits that he gave evidence against the brothers of the applicant in a case under section 107 of the Code of Criminal Procedure and that the latter were bound over. Tota Ram is the headman of an adjoining village. He too admits that he gave evidence in a case in which a brother of the applicant was charged with murder. Prag Dat is a co-sharer of another village. He too gave evidence against a brother of the applicant in a proceeding under section 107 of the Code of Criminal Procedure arising out of a quarrel he had with Bhajan Lal with whom the brother of the applicant was employed. Kalka Prasad, a co-sharer in Muhammadpur, which is two miles off, states that he heard complaints against the applicant, but admits that he did not make any enquiry into the truth of those complaints. Prag Dat is a co-sharer of another village $2\frac{1}{2}$ miles off. He states that he heard from 10 or 11 months that the applicant commits thefts and burglaries, but admits that he never made any report about it. Two other co-sharers of adjoining villages have been produced to give evidence to the same effect.

Against this evidence there is the evidence of five witnesses, belonging to the village Barkhar itself, who state that they never heard anything against the character of the applicant. They are men of some standing. Jagan Nath, for instance, pays a land revenue of Rs. 60 per year and carries on money-lending business. Shanker Dayal pays a land-revenue of Rs. 27 per year. Balbhaddar Prasad is a cultivator of that village. Tulshi is a small land-holder and cultivator of that village and so is Nil Kanth. Some witnesses from the adjoining villages have also been adduced to give similar evidence. The mere fact that some of these witnesses are caste-fellows of the applicant is, as pointed out in *Miharban Singh v. Emperor* (1) and *Gur Bakhsh Singh v. Emperor* (2), not by itself a sufficient reason for discrediting their testimony. If the applicant was by repute a habitual thief or burglar, there is no reason why the residents of

his village, other than the headman, should not have been forthcoming to bear testimony to his reputation or character or why no history sheet was ever started about him. The evidence at all events is not sufficiently clear to justify an action being taken against him under section 110 of the Code of Criminal Procedure.

The application is, therefore, allowed, the order of the Court below set aside and the security bond, if any, filed by the applicant will be discharged.

Revision accepted.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 703 OF 1919.
November 27, 1919.

Present :—Justice Sir George Knox, KT
SAHDEO—APPLICANT

versus

SARJOO AND OTHERS—OPPOSITE PARTIES.

Criminal Procedure Code (Act V of 1898), ss. 209, 210, 213—Case triable by Court of Session—Enquiry, by Magistrate—Prima facie case made out—Magistrate, whether can try case himself—Procedure.

Where a *prima facie* case is made out against an accused person in the Court of a Magistrate, and the case is triable exclusively by a Court of Session, the Magistrate ought to commit the accused for trial by that Court, and not dispose of the case himself. [p. 414, col. 1.]

Criminal revision against the order of the Magistrate, First Class, Allahabad, dated the 14th July 1919.

Mr. R. R. Sorabji, for the Applicant.

Mr. A. S. Osborne, for the Opposite Parties.

JUDGMENT.—This is an application asking this Court to revise an order passed by a Magistrate of the First Class at Allahabad. The complaint before the Magistrate was a complaint of an offence under section 302 of the Indian Penal Code. That of course was a case triable by the Court of Session only. The Magistrate dismissed the complaint. I am asked to direct a further enquiry. I find on turning to the judgment

(1) 31 Ind. Cas. 821; 13 A. L. J. 1046 at p. 1048; 16 Cr. L. J. 805.

(2) 12 Ind. Cas. 518; 12 Cr. L. J. 542.

CHITRALA BHEEMANNI, *In re.*

of Mr. Bisheshar Nath, Magistrate of the First Class, dated the 14th July 1919, that he is of opinion that "there can be no doubt that the man was murdered and probably one or all of the accused are directly or indirectly involved in it. That an attempt of the deceased's brother to fabricate evidence with the help of the head Moharrir has spoilt the whole case." This was most certainly a case in which the learned Magistrate should never have passed an order of discharge. It is evident from what he has written that there was a *prima facie* case, and that case triable by the Court of Session only. This Court has often pointed out to learned Magistrates that they should not dispose of a case, triable by the Court of Session only, when there is a *prima facie* case before them. The remarks made by the learned Magistrate are:—

"I do not feel justified in wasting the time of the Court of Session by sending up a case which was useless to stand upon."

Whatever they may mean, I direct further enquiry to be made into the case and when the further enquiry is complete, the case be committed for trial to the Court of Session under a charge declaring that the accused is charged with an offence under section 302 of the Indian Penal Code. It will be for the Court of Session to decide the case. Let the record be returned.

Record returned.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 445 OF 1919.

CRIMINAL REVISION PETITION No. 382
OF 1919.

October 8, 1919.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Burn.

In re CHITRALA BHEEMANNA

AND OTHERS—ACCUSED—PETITIONERS.

Railways Act (IX of 1890), s. 121—Station master power of, to assign duties temporarily to station staff—

Signaller delegated to collect tickets, obstruction to—
Offence—"Service of a railway," meaning of—Railway Board Act (IV of 1905), rules under, rr. 229, 231, 244, effect of.

The expression "service" of a railway in section 121 of the Railways Act includes collecting tickets and fares from passengers. [p. 415, col. 1.]

Rules 229, 231 and 244 of the rules framed under the Indian Railway Board Act give sufficient authority to a station master to appoint one of the station staff temporarily to do the duties of a particular post in the station and when the person so appointed temporarily performs that duty, he is a railway servant acting in the discharge of his duty, and obstruction to him is punishable under section 121 of the Railways Act. [p. 416, col. 1.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the District Magistrate, Markapur, in Criminal Appeal No. 334 of 1919, preferred against the order of the Stationary Sub-Magistrate, Giddalur, in Calendar Case No. 529 of 1918.

FACTS appear from the judgment.

Mr. A. S. Viswanatha Aiyar, for the Petitioners.—Under section 69 of the Indian Railways Act the only person authorised to collect tickets and demand excess fare is the railway servant "appointed by the Railway Administration in that behalf". A person to whom the function is delegated temporarily by the station master does not satisfy that requirement. The signaller, therefore, had no authority to demand tickets. Obstruction to him is not obstruction to a railway servant in the discharge of his duty.

Mr. V. L. Ethiraj, for the Public Prosecutor.—The 'Railway Administration' do not appoint the station staff direct. The appointment is made by their agents. Under the rules framed under the Railway Board Act the members of the station staff can exchange duties with each other with the permission of their superior officer. The station master is impliedly authorised to assign temporarily particular functions to particular members of the station staff. The delegation of the signaller to collect tickets was valid and obstruction to him in the discharge of that duty is an offence under section 121 of the Railways Act.

ORDER.—The three accused (petitioners in revision) were convicted by the Giddalur Stationary Sub-Magistrate, the first two, of

CHITRALA BREEMANNA, *In re*.

the offences under section 120 (b) of the Indian Railways Act, IX of 1890.

The petition is not pressed as regards the 3rd accused except in the matter of sentence (a fine of Rs. 25 has been imposed on each of the accused), but we do not think that the sentence is so excessive, having regard to the facts found by the first Magistrate and by the Appellate Magistrate, to call for interference in revision in the case of any of the accused on that sole ground.

As regards the 1st and 2nd accused, the facts found are: (a) on 21st November 1918 the station master of Giddalur (P. W. No. 1) deputed the signaller (P. W. No. 2) to collect tickets and excess fare (where such has to be collected) from the passengers alighting from the 45 Up train arriving at Giddalur in the evening; (b) the 1st accused alighted with a rice bag and P. W. No. 2 demanded payment of excess fare, evidently as the rice bag was heavier than the weight of the luggage allowable on his ticket; (c) the 1st and 2nd accused assaulted P. W. No. 2 and also P. W. No. 1 (station master) when he intervened to help P. W. No. 2.

"Railway servant" is defined in section 3, clause 7, as "any person employed by a Railway Administration in connection with the service of the railway". "Railway Administration" means (in this particular case) "the Railway Company." [See section 3, clause (6).] "Railway Company" means "owners or lessees of a railway or parties to an agreement for working a railway" (clause 5).

Thus a "railway servant" in section 121 is a person employed by the owners or lessees of the railway or the persons working the railway in connection with the service of the railway.

The employment (we take it) is by appointment, and the "service of a railway" includes collecting the tickets and fares from passengers.

The appointment of the ticket collector cannot be, and is not, made by all the proprietors forming the Railway Company who are usually in England but through agents appointed under rules, the rule

making power being invested in the company under section 47, such rules providing (among other matters) "(e) for regulating the conduct of the railway servants and (g) generally, for regulating the travelling upon, and the use, working and management of, the railway".

Mr. A. S. Viswanatha Iyer, who appeared for the accused, did not dispute that P. W. No. 1 was the validly appointed station master and P. W. No. 2 validly appointed signaller at the station. It is also found by the lower Courts that the station master did depute the signaller to collect tickets. Rule 244 of the General Rules made by the Railway Board acting under the Indian Railway Board Act (IV of 1905) says: "The station master shall be responsible for the efficient discharge of the duties devolving upon the several members of the staff employed, and such staff shall be subject to his authority and directions in the working of the station" Rule 229 says: "Every railway servant must promptly obey all lawful orders given by any person placed in authority over him." Rule 231 (1) allows a railway servant with the permission of his superior officer to exchange duty with any other railway servant. We think that these rules give sufficient authority to the station master who delegates the duty of collecting tickets to a signaller. Thereupon and especially when the signaller consents, it becomes the duty of the signaller as a railway servant to collect tickets, and there is nothing to prevent him from consenting to undertake the duty of collecting tickets. Once he undertakes such a duty and does acts in discharge of that duty he must be held to be a railway servant acting in the discharge of his duty within the meaning of that expression in section 121.

Mr. A. S. Viswanatha Iyer, if we understood his rather subtle argument aright, relied upon section 69 of the Indian Railways Act and contended that the passenger was bound to present his pass or ticket only to the railway servant "appointed by the Railway Administration in that behalf," and hence it followed that he need not present a pass or ticket to a railway servant who was not appointed

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by the Railway Administration but who was only appointed by the station master temporarily, and that obstruction to that person when he demands a pass or ticket is not obstruction to a railway servant in the discharge of his duty. We are unable to accept this argument. The appointment by the "Railway Administration" or Railway Company of a particular person to do a particular duty is through agents empowered by rules, and we think that the rules empower the station master as agent of the Railway Administration to appoint one of the station staff temporarily to do duties of a particular post in the station and when the person so appointed to do that duty temporarily performs that duty, he is a railway servant acting in the discharge of his duty and obstruction to him is punishable under section 121 of the Indian Railways Act. We, therefore, dismiss the revision petition as regards accused Nos. 1 and 2 also.

M. C. P.

Petition dismissed.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 542 OF 1919.
November 13, 1919.

Present:—Mr. Justice Ryves.

SHEIKH SANAOO—APPLICANT
versus

EMPEROR THROUGH RAMA KANT—
OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 195, 476—Penal Code (Act XLV of 1860), s. 211—Sanction to prosecute, when to be granted—Prosecutor actuated by enmity—Procedure—Court, duty of.

An application for sanction to prosecute should not be granted where it appears that the object of the applicant is not to vindicate public justice but to satisfy private spite. If in such a case the Court is of opinion that proceedings ought to be instituted in the interests of justice, it should proceed under section 476 of the Criminal Procedure Code.

Criminal revision against the order of the Sessions Judge, Gorakhpur, dated the 12th August 1919.

Mr. S. O. Mukerjee, for the Applicant.

Dr. S. M. Sulaiman, for the Opposite Party.

JUDGMENT.—This is an application in revision asking this Court to quash the order sanctioning prosecution of the applicant under section 211, Indian Penal Code. It is found that the applicant and the person against whom he brought a case under section 408, Indian Penal Code, are on bad terms with each other. The Magistrate who tried the case acquitted the accused and subsequently gave him sanction to prosecute the applicant, and the learned Sessions Judge has refused to interfere. It seems to me that if the trial Court was of opinion that in the interests of public justice proceedings should be taken against the applicant, it could and should have acted under section 476 of the Code of Criminal Procedure. I am very loath to give sanction to a private individual, specially in a case where he and the opposite party are actuated by enmity. These cases are not brought to vindicate public justice but to satisfy private spite. In this case, however, the learned Sessions Judge says that there are certain points in Sheikh Sanao's case which can most probably be shown to be false, and this might probably lead to a conviction under section 211, Indian Penal Code. I think before sanction should be given there ought to be a very much stronger case made out than what appears in this case and there should be a strong probability of conviction before sanction is given. I allow the application and set aside the order of sanction.

Application allowed.

SHEOPRASAD V. GOVIND.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 2 B OF 1919.

September 20, 1919.

Present:—Mr. Mittra, A. J. C.

SHEOPRASAD AND ANOTHER—DEFENDANTS
—APPELLANTS

versus

[GOVIND—PLAINTIFF—RESPONDENT.

Patents and Designs Act (II of 1911), ss. 1 (2), 2 (3), 81—Berar, whether included in British India—Patent granted in British India, whether can be recognised in Berar.

G. obtained the exclusive privilege in respect of an invention under the Inventions and Designs Act, 1888. Under the Patent and Designs Act, 1911, which repealed the Act of 1888, his exclusive privilege was converted into a patent and extended throughout British India, including British Baluchistan and the Santhal Parganas. The Act of 1888 was never applied to Berar, but by a Notification of the Government of India issued under the Act of 1911, Berar was included in the term British India. No Controller of Patents was appointed for Berar nor was a Patent Office established there and in an action for infringement of the patent it was contended that the patent was not operative in Berar:

Held, that the patent was operative in Berar and an infringement thereof was actionable, that although a separate Controller of Patents was not expressly appointed for Berar, the officer appointed to this office for British India was the Controller for Berar; and that though the patent was granted on a date anterior to the date of the Notification of the Government of India, that Notification had the effect of making it valid in Berar from the date on which it was granted [p. 48, col. 1.]

Appeal against the decree of the Additional District Judge, East Berar, Amraoti, in Civil Suit No. 18 of 1917, dated the 2nd September 1918.

Mr. M. V. Joshi, for the Appellants.

Mr. Gupta, for the Respondent.

JUDGMENT.—The plaintiff-respondent, a resident of Kalyan in the Bombay Presidency, obtained in 1906 the exclusive privilege, under the Inventions and Designs Act of 1888, in respect of the invention of an improved method of working kilns for burning bricks. This Act was never applied to Berar. It was repealed by Act II of 1911, the Patents and Designs Act. Under section 81 of Act II of 1911, the plaintiff made an application to have his exclusive privilege converted into a patent under the Patents and Designs Act. Exhibit P-12 shows that the plaintiff has the exclusive privilege of making, selling and using the invention for fourteen years

from the 17th February 1906. This privilege under the term of the patent extends throughout British India including British Baluchistan and the Santhal Parganas. The patent was granted on the 3rd April 1913. By Notification in the Foreign Department No. 3510-I. B, dated the 3rd November 1913, published in the Central Provinces Gazette, dated the 22nd November 1913, Part I, page 1004, the Governor-General in Council was pleased to apply to Berar, amongst other Acts, the Indian Patents and Designs Act, 1911, with the following modification: the words "British India" shall be read as referring to "British India and Berar."

By reason of the application under section 81, the patent became a patent granted under the provisions of Act II of 1911. So far as the operation of that Act is concerned, the patent extended only to the whole of British India including British Baluchistan and the Santhal Parganas. The question is, whether the Notification above referred to made it a valid patent in Berar and its infringement there actionable. Under section 12 of Act II of 1911, the plaintiff became entitled to the exclusive privilege of making, selling and using the invention throughout British India. The Notification directs that here we should read, so far as the Berar enactment is concerned, "throughout British India and Berar" for "throughout British India." This is the view which has been taken by the Court below.

It is, however, contended that as no Controller of Patents and Designs has been appointed for Berar, nor a Patent Office established there, the patent has not become operative in Berar, notwithstanding the Notification just referred to. I am not prepared to accept this view. If the authorities intended to have a separate Controller of Patents and Designs for Berar, the appointment would have been made long ago. None has yet been made. The Officer who has been appointed Controller of Patents and Designs is to be regarded as Controller for the whole of British India including British Baluchistan and the Santhal Parganas. This follows from section 1, sub-section 2. Similarly, the Patent Office is a Patent Office for the same area. Although the Controller has

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not been expressly appointed Controller for Berar, the intention of the Notification, it appears, is to make him the Controller of Patents and Designs for British India and Berar, and similarly the Patent Office a Patent Office for British India and Berar.

It is pointed out that the patent (Exhibit P-12) was granted on the 3rd April 1913, and the Notification came into force on the 2nd November following, and hence it is urged that as the patent is in terms limited to British India including British Baluchistan and the Santhal Parganas, it has no force outside that area, until a fresh certificate or patent is granted under the authority of the Notification. I am also not prepared to accede to this argument. At the time when the patent was granted it did not extend to Berar, but upon the introduction of the Patents and Designs Act into Berar by virtue of the Notification, the patent became operative in Berar. In order to determine the extent of the grant we are directed to substitute "British India and Berar" for "British India", and to give due effect to the intention of the Notification this substitution must be made not only in the wording of the Statute but also in any patent or certificate issued thereunder, as well as in the designation of any appointment made and office created under the British Indian enactment. The result is that the patent was a valid patent in Berar, and its infringement there was actionable.

The decision of the case on the merits has not been questioned before me and I dismiss the appeal with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 110 OF 1919.
November 28, 1919.

Present :—Mr. Justice Tudball and
Mr. Justice Ryves.

Musammât SUDHIA—DEFENDANT—
APPELLANT

versus

MAKKA—PLAINTIFF—RESPONDENT.

Guardians and Wards Act (VIII of 1890), ss. 7, 17

—Minor living with mother—Guardian, whether should be appointed—Welfare of minor.

In the absence of any allegation against the character of the mother of a boy aged 9 years and of anything to show that she is not capable of looking after the child, the appointment of a guardian is unnecessary and the boy should not be removed from her care.

Where the object of a person who applies to be appointed the guardian of a minor is not so much the welfare of the minor as the vindication of his own rights to be appointed a guardian, his application should be disallowed.

Appeal from an order of the Officiating District Judge, Cawnpore, dated the 4th June 1919.

Mr. K. N. Katiu, for the Appellant.

Dr. S. M. Sulaiman, for the Respondent.

JUDGMENT.—This is an appeal from an order passed by the Court below appointing the grandfather of the minor to be guardian in spite of the objection made by the appellant, who is the minor's mother. The minor is now said to be 9 or 10 years of age. The parties are Muhammadans. The property of the family consists of two buffaloes in which the mother and the other children also have shares. In the course of the proceedings the respondent, the applicant for the guardianship, stated that he did not wish to handle the property and that it might be left with the mother. The sole ground upon which he applied to be made guardian of this minor was that the mother's brother was denying his right to be guardian. The object, therefore, of his application is not the welfare of the minor but the vindication of his own rights to be a guardian. The minor's father died six years ago. The minor arrived at the age of seven years some three years ago. It is an admitted fact that the mother has always taken care of her children. The respondent Makka, the grandfather, has not taken any steps to benefit the minor all these years. Admittedly there are two religious factions in this caste; the mother belongs to one, while the respondent belongs to the other. It appears to us that this is probably the cause of the application. We cannot see that it is for the benefit and welfare of the minor that a child of his years should be taken from his mother against whose character no allegations whatsoever have been made. The circumstances are such that in our

GHULAM MUHAMMAD v GAU HAR BIBI.

opinion there is no necessity whatsoever to appoint any guardian. The mother is quite capable of looking after her own children. We, therefore, think that the order of the Court below is not based on good grounds. We allow the appeal and set aside the order of the Court below. There is no necessity whatsoever in the present case for the appointment of any guardian. The appellant will have her costs from the respondent in both Courts.

Appeal allowed.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 86 OF 1914.

November 12, 1919.

Present:—Mr. Justice Broadway and
Mr. Justice Petman.

GHULAM MUHAMMAD AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

Musammât GAU HAR BIBI AND OTHERS—
DEFENDANTS—RESPONDENTS.

Custom—Succession—Self-acquired property—Daugh.

ters versus collaterals—Riwaj-i-am—Presumption of correctness—Wajib-ul-arz, entries in, value of—Entries not specifically mentioning ancestral property, construction of.

Those portions of a *wajib-ul-arz* that refer to custom are not provisions intended to enure for the duration of the settlement only but are statements that a certain custom exists. [p. 423, col. 2.]

There is a presumption as to the correctness of such entries in a *wajib-ul-arz*, but though such entries are evidence, the presumption as to their correctness is a rebuttable one. [p. 423, col. 2.]

The *riwaj-i-am* carries with it a certain presumption of correctness, but the presumption is rebuttable and when positive instances are given, the *riwaj-i-am* cannot be regarded as overriding them. [p. 424, col. 1.]

In the case of self-acquired property the general custom is that daughters are preferred to collaterals. [p. 424, cols. 1 & 2.]

Where the entries in the *wajib-ul-arz* do not distinctly state that they relate to self-acquired property as well as ancestral, they should be read as merely referring to ancestral property. [p. 424, col. 2.]

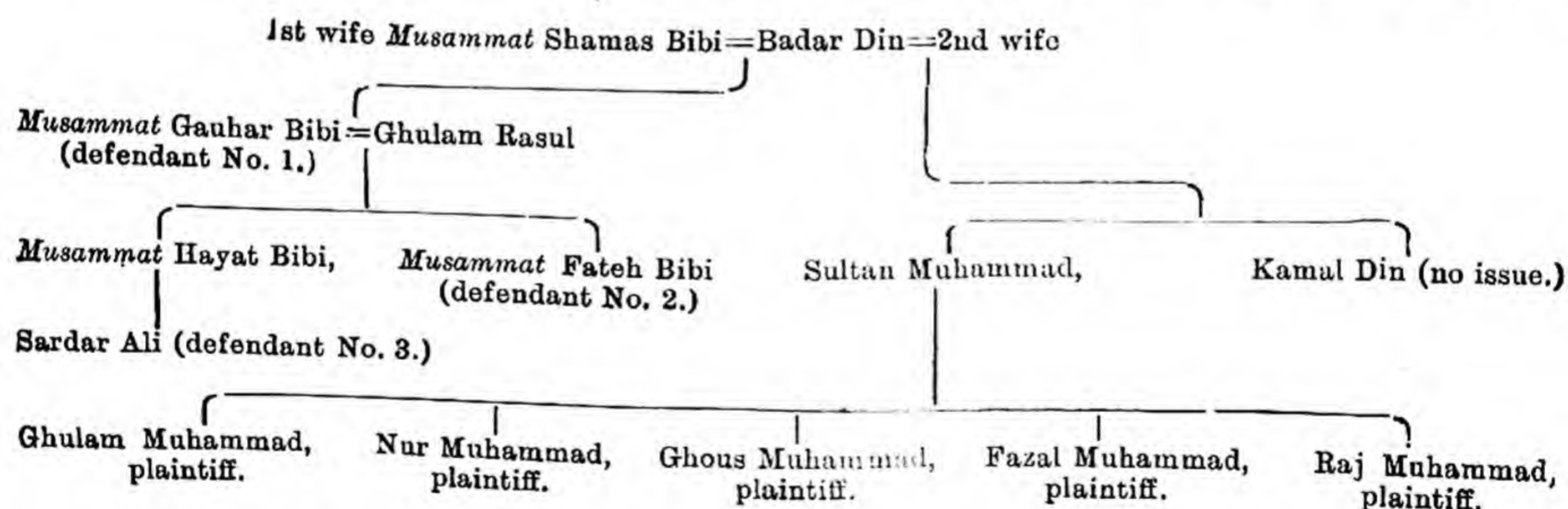
First appeal from the order of the District Judge, Shahpur, dated the 2nd December 1913.

Mr. Nanak Chand, for the Appellants.

The Hon'ble Pandit Sheo Narain, R. B., and Sheikh Niaz Ali, for the Respondents.

JUDGMENT.

BROADWAY, J.—The following pedigree table will assist in understanding this case:—



On the 19th of April 1913 Musammât Gauhar Bibi widow of Ghulam Rasul executed a deed of gift in favour of her daughter Musammât Fateh Bibi and her grandson Sardar Ali, making over to them her deceased husband's estates in the villages of Barj Ghulam Rasul, Bharat, and Miana Hazara. On the 2nd of May 1913 Ghulam Muhammad and his brothers instituted the present suit, alleging that the property conveyed

under the deed of gift was ancestral with the exception of 1/4th of Sailanwala well and 1/2 of Kadharanwala well which was acquired by Ghulam Rasul, and that Musammât Gauhar Bibi had no power to make the gift. It was prayed that the plaintiffs be granted a decree, declaring that the said deed of gift was null and void and would not affect their reversionary rights on the death or remarriage of Musammât Gauhar Bibi. The defend.

GHULAM MUHAMMAD v. GAUCHAR BIBI.

ants denied the right of the plaintiffs and pleaded, *inter alia*, (1) that the entire property in suit was acquired by Ghulam Rasul and was not ancestral;

(2) that the plaintiffs were not entitled to succeed to the property in the presence of the donees, who were the rightful heirs;

(3) that on the death of Ghulam Rasul his mother Shamas Bibi had taken possession of the property and held it adversely for 13 years and that on her death it had devolved on *Musammât Gauhar Bibi*.

It was admitted that the parties were bound by agricultural custom in matters of succession, and alleged that by custom as well as by their personal law daughters succeeded to the acquired property of their father in preference to collaterals (page 570, paper book).

On the pleadings the following issues were settled:—

(1) Is the property in suit other than $\frac{1}{4}$ th of Sailanwala well and of $\frac{1}{2}$ Kadhranwala well ancestral?

(2) Are not the defendants Nos. 2 and 3 (donees) next heirs if the property is not ancestral?

(3) If the property in suit is ancestral, had not Gauhar Bibi any right to make a gift of it to the defendants Nos. 2 and 3?

(4) Are the defendants Nos. 2 to 3 estopped from raising any such plea in view of the judgment, dated the 5th May 1903, by Mian Abdul Hamid?

(5) Was *Musammât Shamas Bibi* in adverse possession of the land in suit after the death of Ghulam Rasul and did she acquire full proprietary rights?

(6) If so, how does it affect the case?

The findings as to *Issues Nos. 5 and 6* were that though the land had been mutated in favour of *Musammât Shamas Bibi* on the death of Ghulam Rasul, she had not been proved to have acquired full proprietary rights.

As to *Issue No. 4* it was held that the defendants were not estopped from raising the pleas in question.

On *Issues Nos. 2 and 3* it was found that daughters succeeded to their father's acquired property in preference to collaterals and that *Musammât Gauhar Bibi* had the power to make the gift so far as that was concerned, but that the plaintiffs were entitled to succeed to the ancestral property,

In deciding *Issue No. 1* the property in each of the three villages was dealt with separately and it was held:—

(a) that the land in Burj Ghulam Rasul and Bharat was the self-acquired property of Ghulam Rasul;

(b) that the property in Miana Hazara consisted of (i) Sailab land, (ii) land attached to the wells Sailanwala and Kadhranwala and the Jhalar, (iii) house

and that one-fourth of well Kadhranwala land and 278 *bighas* 1 *kanal* of Sailab land were ancestral and the rest acquired.

The plaintiffs were, therefore, granted a decree declaring that the said deed of gift executed by *Musammât Gauhar Bibi* "shall not affect their reversionary rights after her death or re-marriage *re* $\frac{1}{4}$ th of Kadhranwala well and 278 *bighas* 1 *kanal* of land situate in Miana Hazara as claimed."

Against this decree both sides have preferred appeals which will be disposed of by this judgment.

The plaintiffs in their appeal claim that the whole of the property left by Ghulam Rasul was ancestral, while the defendants in their appeal attack the findings as to the property decreed.

It will be as well to consider first the nature of the properties in the three villages and to decide whether they are self acquired or ancestral.

A. Burj Ghulam Rasul.

Mr. Nanak Chand for the plaintiffs-appellants contended that the finding of the trial Court that this property was self-acquired was erroneous.

Exhibit P. 38 (pages 50-51 of printed book) shows that in 1891-92 and in 1908-09 the lands in the village were held jointly by *Musammât Gauhar Bibi* and the descendants of Badr Din by his second wife, *Musammât Gauhar Bibi* holding half. As the rule of descent is said to be *chundawand*, she would have held half whether the property was ancestral or self-acquired. It is common ground that Ghulam Rasul and his father Badr Din separated somewhere about the year 1838. From the Revenue Records of 1853 it appears that the lands in the village were jointly held by Ghulam Rasul and his half brothers, Ghulam Rasul holding a half share (see Exhibit P. 24,

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page 32, printed book). It is, therefore, stated that some 19 years previously Maharajah Ranjit Singh had found the "Bela" lying waste and granted a *snad* for the foundation of the village.

There was litigation in connection with this village in 1855, Jodh Singh and others bringing a claim against both Ghulam Rasul and Badr Din, alleging that they had wrongfully taken possession of the lands. This was ultimately decided in favour of Badr Din and Ghulam Rasul, but in the course of the proceedings Badr Din made a statement, Exhibit P. 7, page 12, printed book, in which he supported the entry relating to Maharajah Ranjit Singh.

In 1856 and again in 1859, Exhibit D. 1, page 369 and Exhibit D. 2, page 370, printed book, show that Ghulam Rasul was looking after the land and the revenue was settled with him. To the same effect are Exhibit D. 6, page 374, Exhibit D. 9, page 379, and Exhibit D. 10, page 379, while Exhibit D. 3, page 371, Exhibit D. 4, page 371, and Exhibit D. 5, page 373, show that the same was the case even before 1853.

In the litigation started by Jodh Singh and others it was definitely alleged that *Ghulam Rasul and Badr Din* had forcibly taken possession of the land in suit, see Exhibit D. 15, page 383, and the claims were finally withdrawn or at any rate settled in 1859; see Exhibit D. 17, page 385, printed book.

In 1859 the pedigree table for the village shows that Badr Din and Ghulam Rasul are entered side by side as founders of the village, see Exhibit D. 7, page 375, and in the same year 200 *bighas* of land that had emerged from the river were entered as the property of Ghulam Rasul, see Exhibit D. 13, page 381, printed book.

Taking all these circumstances into consideration there seems to be no doubt that this village was founded by Badr Din and Ghulam Rasul jointly and that Ghulam Rasul's share cannot be regarded as ancestral *qua* the plaintiffs.

B. Bharat.

While Mr. Nanak Chand attacks the finding of the trial Court with regard to this village, Mr. Sheo Narain for the defendants-respondents contends that the

whole of the village was acquired solely by Ghulam Rasul, who out of deference to his father allowed Badr Din's name to be entered as owner of half in 1859.

From Exhibit P. 6, pages 10 and 11, printed book, it appears that this village was originally founded by Jodh Singh during the regime of Wazir Ratno. He was unable to meet the revenue demands and left the lands. Badr Din applied to the British Government for a lease of the village. This was granted and Badr Din became a lease-holder with the proviso that should any one come forward with a claim within 12 years, that person would be given possession otherwise the lease would continue.

In 1857 Badr Din's name is entered in the proprietors column (page 366, printed book) and in 1859 he and Ghulam Rasul are entered as joint owners in equal shares. Badr Din was, however, merely a lease-holder in 1853: see Exhibit P. 23, page 31, printed book.

On the 3rd January 1854 Badr Din filed an application, Exhibit D. 21, page 435, printed book, pointing out that he had suffered losses and asking for a remission.

A year later on the 4th January 1855 the application was treated as one for permission to resign the lease and sanction was accorded to his resignation, Exhibit D. 22, pages 435-436, printed book.

On the 3rd May 1859 Ghulam Rasul filed an application asking that the revenue for the village might be fixed, Exhibit D. 25, page 438.

On the 28th June 1859 orders were passed assigning the revenue to Ghulam Rasul, Exhibits D. 26 and D. 27, page 439, and Ghulam Rasul was directed to file the necessary application which he did on the 8th August 1859, Exhibit D. 29, page 441, and formal orders were passed on the 15th August 1859, Exhibit D. 28, page 440.

It is on these facts that Mr. Sheo Narain contends that the village was acquired by Ghulam Rasul after Badr Din had given it up. Badr Din and Ghulam Rasul, however, both signed an agreement relating to the duties of *lambardars* in connection with the village on the 16th July 1859, Exhibit D. 98, page 556, and on the 28th April 1853 Ghulam

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Rasul had applied in his own name for the fixing of the revenue, page 606. In these circumstances it appears that father and son were acting in conjunction and that though the land was finally leased to Ghulam Rasul it was for the benefit of both. It seems clear, however, that it was acquired as much by Ghulam Rasul as by his father and that it cannot be regarded as ancestral *qua* the plaintiffs. This is strengthened by Exhibit D. 31, page 443, in which father and son are shown as joint acquirers.

Before dealing with the remaining village it will be as well to dispose of a contention advanced by Mr. Nanak Chand. The learned Counsel referred to Exhibit P. T and Exhibit P. J at pages 347 and 364 respectively. These are duplicates of the same document which was executed by Badr Din on the 23rd May 1863 and was signed by all his sons in token of agreement.

This document was executed a few days before Badr Din's death and contains an inventory of his estate. It recites the fact that he had *already partitioned* his property, giving Ghulam Rasul his full share and retaining the rest in his own name. What had been given to Ghulam Rasul is detailed as also is what Badr Din still held. This portion he declares to belong to his sons by the second wife. From this Mr. Nanak Chand contended that Ghulam Rasul by signing had admitted that the property was joint up to 1863 and that he, therefore, must be held to have inherited his share from his father.

Now as to this it is evident that as far back as 1853 it had been recorded that Ghulam Rasul had been separated from his father for a considerable period. In 1863 Badr Din was practically on his death-bed when this document was drawn up. Ghulam Rasul had undoubtedly been largely instrumental in acquiring the lands in Burj Ghulam Rasul and Bharat. His share had been duly entered up in all the property and he was in possession of the same. The family was, as far as is known, on good terms and there is force in Mr. Sheo Narain's contention that Ghulam Rasul, having acquired his share of the two villages

along with his father and being well off, did not care or wish to create any difficulties.

His signing this document cannot be regarded as any such admission as is contended for by Mr. Nanak Chand. Indeed the document itself recites the fact that the partition had taken place long before, so that, even at that date, it is clear that Ghulam Rasul was entirely separate from the rest of the family. Doubtless any claim by him to share in the property left by Badr Din might have been met by his assent to this document, but no such claim has at any time been made.

It is thus clear that these two villages must be regarded as the self-acquired property of Ghulam Rasul.

O. Miana Hazara.

This village is the original home of the parties and the property in it consists of:—

- (i) Sailab land;
- (ii) land attached to wells Sailanwala and Kadhranwala and the Jhalar;
- (iii) house.

As held above, Gulam Rasul cannot be bound by any admission by his signing Exhibit P. T or allowing his half brothers to take the property left by Badr Din, and it is clear that Badr Din partitioned the property in this village, giving half to Ghulam Rasul and retaining the other half himself.

According to the Revenue Records the rule of succession in this village was "*pagwand*," but Badr Din deliberately departed from this rule and gave half to Ghulam Rasul. This is borne out by Exhibit P. 39, page 92, printed book (November 1859); Exhibit P. 31 and Exhibit P. 29, pages 357 to 363, printed book (1863).

Admittedly the Sailanwala lands were acquired by Ghulam Rasul. So far as the Kadhranwala well is concerned, half of it is admittedly Ghulam Rasul's acquired property. This well is not mentioned in Exhibit P. T and while Mr. Nanak Chand claims that the $\frac{1}{4}$ th share in Amir Shahwala well was exchanged for a $\frac{1}{2}$ share in Kadhranwala, Mr. Sheo Narain points to Exhibit D. 44, dated 2nd April 1860, page 453, printed book, and Exhibit D-37 (1859) page 451, printed book, and contends that

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the former shows that $\frac{3}{4}$ ths of the well and not $\frac{1}{2}$ was purchased by Ghulam Rasul, while the latter shows him in possession of the whole.

No deed of exchange has been produced and the exchange has not been proved and it would, therefore, seem that Badr Din's connection with the well has not been made out and the whole well should be regarded as having been acquired by Ghulam Rasul.

The Jhalar land, however, has not been shown to have been so acquired and may be regarded as ancestral. The Sailab land seems to be on the same footing, Exhibit D. 41, page 460 (1859). Regarding the house there is certainly no definite evidence as to its being ancestral and as Exhibit D. 40, page 458, printed book, shows separate possession, the trial Court's finding should be upheld.

On the findings it follows that the lands in the villages of Burj Ghulam Rasul and Bharat in their entirety, and the Sailanwala and Kadhwanwala wells and the house in Miana Hazara must be regarded as self-acquired, leaving an area of 702 *bighas* 1 *kanal* as ancestral, deducting from the total area of 832 *bighas* 3 *kanals* the Sailanwala land, 19 *bighas* 2 *kanals*, and the Kadhwanwala land, 111 *bighas*, or 130 *bighas* 2 *kanals*. Mr. Nanak Chand, however, contended that whether the property was ancestral or self-acquired collaterals excluded daughters.

Mr. Sheo Narain on the other hand urged that when a father divides his property in his lifetime among his sons, whether the division is on any particular system or merely arbitrary, the heirs in one group so formed must be exhausted before the members of the other group or groups can succeed [*Kaila Singh v. Tahal Singh* (1)].

Therefore, he argued, if the daughters are heirs to their fathers' property, the gift by *Musammal Gauhar Bibi* merely accelerated the succession and the plaintiffs, not being the heirs, could not sue. So far as the self-acquired property is concerned this is no doubt correct, but ancestral property does not necessarily cease to be ancestral, nor become self-acquired or non-ancestral, on

partition. The question, therefore, is whether the daughters are the heirs of Ghulam Rasul.

As to this Mr. Nanak Chand referred to the *wajib-ul-arz* of Miana Hazara (1859) Exhibit P. 39, page 92, Printed Book, in paragraph 5 of which it is declared that the rule of descent is *pagwand* and that daughters did not succeed. Badr Din, however, had it entered that he had given Ghulam Rasul half of his property and that his other sons would succeed to the property held by him at this death, thus departing from the ordinary rule. The entries in the Revenue Records of the other two villages Burj Ghulam Rasul and Bharat are to the same effect; see Exhibit P. 22, page 29, printed book, and Exhibit P. 21, page 28, printed book, which both relate to 1859.

Those portions of a *wajib-ul-arz* that refer to custom are not provisions intended to enure for the duration of the settlement only, but are statements that a certain custom exists [see *Rahiman v. Bala* (2), *Master v. Pohlo* (3)]. There is also a certain presumption as to the correctness of such entries as held in *Dilsukh Ram v. Nathu Singh* (4), *Dakas Khan v. Ghulam Kasim Khan* (5), *Digambar Singh v. Ahmed Sayeed Khan* (6), *Aulia v. Alu* (7), *Ahmad Shah v. Khuda Bakhsh* (8), *Maha Ram v. Ram Mohar* (9) and *Muhammad Faiyaz Ali Khan v. Behari* (10) but, though such entries are evidence, the presumption as to their correctness is a rebuttable one.

Mr. Nanak Chand then referred to Wilson's Tribal Custom in the Shahpur District, pages 46, 48 and 49, and contended that Badr Din and his family being

(2) 8 P. R. 1892.

(3) 52 P. R. 1896.

(4) 98 P. R. 1894 (F. B.).

(5) 48 Ind. Cas. 473; 45 C. 793; 24 M. L. T. 271; 28 C. L. J. 441; 20 Bom. L. R. 1068; 26 P. L. R. 1919; 9 L. W. 558 (P. C.).

(6) 28 Ind. Cas. 34; 37 A. 129; 28 M. L. J. 556; 17 M. L. T. 193; (1915) M. W. N. 581; 19 C. W. N. 393; 13 A. L. J. 236; 21 C. L. J. 237; 2 L. W. 303; 17 Bom. L. R. 393; 42 I. A. 10 (P. C.).

(7) 49 P. R. R. 1898.

(8) 33 P. R. 1903.

(9) 65 P. R. 1903; 139 P. L. 1903.

(10) 45 Ind. Cas. 329; 40 A. 56 (F. B.); 15 A. L. J. 873.

(1) 143 P. R. 1888.

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khokars, the customs referred to by Mr. Wilson applied to them and were conclusive.

Badr Din is shown in Exhibit P. 23, page 31, printed book, as a "Sipra" *khokar*, but this is the only instance of his being so described, and having regard to Ibbetson's Punjab Ethnography (paragraphs 468-469), the Census Report, 1901, Table XIII, page XCII, the Census Report, 1911, page 464, and the Shahpur Gazetteer, 1917, page 85, note, it is by no means certain that "Sipras" are a sub-section of *khokars*. They would, of course, be included in the Miscellaneous Muhammadan Tribes. Wilson's Tribal Custom is no doubt a work of considerable authority, but it cannot be regarded in the present case as finally settling the point in issue.

The *riwaj-i-am* also carries with it a certain presumption of correctness, as has been repeatedly held in decisions such as *Umar v. Musammât Sahib Khatun* (11), *Ali Muhammad v. Dulla* (12), *Sheran v. Musammât Sharman* (13), *Mehr Khan v. Karam Ilahi* (14), *Sher v. Alam Sher* (15), *Beg v. Allah Ditta* (16) and *Saide Khan v. Musammât Amir-un-nissa* (17) which it is not necessary to discuss in detail.

These presumptions are also, however, rebuttable and the trend of the decisions cited by Mr. Sheo Narain, viz., *Nidhu v. Ram Singh* (18), *Zainab Bibi v. Bader-ud din* (19), *Lelu v. Ram Chand* (20), *Ohuttan v. Hazori Lal* (21), *Budhi Parkash v. Chander Bhan* (22), seems to be that when positive instances are given, the *riwaj-i-am* cannot be regarded as overriding them. In the case of self-

acquired property the general custom is that daughters are preferred to collaterals: Article 23 (2), Rattigan's Digest of Customary Law. In the present case the entries in the *wajib-ul-arz* of these villages do not distinctly state that they relate to self-acquired property as well as ancestral and in Civil Appeal No. 665 of 1905 printed at page 498, printed book, it was held by a Division Bench of the Chief Court that similar entries should be read as referring merely to ancestral property. There is no reason to doubt the correctness of this dictum, nor does the answer to question 17, page 49, of Wilson's Tribal Custom militate against it.

It is then for the plaintiffs to show that collaterals exclude daughters and this they have not done, while as pointed out by the trial Court, various specific instances have been given by the other side, which afford good evidence in rebuttal of the entries in the *wajib-ul-arz* and the *riwaj-i-am*. Qua ancestral land, however, the general custom is against daughters succeeding and the instances referred to do not assist the defendants so far as the ancestral land is concerned and the *wajib-ul-arz* and *riwaj-i-am*, standing unrebutted as they do, must be given effect to. I would, therefore, vary the decree of the Court below so as to grant the plaintiffs a decree, as prayed declaring that the deed of gift executed by *Musammât Gaubar Bibi* shall not affect their reversionary right, on her death or re-marriage, in 702 *bighas 1 kanal* of land situate in village Miana Hazara and now in suit. The claim relating to the other properties I would dismiss, leaving the parties to bear their own costs throughout.

PETMAN, J.—I agree.

Decree varied.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 41 OF 1919.

November 26, 1919.

Present:—Mr. Justice Lindsay.

MUNDAR BIBI AND ANOTHER—APPELLANTS

versus

BAIJNATH PRASAD—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11—Res

(11) 76 P. R. 1892.

(12) 26 P. R. 1901; 65 P. L. R. 1901.

(13) 117 P. R. 1901; 18 P. L. R. 1901.

(14) 13 P. R. 1902; 161 P. L. R. 1901.

(15) 94 P. R. 1905; 51 P. L. R. 1906; 125 P. W. R. 1905.

(16) 38 Ind. Cas. 354; 45 P. R. 1917; 12 P. W. R. 1917; 21 M. L. T. 310; 32 M. L. J. 615; 19 Bom. L. R. 388; 15 A. L. J. 525; 21 C. W. N. 842; 44 C. 749; 26 C. L. J. 175; 44 I. A. 89 (P. C.).

(17) 45 Ind. Cas. 963; 94 P. R. 1918; 109 P. W. R. 1918.

(18) 1 Ind. Cas. 457; 2 P. R. 1909; 25 P. W. R. 1909.

(19) 17 Ind. Cas. 187; 43 P. R. 1913; 270 P. W. R. 1912; 20 P. L. R. 1913.

(20) 31 Ind. Cas. 294. 23 P. R. 1916; 174 P. W. R. 1915.

(21) 30 Ind. Cas. 22; 7 P. R. 1916; 129 P. W. R. 1915; 46 P. L. R. 1916.

(22) 48 Ind. Cas. 813; 123 P. R. 1918.

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judicata—Promissory note, suit on—Dismissal for default—Suit, subsequent, on original cause of action, maintainability of.

Plaintiff sued to recover a sum of money advanced on a promissory note. The suit was dismissed in consequence of his failure to put in an appearance. An application to reinstate the suit was dismissed, as also an appeal against the order dismissing the application. He then instituted a fresh suit to recover the same sum of money on the basis of entries in his account book, and alleged that the promissory note was null and void and ineffective and that he was entitled to recover the sum in lieu of which the promissory note had been executed.

Held, that the suit must fail, as the plaintiff's cause of action was one and indivisible, and the fact that the transaction was recorded in his account book did not give him another or different cause of action. It is only where a promissory note is invalid owing to some inherent defect therein, that the party suing thereon is entitled to fall back upon an action for money had and received to his use, and not where, as in this case, the previous suit was dismissed in default of plaintiff's appearance. [p. 425, col. 2.]

First appeal from the order of the Judge of the Court of Small Causes exercising the powers of a Subordinate Judge, Allahabad, dated the 29th January 1919.

Mr. Panna Lal, for the Appellants.

Dr. S. N. Sen, Mr. Haribans Sahai and Pandit Lakshmi Narain Tewari, for the Respondent.

JUDGMENT.—This appeal arises out of the following circumstances. Baijnath Prasad, the plaintiff, sued the defendants in the Court of the Munsif of Allahabad in Suit No. 633 of 1916. In that suit he stated in the first paragraph of his plaint that the defendants, after borrowing Rs. 575 by means of a promissory note on the 26th of April 1916 at Allahabad, promised to pay on demand. The cause of action arose at Allahabad on the 26th of April 1916, the date on which the promissory note was executed. The suit was dismissed under the provisions of Order IX, rule 9 of the Civil Procedure Code, that is to say, the plaintiff did not appear and the defendants, who appeared, denied the claim. Subsequently the plaintiff applied to have the suit reinstated, but the application was dismissed on the 28th of April 1917 and an appeal from that order of dismissal was also rejected. Subsequently he brought this Suit No. 78 of 1918 in the same Court.

In the first paragraph of his plaint he stated as follows:—"On Baijakh Badi 9th,

Sambat 1973, corresponding to the 26th April 1916, the defendants borrowed at Allahabad from the plaintiff Rs. 575 bearing interest at the rate of Rs. 2 per cent. per mensem as per entries made in the account book, a copy of which is annexed hereto, and executed a promissory note in lieu thereof." Then after describing the failure of his first suit he proceeded to state in paragraph No. 4 as follows:—"No suit can be instituted on the basis of the said promissory note payable on demand. It is altogether null and void and ineffectual, but the plaintiff is entitled to realise the principal amount due to him in lieu of which the promissory note aforesaid was executed." The cause of action for this suit arose on the 26th of April 1916.

From these recitals it is quite clear that what happened was this:—The defendants asked the plaintiff for a loan. The plaintiff agreed to give it on the defendants executing a promissory note for the said amount, and on execution of it the plaintiff gave the defendants the money. The defendants failed to repay it. The plaintiff sued to recover the amount then due. The recital of the above facts constitutes the plaintiff's cause of action, which seems to us to be one and indivisible. We do not see how the fact that the plaintiff recorded the transaction in his account book or private diary can give him another or a different cause of action. The plaintiff sued to recover the amount due and his suit was dismissed. It was not dismissed because of any inherent defect in the promissory note itself, but it was dismissed because the plaintiff failed to put in an appearance. Therefore, it is inaccurate to say, as was said by the plaintiff in paragraph No. 4 of his plaint, that the promissory note is altogether null and void and ineffectual. It is a perfectly good promissory note, and this is not one of those cases in which the Courts have held that where a promissory note is invalid and amounts really to nothing more than a piece of waste paper, the plaintiff can fall back upon an action for money had and received by the defendant to the plaintiff's use on the ground that there is a total failure of the consideration by reason of the invalidity of the promissory note. It seems that what we have said above is really the law as laid down in the case on which the learned Subordinate Judge relied, that is to

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say, *Baij Nath Das v. Salig Ram* (1). The facts of this case are distinguishable from the numerous cases which have been referred to in argument before us. The result is that we allow the appeal and setting aside the order of remand of the learned Subordinate Judge, restore the order of the Munsif with costs, including fees in this Court on the higher scale.

Appeal allowed.

(1) 16 Ind. Cas. 33.

ODDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL No. 3 OF 1919.
January 30, 1919.

Present:—Pandit Kanhaiya Lal, A. J. C.

KALKA SINGH—JUDGMENT-DEBTOR—

APPELLANT

versus

GUR SARAN LAL—DECREE-HOLDER—
RESPONDENT.

Limitation Act (IX of 1908), s. 15, Sch. I, Arts. 181, 182—Execution of decree—Application, dismissal of, for want of bidders—Application, subsequent, presented more than three years after dismissal of previous application—Limitation.

Where no obstacle, actual or resulting, is imposed upon the execution of a decree by the Court executing the decree or by a Court before which an appeal from an order passed in the execution proceeding is pending or by the Court before which a suit or appeal to contest the validity of the decree or the order passed in execution is awaiting trial, there is nothing to stop the running of limitation either under Article 181 or under Article 182 of Schedule I to the Limitation Act. [p. 427, col. 2.]

The dismissal of an application for execution for no fault of the decree-holder is a mere direction to the officers of the Court to remove the application from the pending list, but the decree-holder's right to apply for its revival accrues from day to day and will be barred if no application is made for the purpose before three years have elapsed from the date when such proceedings were closed in fact or struck off. [p. 427, col. 2.]

Appeal against the order of the Second Additional District Judge, Lucknow, dated the 30th November 1918, upholding that of the Munsif, North Lucknow, dated the 30th August 1918.

The Hon'ble Pandit Gokaran Misra and Pandit Manohar Lal Tewari, for the Appellant.

Babus Bisheshwar Nath Srivastava and Rajeshwari Prasad, for the Respondent.

JUDGMENT.—The question for consideration in this case is whether a certain application for execution is barred by time. On the 10th August 1907 a decree absolute for sale was obtained by the decree-holder-respondent and another person named Ram Narain. Various efforts were made to execute that decree but without any success. It is only necessary to refer to two applications for execution. One was made on the 25th January 1911 which was struck off on the 31st October 1911, in consequence of the fact that no person was willing to bid for the property mortgaged and the decree-holder was unable to take any further steps to proceed with the execution. The reason why no person was willing to purchase the property was that a suit had been filed by Dhir Singh and some other persons contesting the enforceability of the mortgage, on the ground that the mortgagor had only a life-interest in the property mortgaged and that that life-interest had expired with the death of the mortgagor. The interest claimed by Dhir Singh and those who joined with him in the suit was that of persons entitled to succeed to the property on the expiry of the life estate. That suit was dismissed on the 15th March 1912. An appeal filed from that decree was dismissed on the 15th March 1913. On the 24th July 1913 a fresh application for execution was made by the decree-holder for the sale of the mortgaged property, but it was not properly prosecuted and was eventually struck off for default on the 15th November 1913.

Meanwhile Dhir Singh and his companions filed a second appeal in this Court, which was dismissed on the 13th July 1915. On the 5th July 1918 the present application for execution was filed. It is within three years from the date when the appeal filed by Dhir Singh and his companions was decided but beyond three years from the date when the preceding application for execution was struck off for default.

The Courts below have allowed the execution to proceed, treating the present application as being within time. It would undoubtedly have been so, had the application

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been filed within three years from the date on which the previous application for execution was struck off. In *Qamar ud-din Ahmad v. Jawahir Lal* (1) their Lordships of the Privy Council held that an application for execution made to revive and carry through a pending execution, suspended by no act or default of the decree-holder, was not governed by Article 179 of Act XV of 1887, which has now been replaced by Article 182 of the Indian Limitation Act (IX of 1908). It does not, however, follow that there is no limitation applicable to an application for such a revival. Where an execution has been stayed by an injunction or other order, section 15 of the Indian Limitation Act provides that the period during which such injunction or order was in force shall be excluded in computing the period of limitation applicable to an application for execution. The injunction or order aforesaid might be passed in the execution proceeding itself by the Court executing the decree or by a higher Court on appeal either from the decree under execution or from the order passed in the execution proceeding, or it may be passed in a suit or appeal to contest the validity of the decree under execution or the order passed in execution thereof. Where in such an appeal, suit or other proceeding arising therefrom an order has been passed prejudicial to the decree-holder and such an order operates as an express or resulting impediment to the execution in whole or in part, the decree-holder is entitled to wait till he succeeds in getting that order discharged. In *Qamar ud-din Ahmad v. Jawahir Lal* (1) such an order had been passed on an appeal from an order passed in the execution proceeding and the right of the decree-holder to apply for execution was in consequence suspended. In *Sheikh Mahomed v. William Alfred Thomas* (2) and *Muhammad Nabi Reza v. William Alfred Thomas* (3) the progress of the execution was similarly interrupted on account of the appeals filed by the judgment debtor from the orders passed in the execution proceeding. The decisions in *Rungiah Gounden*

& Co. v. Nanjappa Row (4) and *Ruddar Singh v. Dhanpal Singh* (5) afford instances of cases where the execution was stayed by an express order. In *Gurudeo Narayan Sinha v. Amrit Narayan Sinha* (6) the interruption was partial. In all these cases, the decree-holder was held entitled to execute the decree as soon as the interruption was removed.¹

These considerations do not, however, apply where no such obstacle has been imposed either by the Court executing the decree or by a Court before which an appeal from an order passed in the execution proceeding is pending or by the Court before which a suit or appeal to contest the validity of the decree or the order passed in execution is awaiting trial. Where there is no such obstacle, actual or resulting, there is nothing to stop the running of limitation, which will be governed by Article 181 or 182 of the Indian Limitation Act (IX of 1908), whichever may be applicable. As pointed out in *Chalavadi Kotiah v. Poloori Alimelammah* (7), the dismissal of an application for execution without notice to the parties and for no fault of the decree-holder is a mere direction to the officers of the Court to remove the application from the pending list; but the decree-holder's right to apply for its revival accrues from day to day and will be barred if no application is made for the purpose before three years have elapsed from the date when such proceedings were closed in fact or struck off.

On behalf of the decree-holder-respondent reliance is placed on the decision in *Ganga Prasad v. Jwala Prasad* (8) and *Kaniz Zohra v. Syam Kisen* (9). In the former case the order removing the case from the file on an application being made by the judgment debtor for time to comply with the decree was treated as an order staying the proceedings. In the latter case the application for revival was made within three years from the date when the previous application for execution was struck off. The suit filed by Dhir Singh and his companions to contest the enforceability of the mortgage having been dismissed by the

(4) 26 M. 780; 13 M. L. J. 412.

(5) 26 A. 156; A. W. N. (1903) 221.

(6) 33 C. 69.

(7) 31 M. 71; 18 M. L. J. 46; 3 M. L. T. 329.

(8) 26 Ind. Cas. 815.

(9) 39 Ind. Cas. 89; 2 P. L. J. 115; 1 P. L. W. 73 (1917) Pat. 133.

(1) 27 A. 334; 32 I. A. 102; 1 C. L. J. 381; 15 M. L. J. 258; 9 C. W. N. 601; 2 A. L. J. 397; 7 Bom. L. R. 433; 8 Sar. P. C. J. 810 (P. C.).

(2) 11 Ind. Cas. 972.

(3) 21 Ind. Cas. 923.

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trial Court and by the Courts of Appeal and no injunction or order for stay having been granted in any of the proceedings arising out of that suit, section 15 of the Indian Limitation Act (IX of 1908) has no application and the present application for execution, whether treated as an independent application for execution or an application for revival, is barred by time.

The appeal is, therefore, allowed and the application for execution dismissed. The parties will in the circumstances bear their own costs throughout.

Appeal allowed.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 54 OF 1919.

November 26, 1919.

Present:—Mr. Justice Lindsay.

BINDESRI AND AFTER HIS DEATH BHAGWAN
DAS AND ANOTHER—DEFENDANTS—PETITIONERS
versus

GANGA PRASAD—PLAINTIFF—OPPOSITE
PARTY.

Provincial Small Cause Courts Act (IX of 1887), ss. 27, 32 (2)—Suit instituted before Munsif not invested with Small Cause Court powers—Decision by Munsif having Small Cause Court powers—Trial on ordinary side—Decree, whether final—Appeal, whether lies.

A suit in the nature of a Small Cause instituted in the Court of a Munsif not invested with Small Cause Court powers and registered as an ordinary suit was tried as an ordinary suit by a Munsif who possessed Small Cause Court powers. On revision before the High Court it was contended that the decision of the Munsif ought to be regarded as a decision of a Small Cause Court and that it was not open to appeal:

Held, that under section 32 (2) of the Provincial Small Cause Courts Act, the Munsif who finally dealt with the case was bound to try it as a regular suit and the procedure adopted by him was perfectly correct, and that, consequently, his decree was not a final decree. [p 429, col. 1.]

Civil revision against the order of the Sessions and Subordinate Judge, Mirzapur, dated the 27th of February 1919.

Mr. A. C. Mitra, for the Applicant.

Mr. K. O. Mithal, for the Opposite Party.

JUDGMENT.—I have listened to the arguments in this case and have made up

my mind that the application should be dismissed. I may say at once that the case being a case under section 25 of the Provincial Small Cause Court Act, I should not be disposed to interfere unless the law obliges me to. The suit was a suit for Rs. 47 4 0. It was tried in the Court of a Munsif, who admittedly was possessed of Small Cause Court powers up to a limit of Rs. 50. The Munsif, however, tried the suit as a regular suit and gave a decree in favour of the defendants. The plaintiff appealed and the appeal was heard by the Subordinate Judge of Mirzapur. He reversed the decision of the Court below and gave a decree in favour of the plaintiff. Now we have this application in revision, in which it is contended on behalf of the defendants that no appeal lay to the Court below and that the order of the Subordinate Judge is void as having been passed without jurisdiction. The way the case was put on behalf of the petitioners is this. It is said that the suit as framed was a suit exclusively cognisable by a Court of Small Causes and that the Munsif who decided the case being a Munsif invested with the powers of the Small Cause Court it ought to be taken that his decision was the decision of a Court of Small Causes and was not, therefore, open to appeal. I take it as admitted that the suit was a suit ordinarily cognisable by a Court of Small Causes and that to this extent the case put forward by the petitioners is correct. Even then I should not be disposed to interfere in these proceedings in view of the fact that the case has been fully tried out and has not been disposed of in the summary way in which Small Cause Court cases are usually dealt with. The learned Counsel for the petitioners, however, referred me to a judgment of this Court which is to be found reported as *Abdul Majid v. Bedyadhar Saran Das* (1). That case follows a Full Bench decision of the Madras High Court reported as *Kollipara Seetpaty v. Kankipaty Subbaya* (2). The view taken in this latter case was that where a small cause suit is tried by a Munsif on the original side and his decision is

(1) 37 Ind. Cas. 92; 39 A. 101; 14 A. L. J. 984.

(2) 1 Ind. Cas. 543; 33 M. 323; 20 M. L. J. 718; 6 M. L. T. 121.

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reversed in appeal by the Subordinate Court, the High Court is bound to set aside the decree in appeal as having been passed without jurisdiction.

The learned Counsel for the opposite party, however, has been able, in my opinion, to put a different complexion on the facts and after some argument it has been admitted before me that the statements of fact made by the learned Counsel for the opposite party are correct. It seems that this suit was filed on the 6th of August 1918 and it was filed in the Court of the Munsif of Mirzapur. At that time the permanent incumbent had gone on leave and there was officiating in his place one Mr. Charu Chandar, who admittedly was not invested with the powers of a Small Cause Court Judge. The case was instituted in his Court and was necessarily registered as an ordinary suit. The case came on for trial in the month of November 1918. By that time Mr. Raj Rajeshwar Sahai, the permanent Munsif, had returned from leave. It is not disputed that this gentleman was invested at that time with the jurisdiction of a Court of Small Causes up to the pecuniary limit of Rs. 50. Mr. Raj Rajeshwar Sahai, as I have said, tried the case as an ordinary suit and, in my opinion, that was the proper course for him to adopt. The suit was filed while his *locum tenens* who was not invested with the Small Cause Court powers was carrying on, and consequently, under the provisions of section 32, sub-section (2) of the Provincial Small Cause Courts Act, I think it was the duty of the Munsif who finally dealt with the case to try the case as a regular suit. If any authority on this proposition is required, it will be found in a ruling of this Court which appears to me to be exactly in point. That is the decision of a single Judge of this Court reported as *Jagmohan Lal v. Lakha* (3). I cannot distinguish the facts of that case from the facts of the case before me. Apart from this authority of this Court there are at least three other cases which support this view. One of these is to be found reported as *Mahima Chandra Sirdar v. Kali Mondol* (4), another case is *Hari Kamayya v.*

Hari Venkayya (5) and another *Sambhu v. Ram Vithu* (6). It seems to me, therefore, that it is not any longer possible to contend that there was any irregularity in the trial of the first Court. On the contrary the procedure of the Munsif was perfectly correct and if he tried the suit out as a regular suit and did not exercise his powers in this particular instance as a Court of Small Causes, it follows that the petitioners here are not entitled to argue that the decree of the first Court was a final decree as provided by section 27 of Act IX of 1887. On the authorities to which I have referred an appeal certainly lay to the District Judge and the result, therefore, is that I hold that there was no want of jurisdiction in the Court below to hear the appeal. The application fails and is dismissed with costs to the opposite party.

Application dismissed.

(5) 26 M. 212 (F.B.).

(6) 28 B. 244; 5 Bom. L. R. 1008.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 210 OF 1918.

June 16, 1919.

Present :—Mr. Justice Newbould and Mr. Justice Cuming.

KUNJA BEHARI ROY AND ANOTHER
—JUDGMENT-DEBTORS—APPELLANTS

versus

PANCHANON SIKDAR—DECREE HOLDERS
—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 47, 102—Decree in suit of small cause nature of value below Rs. 500—Execution, order in—Appeal, second, whether lies.

No second appeal lies against an order passed in execution proceedings arising out of a suit of the nature cognisable by a Court of Small Causes and of value below Rs. 500. [p. 430, col. 2.]

Appeal against the order of the Officiating District Judge, Jessore, dated the 20th April 1911, affirming that of the Munsif 3rd Court at Narail, dated the 6th October 1917.

(3) 9 Ind. Cas. 264.

(4) 12 C. W. N. 167.

KUNJA BEHARI ROY v. PANCHANON SIKDAR.

FACTS.—One Panchanon Sikdar obtained a decree for Rs. 400 against Kunja Behary Roy and another in the Court of Small Causes at Khulna and in execution of the said decree applied for attachment of two plots of land one forming the homestead and the other forming an agricultural holding of the said Kunja Behary Roy and another the judgment debtors. On the judgment-debtors objecting to the attachment on the ground that the said two plots of land formed their non-transferable occupancy holding the decree-holder withdrew the attachment with respect to the plot of agricultural holding but continued his execution with respect to the homestead land. The matter coming on for trial, the Courts below allowed attachment of the said land. The Court of appeal below held that "the evidence shows that the property in question is the homestead of the debtors and that no agricultural land is attached to the *jama*. Therefore, the case is governed by the provisions of the Transfer of Property Act," and affirmed the decision of the Court of first instance. The judgment-debtors filed this second appeal against the said judgment.

Babu Gopal Ohandra Das, for the Respondents, took a preliminary objection as to the competency of the appeal. The suit out of which these execution proceedings have arisen is a suit of the nature of small causes and being valued under Rs. 500 is not appealable. The execution proceedings, therefore, are also not appealable. Cited *Peary Lal Singh v. Radha Nath Singh* (1).

Babu Nalin Ohandra Pal, for the Appellant.—Section 102 of the Civil Procedure Code contemplates the case of a suit, and the present appeal having arisen out of execution proceedings under section 47 the appeal is competent.

On the merits, my submission is that the judgment of the Court of appeal below is wrong in law because in view of section 182, Bengal Tenancy Act, homestead land of a Raiyat is governed by the Bengal Tenancy Act and not by the Transfer of Property Act, even though it does not form part and parcel of any of his agricultural holding. The real test is whether the

tenant of the homestead land is a Raiyat of the village in which the said land is situate. See *Kripa Nath Ohakravarti v. Seikh Anu* (2), *Golam Mowla v. Abdool Sowar Mondul* (3), *Krishna Kanta Ghosh v. Jadu Kasya* (4), *Harihar Ohattopadhyaya v. Dinu Bera* (5), *Dina Nath Nag v. Sashi Mohan Day Tarafdar* (6). The incidents of an occupancy holding, the chief of which is non-transferability, are therefore, applicable in the case. That the judgment-debtor is a Raiyat of the village in which the homestead land is situate is admitted in this case, because the agricultural holding in respect of which the decree-holder has withdrawn his attachment on the objection of the judgment-debtor is adjacent to the homestead land though not attached to it and is within the same village. The withdrawal of the attachment does certainly amount to an admission that the judgment-debtor holds the agricultural holding as a non-transferable occupancy Raiyat. The learned Judge below has, moreover, placed the entire onus upon the judgment-debtors and therein he has erred. *Prima facie*, the debtors being, as they are, Raiyat of the village in which the agricultural holding is situate, the presumption of non-transferability should have been raised in their favour and the burden of proving that the said land is transferable or is governed by the Transfer of Property Act should have been placed upon the decree-holder.

JUDGMENT.—The facts of this case cannot be distinguished from those in the case of *Peary Lal Singha v. Radha Nath Singha* (1). We must, therefore, hold that no appeal lies in this case. The case is not one which would justify us in interfering in the exercise of our revisional powers.

The appeal is dismissed with costs. We assess the hearing fee at one gold mohur.

Appeal dismissed.

(2) 4 C. L. J. 332; 10 C. W. N. 944.

(3) 9 Ind. Cas. 922; 13 C. L. J. 255.

(4) 28 Ind. Cas. 839; 19 C. W. N. 914; 21 C. L. J. 475.

(5) 10 Ind. Cas. 139; 14 C. L. J. 170; 16 C. W. N. 536.

(6) 31 Ind. Cas. 16; 22 C. L. J. 219; 20 C. W. N. 550.

(1) 11 C. W. N. 861.

PARSHOTAM DAS v. BITHTHAL DAS.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1615 OF 1917.

November 22, 1919.

Present:—Mr. Justice Lindsay.

PARSHOTAM DAS AND ANOTHER—

PLAINTIFFS—APPELLANTS

versus

B. BITHTHAL DAS AND ANOTHER—

DEFENDANTS—RESPONDENTS.

Interest Act (XXXII of 1839), s. 1—Sale of goods—Vendor, whether entitled to interest on price of goods—Agreement to pay interest, absence of—Notice to claim interest, failure to give, effect of.

In the absence of any agreement to pay interest upon a particular transaction, or of any notice of the creditor's intention to claim interest in case the debt is not discharged by a certain time, a claim for interest cannot be brought within the purview of the Interest Act and consequently cannot be decreed.

Second appeal against the decision of the District Judge, Benares.

Mr. S. P. Ghosh, for the Appellants.

Mr. Gulzari Lal, for the Respondents.

JUDGMENT.—The only question to be discussed in this appeal relates to interest. The suit was brought by the plaintiffs to recover the price of goods supplied to the defendants. The claim as laid included a claim for interest at Rs. 1 per cent. per mensem. One of the pleas raised in defence was that the plaintiffs were not entitled to claim interest as there had been no agreement for payment of the same. The Court of first instance, relying on the statement of one of the defence witnesses, thought that the plaintiffs were entitled to interest at the rate of 0 8.0 per cent. per mensem. In appeal the learned District Judge has refused the claim for interest. He has referred to the provisions of the Interest Act (XXXII of 1839), and says the plaintiffs have failed to bring their case within the purview of that Act. After hearing the argument of the learned Counsel for the appellants I think the Judge's view must be maintained. It is not pleaded here that there was any written instrument containing an agreement to pay interest, nor again was it claimed by the plaintiffs that they had given any notice to the defendants of their intention of claiming interest in case the debt was not discharged by a particular time. It is true as argued by the learned Counsel for the appellants, that there is a proviso to this enactment of

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1839 whereby notwithstanding anything contained in the Act, interest is to be payable in all cases in which it is now payable by law, the word now referring, of course, to the year 1839. The only piece of evidence to which I have been referred for the purpose of showing that this case falls within the proviso is the statement of one Kishen Das, the witness whose evidence was relied upon by the Court of first instance. He is a son-in-law of one of the defendants, and in his cross-examination stated as follows: "I purchased tar from the plaintiffs and paid interest at the rate of ten annas per cent." It would be difficult, in my opinion, to found on this statement an agreement to the effect that the present transaction is one in which interest is payable according to law. I think the decision of the Court below is correct. The appeal fails, and is dismissed with costs to the respondents.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 390 OF 1917.

March 24, 1919.

Present:—Mr. Justice Chitty and

Mr. Justice Walmsley.

SATISH CHANDRA KANUNGOE—

APPELLANT

versus

NISHI CHANDRA DUTTA—

RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 166, 181—Execution of decree—Sale in execution—Application to set aside sale—Limitation applicable—Scope of Art. 166.

The scope of Article 166, Schedule I, of the Limitation Act is not limited to applications under Order XXI, rules 89, 90 and 91 of the Civil Procedure Code. The Article is perfectly general in its terms and refers to an application under the Code to set aside a sale in execution of a decree. [p. 432, col. 1.]

An application to set aside a sale in execution of a decree passed against the father of the applicant, on the ground that the property sold belongs to the applicant and not to his father, is governed by Article 166 and not by Article 181 of Schedule I of the Limitation Act. [p. 432, col. 1.]

AMBA PRASAD v. MUSHTAQ HUSAIN.

Appeal against the order of the District Judge, Chittagong, dated the 13th August 1917, reversing that of the Munsif, 1st Court at Patiya, dated the 5th May 1917.

Babu Kshitish Chandra Sen, for the Appellant.

Babu Prabodh Kumar Das, for the Respondent.

JUDGMENT.

CHITTY, J.—This is an appeal by the judgment-debtor against an order of the District Judge of Chittagong, holding that his application to set aside a sale was barred by limitation.

In the first place, it is doubtful whether any appeal lies; and the learned Pleader for the appellant has not been able to satisfy us on this point. He conceded that if the amount of the suit was below Rs. 500 there would be no second appeal, but as to that we have not been informed.

Turning to the merits of the application, it appears that a decree was passed in 1904 against the appellant's father. In 1911 his father died. In 1913, presumably in an application for execution, the appellant was substituted in the place of his father, who had died two years before. Attachment was levied on immoveable property in the hands of the appellant. The property was brought to sale on 12th November 1915. The application now before the Court was presented on the 8th November 1916—almost a year after. It is argued for the appellant that Article 181 of the Limitation Act applies, and not Article 166. There appears to be no good reason for limiting the scope of Article 166 to applications under Order XII, rules 89, 90 and 91 of the Civil Procedure Code. The Article is perfectly general in its terms and refers to an application "under the Code to set aside a sale in execution of a decree". We are referred by the appellant to the case of *Ajo Koer v. Gorak Nath* (1) and to another case in the same volume, *Upendra Nath Kalamuri v. Kusun Kumari Das* (2). But these were cases where application was made before and not, as here, after the sale. The policy of the Legislature appears to be that questions such as this arising in execution should be brought

(1) 27 Ind. Cas. 321; 19 C. W. N. 517; 20 C. L. J. 481.

(2) 27 Ind. Cas. 323; 19 C. W. N. 523; 42 C. 410; 20 C. L. J. 485.

before the Courts and decided with the least possible delay. In this case no explanation is forthcoming why, if this property was really the property of the appellant, he did not immediately upon attachment prefer a claim under Order XXI, rules 58, of the Civil Procedure Code. Such a claim would have to be made without unnecessary delay, and a suit to establish his right, if the claim were refused, would have to be filed within a year. It is conceded that applications under Order XXI, rules 89, 90 or 91, must be filed within 30 days of the sale. Why, then, in a case like the present, where the appellant has been guilty of laches in bringing his case before the Court at all, should the law allow him three years to do so? In my opinion, Article 166 is applicable, and the application of the appellant should have been made within 30 days from the date of the sale. The appeal is dismissed with costs.

WALMSLEY, J.—I agree.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 46 OF 1919.

November 27, 1919.

Present:—Mr. Justice Tudball and
Mr. Justice Ryves.

AMBA PRASAD—DEFENDANT—
APPELLANT

versus

MUSHTAQ HUSAIN—PLAINTIFF—
RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 102, O. XLI, r. 23, O. XLIII, r. 1 (a).—Small cause of value below Rs 50.—Appeal—Remand, order of—Appeal, second, whether lies.

There is no second appeal in a suit of a small cause nature of value below Rs 50. An order of remand, therefore, in such a suit is not open to appeal. [p. 433, col 1.]

First appeal from an order of the Subordinate Judge of Moradabad, dated the 9th December 1919.

Mr. S. Rizi Ali for the Appellant.

Dr. S. M. Sulaiman, for the Respondent.

JUDGMENT.—A preliminary objection is raised in this appeal that no second

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appeal lies. The facts are briefly as follows:—The plaintiff-respondent and the defendant-appellant with effect from the 1st of July 1914, that is the beginning of the year 1322 Fasli, were owners of two separate *mahals* in a village after a perfect partition had been effected. In the year 1322 Fasli the revenue of both these *mahals* fell into arrears. The plaintiff was forced to pay the revenue not only of his own *mahal* but also of the defendant's *mahal* to the extent of Rs. 127. He brought the present suit to recover their sum plus interest from the defendant in the Court of the Munsif.

The Munsif dismissed the suit on the ground that no suit lay to recover the amount. The plaintiff appealed. The lower Appellate Court came to the opposite conclusion and remanded the suit for decision on the merits to the first Court. The defendant has come up here on appeal from this order of remand. Under Order XLIII, rule 1, clause (4), an order under rule 23 of Order XLI remanding a case is applicable where an appeal would lie from the decree of the Appellate Court. It is contended and with force that in the present suit no second appeal would have lain from the decision of the Appellate Court because the suit is one of a small cause nature, the sum to be recovered being below Rs. 500. On behalf of the plaintiff it is urged that Article 39 or 40 of Schedule II of the Small Cause Courts Act would cover the suit. But with this we cannot possibly agree. The plaintiff did not pay the money in a representative capacity on behalf of the defendant, therefore, Article 39 cannot apply. Article 40 refers to a suit for profits and does not apply. Article 41 refers to a suit by a sharer in joint property, which is not the case here. It is clear that if any suit can lie, it does not fall under any of these articles and is really a suit of a Small Cause Court nature being for a sum below Rs. 500. Therefore, no second appeal would have lain from a decree of the Appellate Court and no appeal, therefore, lies from the order of remand. There are decisions on the point in the case of *Nath Prasad v. Baij Nath* (1) and the case of

(1) 3 A. 68.

Qutub Husain v. Abul Hasan (2). The decision in the case of *Tulsa Kunwar v. Jageshar Prasad* (3) contains remarks which apply to the facts of this case. We have been asked to treat this case as a revision, but in view of the fact that the money was admittedly paid and has not been refunded we decline to do so. We dismiss the appeal with costs.

Appeal dismissed.

(2) 4 A. 134; A. W. N. (1881) 141.

(3) 23 A. 563; 3 A. L. J. 372; A. W. N. (1906) 114.

CALCUTTA HIGH COURT.

[APPEAL FROM ORDER NO. 183 OF 1917.

April 2, 1919.

Present:—Justice Sir Charles Chitty, Kt.,
and Mr. Justice Walmsley.

ABDUL AJIJ ABDULLA—JUDGMENT-DEBTOR.—APPELLANT

versus

YAKUB ABDUL GANI—DECREE-HOLDER
—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 182 (5)—Execution of decree—Application praying that notice be issued to judgment-debtor, whether step-in-aid of execution—Limitation, extension of.

An application for execution headed as "for execution," written in the tabular form prescribed by the Civil Procedure Code for such applications, and stating that the "mode in which the assistance of the Court was required" was by the issue of a notice to the defendant to show cause, if any, why the decree should not be executed against him, is an application to take a step-in-aid of execution sufficient to save limitation within the meaning of clause (5) of Article 182 of Schedule I of the Limitation Act. [p. 434, cols. 1 & 2]

Appeal against the order of the Subordinate Judge, Chittagong, dated the 24th April 1917.

Sir Rash Behari Ghose, Dr. Sarat Chandra Basak and Babu Chandra Sekhar Sen, for the Appellants.

Mr. U. N. Sen Gupta, Babus Ram Dayal Dey and Nerode Bandhu Rai, for the Respondent.

JUDGMENT.

CHITTY, J.—This is an appeal by the judgment-debtor, and the only point for our determination is whether the decree-holder's

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right to execute his decree is barred by limitation.

On 5th December 1910 the decree was passed by the Chief Court of Lower Burma for a sum of Rs. 5,000 and odd.

On 17th March 1913 that Court ordered notice to issue to the judgment-debtor under Order XXI, rule 22.

The notice was sent to Chittagong for service but was not served for want of an identifier.

On 23rd December 1913 the decree-holder applied to execute the decree but withdrew that application on 5th January 1914.

On 9th August 1915 he made a third application, on 29th September 1915 a fourth, and on 12th January 1916 the fifth and present application.

Of these notice of the last only was served on the judgment-debtor, who now comes in and pleads limitation.

The question is whether the application of 17th March 1913 saves limitation. It is argued for the appellant that it was not an application for execution, and that, if it can be so regarded, it was not "in accordance with law." The application was headed as "for execution" and was written in the tabular form prescribed by the Code for such an application. In stating "the mode in which the assistance of the Court was required" in column 10 it said "by notice to the defendant through the District Court of Chittagong to show cause, if any, why the decree should not be executed against him by arrest and imprisonment of his person or by attachment and sale of his movable and immovable properties".

I am disposed to think that it was an application for execution, though possibly loosely expressed. Although with regard to the attachment of property no particulars were given, it was explicit enough as to execution by arrest and imprisonment of the judgment-debtor. But it is not necessary to rest our decision on that ground, as the application was clearly to take a step-in-aid of execution. This was decided by a Bench of this Court in *Gopal Ohunder Manna v. Gosain Das Kalay* (1). There was a reference to a

Full Bench in that case, but on another point which does not here arise. It was suggested that the change in the wording of section 248 of the Code of Civil Procedure, 1882, which was made on its re-enactment as Order XXI, rule 22 would make that decision inapplicable to the present case. It is true that there has been a slight change and the rule now begins "where an application for execution is made," etc. But while the rule prescribes that in certain cases a notice shall issue, it does not forbid the issue of such a notice in cases where it is necessary but where no application for execution has in fact been made. It cannot, therefore, be said that the application for such a notice was not an application in accordance with law. The case thus falls both under clause 5 and also under clause 6 of Article 182 of Schedule I to the Limitation Act. In this view of the case the decree-holder's present application is within time, and the appeal must be dismissed with costs. Hearing-fee 5 gold mohurs.

WALMSLEY, J.—I agree that this appeal should be dismissed. The view I take is that expressed by my learned brother in the first part of his judgment, namely, that the application for execution filed on March 17th, 1913, was of such a nature as to save the decree from being barred by limitation. Beyond that it is unnecessary to go for the purpose of this appeal, and I wish to refrain from expressing an opinion upon the question whether a decree-holder can keep his decree alive by asking for a notice to be issued under Order XXI, rule 22, without presenting an application containing the details required by rule 11.

Appeal dismissed.

(1) 25 C. 594 at p. 599; 2 C. W. N. 556.

IKHLAQ ALI v. BUDH SEN.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 157 OF 1918.

December 11, 1919.

Present:—Mr. Justice Tudball.

Syed IKHLAQ ALI—DEFENDANT—

APPLICANT

versus

Lala BUDH SEN—PLAINTIFF—OPPOSITE
PARTY.

U. P. Honorary Munsifs Act (II of 1896), s. 8 (2), proviso—Civil Procedure Code (Act V of 1908), s. 24 (4)—Small cause transferred to Court of Honorary Munsif—Decree, whether appealable.

Where an Honorary Munsif acting under the U. P. Honorary Munsifs Act decides a suit transferred to him from a Court of Small Causes, he cannot be deemed to be a Court of Small Causes and his decree is appealable.

Civil revision against the order of the Subordinate Judge, Budaun, dated the 16th February 1916.

Mr. S. A. Haidar, for the Applicant.

Mr. Ibn-i-Ahmad, for the Opposite Party.

JUDGMENT.—Second Appeal No. 1549 of 1917 and Revision No. 157 of 1918, which arise out of the same matter, are heard and determined by me together. The facts must be briefly stated. The respondent Budh Sen brought a suit for contribution against the opposite party in the Court of Small Causes, that of the Munsif of East Budaun. He sought to recover contribution in that he had paid the whole costs of a former suit which had been decreed against both him and the present appellant IkhlAQ Ali. That suit was transferred to the Court of the Honorary Munsif under section 8, sub-section 2, of the Honorary Munsifs Act, II of 1896. The Honorary Munsif dismissed the suit. An appeal was preferred and transferred apparently to the Subordinate Judge for decision. The Subordinate Judge on appeal decreed the suit on the 16th February 1916. In execution of that decree a house was sold and purchased by some third party on the 11th of January 1917. When the sale came up for confirmation, the judgment-debtor raised an objection to the confirmation of sale on the ground that the Subordinate Judge had no jurisdiction to hear and decide the appeal, in that the suit was one of a small cause nature and that no appeal would lie; therefore, the decree passed by the Subordinate Judge was a nullity as having been passed without

jurisdiction. He, therefore, asked that the sale should not be confirmed. The Munsif acceded to his request and refused to confirm the sale. An appeal was preferred to the District Judge, who on the 30th of May 1917 set aside the order of the Munsif and directed that the sale be confirmed. IkhlAQ Ali came here on appeal and his appeal is No. 1549 of 1917. A preliminary objection was taken that no second appeal lay to this Court, the suit being a suit (by reason of its value) of a small cause nature. I thereupon allowed the appellant to file a revision against the original decree passed by the Subordinate Judge on appeal, the ground taken being that the Subordinate Judge had no jurisdiction to hear the appeal. The point taken was that because the suit was first instituted in the Court of Small Causes and was transferred thence to the Court of the Honorary Munsif, the Honorary Munsif must be deemed to have decided the suit as a Small Cause Court in view of the last paragraph of section 24 of the present Civil Procedure Code and section 25 of the old Civil Procedure Code of 1882. There is a complete answer to this in section 8 of the Honorary Munsifs Act, in the proviso to clause 2 of that section, which runs thus: "provided that the last paragraph of section 25 of the Code of Civil Procedure shall not be deemed applicable to cases so transferred from Courts of Small Causes." The law has distinctly laid down that when an Honorary Munsif acting under the Act decides a suit transferred to his Court from a Court of Small Causes, he shall not be deemed to be a Court of Small Causes. His decree, therefore, will be appealable and the Subordinate Judge had jurisdiction to hear the appeal. The learned District Judge's decision, therefore, on the appeal was a correction, though perhaps not for the reasons given. The result, therefore, is that the revision must fail and is dismissed with costs.

The appeal also will fail and is equally dismissed with costs.

Revision dismissed.

PRABH DIAL v. SHAMBHU NATH.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 79 OF 1919.

June 26, 1919.

Present:—Mr. Justice Scott-Smith.

PRABH DIAL—PLAINTIFF—PETITIONER

versus

SHAMBHU NATH—DEFENDANT—

RESPONDENT.

Contract Act (IX of 1872), s. 25 (2)—Bond, suit on—Consideration received during minority—Suit, whether maintainable—Interest, whether can be recovered—Provincial Small Cause Courts Act (IX of 1887), s. 25—Revision—High Court, power of interference of, extent of.

An agreement made by a person of full age to compensate a promisee who has already voluntarily done something for the promisor at a time when the promisor was a minor, falls within the terms of section 25, clause 2, of the Contract Act and is enforceable, but no interest can be recovered upon such an agreement. [p. 436, col. 2.]

Karam Chand v. Musammatt Basant Kaur, 11 Ind. Cas. 321; 31 P. R. 1911; 192 P. L. R. 1911; 236 P. W. R. 1911, followed.

Under section 25 of the Provincial Small Cause Courts Act the High Court has wider powers of interference than under section 115 of the Civil Procedure Code. [p. 436, col. 2.]

Petition, under section 25 of Act IX of 1887, for revision of the decree of the Judge, Small Cause Court, Delhi, dated the 5th December 1918, dismissing the claim.

Lala Jagan Nath, for the Petitioner.

Mr. Badri Nath Kapur, for the Respondent

JUDGMENT.—This is an application under section 25 of the Small Cause Courts Act for revision of the order of the Judge, Small Cause Court, Delhi, dismissing the plaintiff's suit for Rs. 330. The parties are brothers and the suit is based upon a bond for Rs. 200 executed by the defendant in favour of the plaintiff on the 18th February 1913. The consideration is stated to be expenses incurred on the marriage of the defendant, which took place $1\frac{1}{2}$ years before the execution of the bond. At the time when it was executed the defendant was some 18 years and 9 months of age, but at the time when the debt was incurred he was a minor. The lower Court was of opinion that the defendant could not incur any debt while he was a minor and that, therefore, at the time when the bond was executed there was no debt which the plaintiff could have recovered and the bond was

consequently without consideration. The lower Court has omitted to consider section 25 (2) of the Indian Contract Act, which says that an agreement made without consideration is void unless it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor. It is contended on behalf of the petitioner that the bond was a promise by the defendant to compensate the plaintiff who had previously voluntarily done something for the defendant, i. e., had spent money on getting him married. In *Karam Chand v. Musammatt Basant Kaur* (1) it was held that an agreement made by a person of full age to compensate wholly or in part a promisee who had already voluntarily done something for the promisor even at a time when the promisor was a minor, did fall within the terms of section 25, clause (2), of the Indian Contract Act. Having regard to this ruling the decision of the lower Court that the bond is void is erroneous. Mr. Kapur on behalf of the respondent cited *Ramgopal Jhoonjhoonwalla v. Joharmall Khemka* (2) and supported the proposition that an error by the Small Cause Court on a question of limitation does not justify the interference of the High Court under section 115, Civil Procedure Code. That ruling was, however, dissented from in the Punjab Chief Court case of *Sarab Dial-Ishar Dass v. Devi Ditta Mall-Gordhan-Das* (3). Moreover the present application for revision is under section 25 of the Small Cause Courts Act, under which a Court has wider powers than under section 115, Civil Procedure Code. I am, therefore, of opinion that the High Court has full power to interfere on the revision side with the order of the lower Court in the present case.

It is, however, contended by Mr. Kapur that the lower Court has found that the consideration for the bond is not proved. This, I think, was merely a remark made by the Court at the end of its judgment without fully appreciating the evidence on

(1) 11 Ind. Cas. 321; 31 P. R. 1911; 192 P. L. R. 1911; 236 P. W. R. 1911.

(2) 15 Ind. Cas. 547; 39 C. 473.

(3) 46 Ind. Cas. 541; 59 P. L. R. 1918; 139 P. W. R. 1918.

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the record. The Court really did not have to go into the question of consideration at all, as it was of opinion that the suit failed on another ground. The defendant does not appear to have been asked whether he executed the bond or not, but he denied having borrowed any money. At the same time he admitted that his brother had spent money on getting him married. The evidence of the plaintiff himself and of Ganga Sahai, the writer of the bond, is sufficient to show that the defendant voluntarily executed the bond after admitting receipt of the consideration. Under these circumstances I consider that the consideration is sufficiently proved. At the same time I do not think that the plaintiff is entitled to any interest. He is merely entitled to be compensated for the money actually spent by him and to nothing further [see the remarks in *Karam Ohand v. Musammatt Bisant Kaur* (1).]

I, therefore, allow the revision and setting aside the order of the lower Court give the plaintiff a decree for Rs. 200 against the defendant with costs in proportion in both Courts.

Revision allowed.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 37 of 1919.

November 24, 1919.

Present:—Mr. Justice Lindsay.

BISHUN PADU HALDAR—DEFENDANT—
APPLICANT

versus

FIRM MESSRS. CHANDI PRASAD & Co.,—
PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), s. 7—Acceptance, what amounts to—Proposal to purchase goods accompanied by price—Price credited by seller to purchaser's account—Acceptance, whether complete.

The acceptance of a proposal must be absolute and unqualified and a person making a proposal cannot impose on the party to whom it is addressed, the obligation to refuse it under the penalty of imputed assent, or attach to his silence the legal result that he must be deemed to have accepted it, but an acceptance may be made without express communication. [p. 438, col. 2.]

A written proposal for the purchase of goods, accompanied by a sum of money as the price thereof, conveyed by a purchaser to the seller and received by the latter, who credits the money so received to his account, amounts to a definite acceptance of the proposal and renders the seller liable in an action for damages in case of his failure to carry out the contract. [p. 438, col. 2.]

Civil revision against the order of the Small Cause Court Judge, Moradabad, dated the 26th November 1918.

Mr. U. S. Bajpai, for the Appellant.

Mr. R. K. Malviya, for the Respondents.

JUDGMENT.—A suit was brought by the plaintiffs, a firm of chemists in Moradabad, against the defendants, also a firm of chemists carrying on a business in Benares. The amount in dispute was Rs. 61-10-0 and this sum was claimed by the plaintiffs on account of an alleged breach of contract. The main defence to the suit was that there was no contract between the parties. The lower Court found in favour of the plaintiffs and decreed the claim. There were several other points debated in the Court below but here I am concerned only with the question whether or not there was a binding contract between the parties.

The facts may be briefly stated as follows:—On the 7th of February 1918 the plaintiffs wrote to the defendants enquiring the price at which they could supply cocaine. The defendants replied on the 13th of February 1918 informing the plaintiffs that the rate for cocaine was Rs. 20 per ounce "without engagement." The meaning of this latter expression is that as

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the market rate of cocaine was varying from day to day, the defendants were unable to quote any definite rate for the article.

On the 14th of February the plaintiffs sent to the defendants a money order for Rs. 17.8. On the coupon attached to the money order the plaintiffs wrote and asked that the defendants should set aside for them a certain amount of cocaine, the price of which was represented by Rs. 17.8.0. It is admitted that the price was calculated on the quotation of Rs. 20 per ounce which had been given by the defendants. It is proved that the money sent by this money order was received by the defendants on the 16th of February 1918; an acknowledgment of the receipt reached the plaintiffs in due course. It was stated at the time the order was given that the plaintiffs were applying to the Collector of Moradabad for a permit to import the cocaine and the defendants were asked to delay the sending of the parcel until the permit had been obtained.

On the 23rd of February the plaintiffs sent the permit which they obtained from the Collector. On the 4th of March 1918 the defendants intimated to the plaintiffs that they were unable to supply cocaine at Rs. 20 per ounce. They intimated that the price had risen and asked the plaintiffs what they were prepared to do. The plaintiffs apparently took up the position that there was a contract for the supply of the article at Rs. 20 per ounce and they wrote accordingly. Later on, the defendants returned the money to the plaintiffs, who refused to receive it; the result has been this suit for breach of contract, the damages claimed being on the difference between the alleged contract rate and the market price of the day.

As I have already said, the Judge of the Court below took the view that there was a binding contract between the parties. He treated the order of the plaintiffs, which was sent to the defendants on the 14th of February 1918, as a proposal and was of opinion that that proposal had been accepted by the defendants by their conduct. The learned Judge pointed out that the defendants had accepted the money and had kept silent for a considerable period. In his judgment, therefore, the defendants had bound themselves by their conduct and their refusal to deliver the cocaine at the rate

quoted in their first letter amounted to a breach of contract.

The argument here is that there was no acceptance of the plaintiffs' offer. It was said that the mere neglect of the defendants to give a speedy answer to the communication sent by the plaintiffs on the 14th of February 1918 could not have the result of placing the defendants under a legal obligation. If there had been nothing more in the case than the communication of a proposal by the plaintiffs followed by silence on the part of the defendants, this argument would have been sound enough. On this point I may refer to a judgment of the Bombay High Court, *Haji Mahomed Haji Jiva v. E. Spinner* (1). At page 524 of the report Jenkins, C. J., observes: "I take it to be clear that a person making a proposal cannot impose on the party to whom it is addressed, the obligation to refuse it under the penalty of imputed assent, or attach to his silence the legal result that he must be deemed to have accepted it."

He referred in support of this dictum to an English decision, *Felthouse v. Bindley* (2). As is observed in the commentary to section 7 of the Indian Contract Act edited by Pollock and D. F. Mulla, "Neglect to answer a business offer is certainly not, as a rule, prudent or laudable; still there is no legal duty to answer at all".

The facts of this case, however, are different, for we find that not merely was there a written proposal conveyed from the plaintiffs to the defendants but the plaintiffs along with the written order sent a sum of money which the defendants accepted.

In these circumstances, I think, it was open to the Court below to find that there was an acceptance of the plaintiffs' proposal. The acceptance of a proposal must be absolute and unqualified, but it is also well established that an acceptance may be made without express communication. Here it seems to me the Judge of the Court below could reasonably find that the conduct of the defendants in receiving this sum of money and crediting it to their account amounted to a definite acceptance of the plaintiffs' proposal. For these reasons I

(1) 24 B. 510; 2 Bom. L. R. 691.

(2) (1862) 6 L. T. (N. S.) 157; 11 C. B. (N. S.) 86; 31 L. J. C. P. 204; 10 W. R. 423; 142 E. R. 1037; 132 R. R. 784.

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am unable to hold in favour of the applicants that the decision of the Court below is not in accordance with law. The application fails accordingly and is dismissed with costs to the opposite party, including in this Court fees on the higher scale.

Application dismissed.

CALCUTTA HIGH COURT.

APPLICATION FOR REVIEW IN A SMALL CAUSE COURT SUIT.

March 28, 1919.

Present :—Mr. Justice Rankin.

C. D. M. HINDLEY—PETITIONER

versus

JOYNARAIN MARWARI—RESPONDENT.

Provident Fund Act (IX of 1897), s. 4—Provident fund deposit, whether can be attached in execution of decree—Civil Procedure Code (Act V of 1908), s. 115—Revision—"Acting illegally", meaning of—Execution of decree—Order directing attachment of property not liable to attachment, legality of.

Whether an employee is in service or out of service, whether he be alive or dead, his share of the provident fund is unattachable in the hands of the provident institution under the provisions of section 4 of the Provident Fund Act. [p. 440, col. 2.]

Sub-section (2) of section 4 of the Provident Fund Act does not in any way cut down sub-section (1) of the Act. It ensures that money payable to a widow or child as such directly shall not, even in their hands, be treated as assets of the deceased depositor's estate. The only light thrown by the second sub-section upon the first is that the first did not go far enough. [p. 440, col. 2; p. 441, col. 1.]

Where in spite of statutory provision to the contrary, a certain sum of money held in deposit by a provident institution was attached in execution of a decree:

Held, that in passing the order of attachment the execution Court had "acted illegally" within the meaning of section 115 clause (c) of the Code of Civil Procedure. [p. 442, col. 2.]

All cases of acting illegally are cases of error in law, though the converse is not always true. Any error in law which amounts to a usurpation of authority in the act done by a Court comes within clause (c) if it is not already within clause (a) of section 115 of the Code of Civil Procedure. In the broad sense of the word no Court ever has jurisdiction to act illegally, though it may have jurisdiction to make an order which in fact or in law is wrong. [p. 441, cols. 1 & 2.]

Sir Binod Mitter (with him Mr. Langford James), for the Petitioner,

Mr. L. P. E. Pugh (with him Mr. A. K. Roy), for the Respondent.

JUDGMENT.—In this case I am asked under section 115 of the Civil Procedure Code to set aside an order made by the Small Cause Court on 23rd November 1918. That order is as follows: "Payable in two weeks. In default execution to issue."

The action was tried in the Court of the 2nd Munsif at Monghyr. The plaintiffs in 1914 lent Rs. 200 on a promissory note to the defendant's son, who was an employee of the E. I. R. and who died on the 27th September 1916 leaving neither widow nor children. So far as the parties know, he left no Will and neither Probate nor Letters of Administration have been granted to anyone in respect of his estate. The plaintiffs in 1917 applied as creditors to the District Judge at Monghyr for a grant of administration, but their application was dismissed. In these circumstances the action was brought against the defendant, apparently as being "the heir at law and legal representative" of his son. As appears by the Munsif's decree of 29th January 1918 the suit was decreed with costs. There is nothing on the face of the decree to show that it is not an ordinary personal judgment against the father or to limit execution thereon to the property of the deceased. Both before and during the trial the plaintiffs and defendant seem to have litigated between themselves the question whether the money standing to the credit of the deceased with the Provident Institution of the E. I. R. was attachable for the debt in view of section 4 of Act IX of 1897 as amended by Act IV of 1903. The Munsif and on appeal the District Judge both held that it was attachable, for reasons which I am unable to appreciate.

On the 18th July 1919 the Munsif's decree was transmitted for execution to the Small Cause Court at Calcutta. This Court has treated the decree as one against the deceased's estate, which is at all events in substance correct. On 1st August a prohibitory order, in the form specified by Order XXI, rule 52, of the Code issued to the Manager of the Provident Institution, as being a public officer, and not to the Trustees who are, I think, the only proper parties. It was returned with a reference

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to the Act. After some correspondence on the 23rd September a notice was issued from the Court to the manager requiring him personally to appear and show cause "why the money attached in his hands by a prohibitory order, dated 1st August 1918, should not be deposited in Court or in default why execution should not be issued against him." The matter ultimately came before a Judge on the 22nd November 1918 and as to what happened then there is no dispute between the parties. The respective attorneys argued the question whether Provident Fund moneys were not attachable in view of the Acts above mentioned in the case of a depositor who had died leaving neither widow nor child. No evidence was taken: nor indeed was there need of any, in view of the entire absence of any intention to dispute the facts about the nature of the institution or of the fund in question. No issue was directed. The subject matter of the attachment was defined by the notices "certain money now in your hands, viz., Rs. 1,182-2 out of the Provident Fund money due to the deceased H. W. Lakin." The learned Judge has given no statement of his reasons, but he has held this money to have been validly attached by the notice of the 1st August and has ordered execution—presumably against the manager, possibly against the institution—to issue in default of payment.

Now, in view of these three decisions, it may be well to state shortly the purpose and intention of the Acts. These Acts make provision in the interests of certain large classes of employees for a scheme of compulsory and to a limited extent voluntary thrift. Part of the employee's wages is impounded, whether he likes it or not: within narrow limits he has an option to contribute more: the employer has on his side to add a contribution: and these sums together with interest, profits or other increments make a total fund of which a defined proportion is held on the individual account of each employee. The Legislature is dealing with people who are poor, with people who are being compelled, and with such people in very large numbers. Its intention is that such people shall in case of necessity be able to afford a passage home to Europe, in case of retirement have something to live on, in case of death

have something to leave. It is not ignorant that if a railway has a hundred thousand employees, the temptation to run into debt or to charge or anticipate his share will occur at some moment of his lifetime to ninety thousand of them at least. Neither the railway company nor the institution is to have its money wasted in large quantities upon the management expenses. There is to be no standing army of attorneys and attorneys' clerks attending to notices and orders from all the Courts in India, settling priorities among competing claims, paying the money into Court as soon as it comes in and acting towards creditors and mortgagees as a providence with costs cut of the fund. By rules made for this institution under the Act, when one employee dies his share if small is to be summarily and directly distributed according to special rules which brush aside the ordinary law as to Wills or intestate succession. If his share is large it is payable to his executor or administrator and to him only on production of his grant: the burden of a due administration is thus put upon the proper shoulders. Whether the employee is in the service or out of the service, whether he be alive or dead, his share is unattachable in the hands of the institution. This is the very basis of the scheme. Section 4 (1) of the Amended Act has been judicially construed in *Veerchand v. B. E. & O. I. Ry. Co.* (1) and *Seth Manna Lal v. Gainsford* (2). It means what it says and is no hardship upon anybody. The plaintiffs' point ever since their action was started before the Munsif, at the trial, on appeal before the District Judge, before me and most probably in the Small Cause Court rests upon sub-section (2) of section 4. That has got nothing to do with this case and in no way cuts down sub-section (1). It is a further provision directed to a wholly different matter. It ensures that money payable to a widow or child as such directly shall not, even in their hands, be treated as assets of the deceased's estate. Nay more; the Legislature knowing that this might be rendered ineffective by getting the widow or child to incur or

(1) 29 B. 259; 6 Bom. L. R. 921.

(2) 35 C. 641; 12 C. W. N. 683.

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to join in incurring the debt, provides (for the more complete discouragement of creditors) that such money, although in the hands of the widow or the child, shall not be made to answer for their own debts if incurred in the lifetime of the deceased. The only light thrown by the second subsection upon the first is that the first did not go far enough.

The result is that, in my view, the order of 23rd November 1918 is one which purports to attach that which the Legislature has forbidden any Court to touch.

I have now to see whether this comes within the scope of section 115 of the Code. It is quite impossible to suggest that the learned Judge held an inquiry upon evidence as to any disputed facts or that his error consisted in his holding wrong'y upon any matter other than his own powers. What has happened is that there is a prohibition in the Statute, that he has failed to see it, and that he has done what the Statute forbids. Whether he has misread the definition of "compulsory deposit" or has wrongly imported some qualification into sub-section (1) of section 4—and these are the only alternatives—his error is the same in nature for the present purpose. In the face of an objection that he had no power to do so, he has done what the Statute forbids, not being under any misapprehension as to the facts: he has done intentionally an act of the very class prohibited; and he has done it solely because the words of the Statute failed to convey the (prohibition to his mind.

A review of the cases upon this section leads me to think that whether or not this case comes within clause (a) it can only escape this clause by falling within clause (c). It comes very close indeed to what has been frequently instanced as a typical case under clause (c)—execution levied upon the tools of an artisan contrary to section 40 of the Code: *Badami Kuar v. Dinu Rai* (3), *Dhan Singh v. Basant Singh* (4), *Sew Bux v. Shib Ohunder Sen* (5). What the Small Cause Court has done here is, I think, a long way

further on the wrong side of the border line that divides mere error in law from acting illegally than was the order set aside by Petheram, C. J., and Ameer Ali, J., in *Sheoraj Nandan Singh v. Gopal Suran Narayan Singh* (6). All cases of acting illegally are cases of error in law, though the converse is very far from true. The element which must be present in the nature of the error to give rise to the power of revision has never been very precisely defined, but I think it clear upon the Statute, and not really doubted in the decided cases, that any error in law which amounts to a usurpation of authority in the act done by the Court comes within clause (c) if it is not already within clause (a). In the broad sense of the word no Court ever has jurisdiction to act illegally, though it may have jurisdiction to make an order which in fact or in law is wrong. I think that the Legislature, when in 1879 it added the last clause, can only have meant to obviate unprofitable nicety in the interpretation of the word "jurisdiction" in the section as it originally stood. If the *dictum* of Woodroffe, J., in *Shew Prosad v. Ram Ohunder* (7) be right as to the two meanings of the word and as to the narrower meaning having been intended, it is, I think, an irresistible conclusion that "the legal authority of a Court to do certain things, namely, to make a particular order in a case over which it has jurisdiction in the sense stated," is the very matter to which the first part of the newer clause is addressed. If a mere irregularity is to be corrected provided only that it is material (as the Statute plainly says), it is indeed strange that excess of authority in matters of substance should be left without remedy altogether. It was argued at the bar on the strength of the judgment given by Jenkins, C. J., in the case last cited that the words "acted illegally" refer only to matters of procedure. This is, I think, a misunderstanding. Save in extreme cases such matters come within the last words of clause (c). The word "procedure" is used by the Chief Justice as covering all three clauses of the section—a clear though certainly an extended sense. The

(3) 8 A. 111 at p. 115; A. W. N. (1886) 28.

(4) 8 A. 519 at p. 529; A. W. N. (1886) 182.

(5) 13 C. 225 at p. 231.

(6) 18 C. 290.

(7) 23 Ind. Cas. 977; 41 C. 323 at p. 339;

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phrases are "faults of procedure," "error of law and not of procedure," and I think he is adverting to the general scope of the section as a whole in short and comprehensive phrase. He uses the word "procedure" as the keynote of the section, just as the Privy Council in *Balakrishna Udayar v. Vasudeva Aiyar* (8) use the word "jurisdiction." In his judgment the word "procedure" does not mean merely the method of conducting a case, and in the Privy Council's judgment the word "jurisdiction" does not mean merely propriety of forum.

In India the law, both substantive and adjective, has been codified in so many of its branches and positive rule covers now so many matters, that it is peculiarly easy to represent errors of law as matter of jurisdiction. Despite the discretionary nature of the revisional powers, the decisions under section 115 show a lively and well-founded terror lest this Court should be inundated with mere matters of appeal. From time to time, but not without recurring checks, the construction of this section has drifted towards the view which the respondent here contends for; but it has never, I think, arrived at it. Logically put that view must be:—that clause (a) refers only to the propriety of the forum; that clause (b) applies only where a case has not been entertained for decision at all, but has been wrongly dismissed *in limine*; and that clause (c) refers to errors in the method or manner of the trial. In my opinion this construction, when narrowly looked at, is found to be doubtful and in conflict with a respectable body of authority at every point. Taken broadly, I think that it eviscerates rather than interprets the section. It gets rid of difficulty but by a process of jettison. It is plain enough that revision is not appeal, but there is no necessity to throw away the baby in emptying the bath. Jurisdiction to try a suit does not mean jurisdiction to anything whatever by order made in the suit: if it did, an exception for material errors in procedure (strictly so called) would be almost ludicrous. In the present case the applicant only came into this

suit at all upon an application against him which, fairly read, was an invitation to the Court to do what the Statute denies the power to do. In substance the Legislature has put these funds beyond the reach of the Court below and the Court has stepped out of its sphere in purporting to levy on them. This error is a usurpation, an offence against public order: in the old language a contempt of the Crown, in the language of the section "acting illegally."

I have now to consider the question of discretion in this particular case. Now, the first ground that was given, why I should not exercise my powers, assuming the case to be within the section, is that from the point of view of these creditors, the error was a mere error of procedure in a large sense. I am of opinion that as far as that is concerned, it would be entirely wrong of me to refuse to exercise my discretion on any such ground. From the point of view of the provident institution it is a matter of great importance: the Act regards it as a matter of great importance; it has been a matter of dispute from the very commencement of these proceedings, and, if the plaintiff fails upon it, it does not seem to me that I ought to regard it as a trivial matter or as a mere matter of form.

The next ground that was given is that there has been no application for a new trial in the Small Cause Court. I am satisfied that the right to make such application is at least doubtful. After all there have been decisions by three Judges upon this matter, and I think it would be very hard if the proper remedy were refused to the present applicants on the ground that they had not attempted to get a fourth. In addition the application here brought was an application against the manager, that is to say, in such a way that it leaves it very doubtful whether if this order were to be allowed to stand, the trustees as representing the institution would not, by a suit such as they have instituted in this Court, be able to render that order infructuous. It seems to me, looking at the matter as a whole, that there is no reason whatever why the remedy asked for should not be given, and the order I shall make is that the decree of the Small Cause Court be set aside with the costs of this Rule and the

(8) 40 Ind. Cas. 650; 40 M. 793 at p. 799; 15 A. L. J. 645; 2 P. L. W. 101; 33 M. L. J. 69; 26 C. L. J. 143; 19 Bom. L. R. 715; (1917) M. W. N. 623; 6 L. W. 501; 22 C. W. N. 50; 11 Bur. L. T. 48; 44 I. A. 261 (P. C.).

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matter remitted back to the Small Cause Court to proceed according to law.

As regards the motion and the action which were tried and argued together along with the Rule under section 115, it is not now necessary to go into the technicalities or the merits of the action at all. As I am setting aside the order under section 115, I shall make no order on the motion and order that the action be dismissed.

The question arises as to what to do with the costs of the motion and the action. In my opinion, the correct order to make as regards costs of the motion and action is, that the trustees of the provident institution must pay to the defendants in the action any costs that have been incurred by them extra to the costs which they required to incur in connection with the Rule.

The result, therefore, will be that the costs of the Rule must be paid by the respondents—that is the plaintiffs in the original action before the Munsif—to the manager, but that the trustees must pay to them the costs which they have incurred as defendants in the action and as respondents to the motion, in so far as those costs are additional to the costs which they have incurred as respondents in connection with the Rule.

Rule made absolute.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 40 of 1919.

November 22, 1919.

Present:—Mr. Justice Lindsay.

LACHHMI NARAIN—PETITIONER

versus

SHEO NATH PANDEY AND OTHERS—

OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 104 (f), Sch. II, paras. 15, 21—Arbitration, reference to—Arbitrator deciding dispute upon his own knowledge—Award, validity of—Order directing award to be filed—Appeal, whether lies—Decree following upon order, effect of.

An order directing an award to be filed is appealable. The fact that a decree is drawn up in

terms of the award has not the effect of taking away the right of appeal against the order. [p. 443, col. 2; p. 444, col. 1.]

Where, in the absence of any agreement that an arbitrator should decide a dispute upon his own knowledge of the facts and without taking any evidence, an arbitrator does so decide a dispute, his act is fatal to the award on the ground of misconduct. [p. 444, col. 1.]

Civil revision from an order of the Subordinate Judge, Mirzapur, dated the 12th December 1918.

Mr. S. D. Sinha, for the Applicant.

Dr. S. N. Sen, for the Opposite Parties.

JUDGMENT.—The application has reference to an order passed in appeal in certain arbitration proceedings. It appears that the plaintiff-petitioner applied to the Court of the Munsif to have an award made a rule of Court. This application was made under paragraph 20 of the Second Schedule to the Code of Civil Procedure. The Munsif followed the procedure laid down in this paragraph and eventually wrote an order directing the award to be filed, and thereafter a decree was prepared on the basis of the award in accordance with the provisions of paragraph 21 (2) of the Schedule. The defendants went in appeal to the lower Appellate Court against the order directing the filing of the award. The lower Appellate Court entertained the appeal, set aside the order of the Court of first instance and directed that the application for the filing of the award should be dismissed. The plaintiff now comes here in revision, and the first ground taken is that the Court below acted without jurisdiction in entertaining the appeal. The learned Counsel for the petitioner had to admit that section 104 (f) of the Code of Civil Procedure clearly lays down that an appeal does lie against an order filing or refusing to file an award in an arbitration made without the intervention of the Court. But according to the ground taken in the first paragraph of the memorandum no appeal lay because the order of the first Court directing the award to be filed had become merged in a decree, and admittedly no appeal lies against the decree. It is only necessary to say that the law and the cases seem to be against this contention of the applicant, and I am referred in this connection to a case reported as *Soudamini Ghose v. Gopal Ohandra Ghose* (1).

(1) 28 Ind. Cas. 557; 19 C. W. N. 948; 21 C. L. J. 273.

THE RHEINFELS.

For a further authority see *Hari Kunwar v. Lakhmi Ram Jani* (2). At page 488* of the report the Judges, dealing with this very matter, point out that the bare fact that a decree has been drawn up after the passing of the order cannot take away the right of appeal against the order.

The first ground, therefore, fails. The other point which has been argued is that the Court below acted with material irregularity in discussing certain pleas of misconduct which, it is said, were not raised in the Court of first instance. It is true that in the first Court the defendants, by way of answer to the application, made general allegations of misconduct against the arbitrator. However this may be, it is certain that one definite allegation of misconduct was raised in the first Court, namely, that the arbitrator had decided the case of his own knowledge and without taking any evidence from the parties. The learned Judge of the Court below finds that this was the case, and accordingly he has held that the arbitration is null and void. It is argued here that the mere fact that the arbitrator decided the case of his own knowledge and without taking any evidence does not amount to misconduct. This matter has to be determined in the light of the language of the agreement by which the dispute was referred to arbitration. If the parties agreed that the arbitrator should decide the dispute between them on his own knowledge, and further agreed that there was no need for him to take any evidence, no misconduct can be disputed. But there is nothing in the language of the agreement to suggest that it was the intention of the parties that the arbitrator should act solely upon his own knowledge of the facts. That he has done so is fatal to the award, in which he expressly says that he has decided the case upon the basis of his own knowledge. I am satisfied, therefore, that the order of the Court below is correct, and there is no ground on which I can interfere. The application is dismissed with costs.

Application dismissed.

(2) 35 Ind. Cas. 833; 14 A. L. J. 481; 38 A. 380.

*Page of 14 A. L. J.—Ed.

BOMBAY HIGH COURT.

CAUSE No. 1 of 1914.

August 21, 1919.

Present:—Mr. Justice Marten.

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Hague Convention No. VI of 1907, Arts. 1, 2, 3—Art. 3, whether applicable to German ships—"Port" in Arts. 1 and 2, meaning of.

Article 3 of the 6th Hague Convention does not apply to German ships, as Germany did not agree to this particular article. [p. 447, col. 1.]

The word "port" in Articles 1 and 2 of the 6th Hague Convention means a place where ships are in the habit of coming for the purpose of loading or unloading, embarking or disembarking. [p. 446, col. 1.]

FACTS appear from the following judgment, dated September 4, 1914, of Macleod, J.:—"The *SS. Rheinfels*, being an enemy vessel and having entered the Port of Bombay after a declaration of war, is to be detained until further order and to be handed over to the Director, Royal Indian Marine, on his requisition; such requisition will be subject to any claim for payment of compensation between Government and the claimants made against the Crown, which question will have to be decided after the war.

Liberty reserved to apply for the confiscation of the vessel.

Any application for cargo not delivered can be dealt in the same way as cargo claimed from the *SS. Warturm*."

In 1919 the Crown applied for condemnation of the ship as prize.

Mr. *Bahadurji* (Acting Advocate-General) for the Crown.

JUDGMENT.—This is an application for condemnation of the German steamship *Rheinfels*, her freight and stores and such of her cargo as has not been delivered. She arrived in the vicinity of Bombay harbour as long ago as the 7th August 1914 in the morning. She belonged to the Hansa line, her gross tonnage was 5,512 tons, and her speed according to her officers was 10½ knots. She was fitted with wireless apparatus, and was bound for Bombay, her last port of call having been Aden, some 1,650 miles away. War between England and Germany began at 1 P. M. on 4th August. She, therefore, left her last port before the outbreak of war.

Under an order of this Court of the 4th September 1914, an order was made in somewhat similar terms to that in *The*

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Ohile (1). It pronounced that the steamship *Rheinfels* belonged at the time of the capture and seizure thereof to enemies of the Crown, and it ordered the detention of the ship and all her store until further order. The ship herself was handed over to the Director, Royal Indian Marine, on behalf of the Secretary of State for India in Council. There was liberty to apply for the confiscation and condemnation of the ship, her stores and cargo.

It is under the liberty to apply in this order that the present application, which is by way of motion, is now made. At the date when the order of the 4th September 1914 was made, the old Prize Court Rules, which date, I suppose, from the Napoleonic Wars, were still in force. It was not till the 6th November 1914 that by a Notification of the Governor-General in Council the present English Prize Court Rules were brought into operation in India. By the English Prize Courts (Procedure) Act, 1914, which enabled these Rules to be made, there was an express provision dealing with cases where Prize Court proceedings had already begun before the Act came into force. One alternative was provided by section 1, subsection 2 (b), viz., that the cause might be continued in accordance with the new Rules subject to such adaptations as the Court might deem necessary to make them applicable to the case.

Accordingly by an order of this Court, dated the 31st March 1914, it was ordered that this cause be continued in accordance with the Prize Court Rules (1914) subject to such adaptations as the Court has deemed or may deem necessary in order to make them applicable to this cause. And the order went on to provide that this cause be set down for further hearing on a date which was subsequently altered by another order of the 29th July 1919.

The reason why the Crown is now asking for condemnation of the ship is this: that it is now ascertained, so it is said, that the ship was not captured in the port or harbour of Bombay, as was the evidence before this Court in September 1914, but was captured outside that port, if one uses the word "port" in the sense in which

it is used in the sixth Hague Convention. Consequently, it is said, on behalf of the Crown that Articles 1 and 2 of the Hague Convention do not apply.

The second and alternative ground on which the application is made is this, that having regard to the wireless messages which were sent from or received at the Government station, Butcher Island, Bombay, and from other circumstances, the Court ought to infer that the *Rheinfels* was aware of the outbreak of hostilities between England and Germany before she entered the port of Bombay, and that consequently she was not entitled to the protection given by Articles 1 and 2 of the Hague Convention, even if she did enter the port.

I think it is still open to the Crown to take these points despite the order of 4th September 1914. That order only finally decided that the *Rheinfels* was a German ship. It left open the question whether she could be condemned as prize.

Taking then the point as to the place of capture first, I think it established that this ship was stopped and boarded by the British military authorities, that is to say, by the Chief Examining Officer, Commander Shearme, R.I.M., and two subordinates some three miles seawards from the Prongslight-house. This light-house is at the end of a reef which juts out into the open sea for about half a mile South or south-west from Colaba Point. It must not be confused with Colaba light-house which is on the point itself. The officers came in a launch from the tug *Rose*, which was then engaged in war examination purposes under military orders. On boarding the ship, these officers exercised rights, which would not, I think, have been justified in time of peace. Amongst other things, they entered the wireless cabin on the ship, they took possession of the books, they turned the wireless operators out of the cabin and then locked it up. Further, the ship then proceeded with Commander Shearme on board, and escorted by the launch, to an anchorage south of what is known as the Middle Ground Shoal, where an armed party was put on board.

It is also established, in my opinion, that even this anchorage on the south

(1) (1914) P. 212; 84 L. J. P. 1; 1 P. Cas. 1; 112 L. T. 248; 12 Asp. M. C. 598; 58 S. J. 852; 31 T. L. R. 3.

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of the Middle Ground Shoal is not a part of the "port," in the sense that ships load and unload there. The evidence is that ships do not load and unload there, and that in the monsoon it would be unsafe for any ship to discharge into lighters at that spot. In fact that anchorage is the usual examination anchorage. The place where a ship loads or unloads is further north, viz., to the north or north-east of the Middle Ground Shoal, unless, as is more usual, the ship goes into the docks themselves. A chart of Bombay has been put in, and there the witness has marked with a cross the place south of the Middle Ground, where the *Rheinfels* was anchored. The chart is an old one, and unfortunately does not take in the Prongs light-house, nor the spot where the ship was first boarded. I have not, however, thought it necessary to adjourn the case for a further chart to be put in. The oral evidence is reasonably clear, and can, if necessary, be supplemented by an atlas, such as the Graphic Atlas of the World, which has small but useful maps of Bombay on pages 64 and 67 of the 1910 Edition. I have not had the advantage of seeing Commander Shearme in the witness box, as Counsel tells me he is in England, but his subordinate officer, Mr. Warden, has given evidence before me, and given it carefully and well.

The significance of the place of capture lies in this, viz., that by two decisions, the one by Sir Samuel Evans in *The Mowe* (2) and the other by their Lordships of the Privy Council in *The Belgia* (3), it has been clearly established that the word "port" in the 6th Hague Convention does not mean a port in the sense of a fiscal or customs port, nor does it refer to territorial waters. It "must be construed in its usual and limited popular or commercial sense as a place where ships are in the habit of coming for the purpose of loading or unloading, embarking or disembarking [see *The Mowe* (2)]. Accordingly in the case of *The Mowe* (2) although she was captured in the Firth of Forth, which was within the fiscal limits of the port of Leith, she

was held to be captured at sea and not in port.

Similarly, in the case of *The Belgia* (3) which was captured outside Newport, that is to say, outside the entrance to the river Usk, which is the river for Newport, there, too, the ship was held not to have entered a port.

So, too, in *The Erymanthos* (4) it was held by the Malta Prize Court that the ship, though captured at the Malta examination anchorage, was not captured in port.

The 6th Hague Convention, or rather the English translation of it, will be found on page 444 of the English Manual of emergency Legislation. Article 1 runs as follows:—

"When a merchant ship belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately, or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or any other port indicated to it."

Then it goes on:—

"The same principle applies in the case of a ship which has left its last port of departure before the commencement of the war and has entered a port belonging to the enemy while still ignorant that hostilities have broken out."

Stopping there, the decisions I have referred to establish that for Article 1 to apply, a ship must "enter a port." Therefore, if she is captured at sea before she enters a port, Article 1 does not apply.

Then Article 2 provides:—

"A merchantship which, owing to circumstances beyond its control, may have been unable to leave the enemy port within the period contemplated in the preceding article, or which was not allowed to leave, may not be confiscated. The belligerent may merely detain it, on condition of restoring it after the war, without payment of compensation or he may requisition it on condition of paying compensation."

But there, again, she has to be in the enemy port. If she is captured before that, then the article does not apply.

(2) (1915) P. 1; 84 L. J. P. 57; 1 P. Cas. 60; 112 L. T. 261; 59 S. J. 76; 31 T. L. R. 46.

(3) (1916) 2 A. C. 183; 85 L. J. P. 106; 2 P. Cas. 32; 114 L. T. 957; 60 S. J. 457; 32 T. L. R. 435.

(4) (1914) 1 Br. & Col. P. O. 339.

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Article 3 deals with ships which left their last port before the war as here and are encountered at sea while still ignorant of hostilities. I use the words "at sea" advisedly, as the English translation "on the high seas" appears to be a mistake [see *The Mowe* (2)]. They also must not be confiscated but only detained. It has, however, been decided that this article does not apply to German ships, because Germany did not agree to this particular article, and consequently her ships cannot claim the benefit of it. That was decided in *The Marie Glaeser* (5) and also in *The Perkeo* (6). Accordingly, I have only to deal with Articles 1 and 2.

Turning then to the facts of this case, I have already said that I am satisfied the ship was stopped and boarded well outside the Prongs light-house. In saying that, I did not overlook the original evidence, viz., the joint affidavit of Commander Warden and Commander Shearme of 10th August 1914, in which Commander Shearme stated that the ship arrived in the "harbour" of Bombay on the 7th August and that on the same day she was captured by him and his crew assisted by the Examination Battery in the "harbour" of Bombay, and that a military guard was placed on board in charge of the steamship and her papers. So, too, in the answers to interrogatories administered to the master and officers of the German ship, they all say that she was taken and seized in Bombay "harbour".

Curiously enough in *The Belgia* (7) Sir Samuel Evans had very similar evidence before him; that is to say, there was an affidavit by the Surveyor of Customs saying that the ship was seized as prize for the use of His Majesty in the "port" of Newport. Similarly the writ in the action described the ship as having been seized at the port (see page 305). Sir Samuel Evans in his judgment stated:—

"The circumstances under which this vessel was captured have been fully stated to me, and I must decide the case in accordance with what was actually done,

and not in accordance with any language, accurate or inaccurate, which may have been used by the laymen in and about the port of Newport at the time of the commencement of this war, when people were not familiar with the nomenclature or with the provisions which one has made since."

Then he says:—

"I find, in fact, that this vessel was captured at sea after the outbreak of hostilities."

Then he describes the place and proceeds:—

"Being captured there and in these circumstances, I have come to the conclusion that she was captured at sea. If that is right, I need not trouble at all about the Hague Convention No. VI, Articles 1 and 2; but in deference to the argument of Counsel for the claimants I will say a word or two about them."

That was the decision which on appeal was affirmed by the Privy Council in *The Belgia* (3).

Under the above circumstances, I am satisfied that this ship, whether she was captured outside the Prongs light-house or on this examination ground south of the Middle Ground, had not entered "the port" of Bombay within the meaning of the Hague Convention. But I base my decision primarily on this, viz., that in my opinion she was captured some three miles outside the Prongs light house. I am not satisfied that this spot is within the limits of the fiscal port of Bombay, but assuming that it is, I think it clear on the authorities that this spot is not within the "port" of Bombay, as that expression is used in the Hague Convention.

I also hold on the evidence that she was captured and seized at this spot. Even, however, if she was not captured and seized until she reached the examination anchorage south of the Middle Ground, I should still hold that she had not entered the "port" in the above sense. That anchorage may be a "roadstead", but as pointed out by Sir Samuel Evans in *The Mowe* (2) in the French text of the Conventions, "the word 'ports' is used in various places in conjunction with, but in contradistinction to, roadsteads and to territorial waters. See Convention XIII, where the words 'les

(5) (1914) P. 218; 84 L. J. P. 8; 1 P. Cas. 38; 112 L. T. 251; 12 Asp. M. C. 601; 59 S. J. 8; 31 T. L. R. 8.

(6) (1914) 1 Br. & Col. P. O. 136; 84 L. J. P. 149; 112 L. T. 251; 12 Asp. M. C. 600; 58 S. J. 852.

(7) (1915) 1 Br. & Col. P. C. 303 at pp. 305, 307; 59 S. J. 561; 31 T. L. R. 490.

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ports, les rades, ou les eaux territoriales,' are frequently used."

It follows that in my opinion the 6th Hague Convention does not apply to this ship and that accordingly she ought to be condemned as a lawful prize.

In the view, therefore, which I take, it is unnecessary to decide the second ground on which the Crown has asked me to condemn the ship, viz., her knowledge of the outbreak of hostilities. The evidence does not establish expressly that the *Rheinfels* either sent or received any message showing that war between England and Germany had broken out. It is all a matter of inference. She was at the time on a voyage from Aden to Bombay. She no doubt was fitted with the Telefunken system of wireless telegraphy, which would enable her to receive messages from wireless stations in Germany. She would also be able to receive the messages which were sent out from the Butcher Island radio station. It is also proved to my satisfaction that as from the morning of the 5th August to the afternoon of the 6th August, the operator in charge of this radio station was sending out messages to British ships warning them that war had broken out and that they must not enter any German port. It is clear also that from about 7-10 A. M. on the 6th August, the *Rheinfels* was in wireless communication with Butcher Island, being then some 240 miles away. Her wireless system was a different one, but she used the same wave length as the Marconi system, and accordingly could pick up the messages sent out from Butcher Island. Her wireless system was also in working order. One can tell that from the messages she sent. She was also near the *City of Lahore* which was also bound for Bombay and receiving messages from Butcher Island.

On the other hand, there is this that the captain did go straight into Bombay and made no attempt to deviate and run for Marmagoa or any other port. Further, he kept up communication and gave his distances. Thus his message at 5.55 P. M. on the 6th stated that he was 130 miles off. In so doing, he was adding to his risk of being captured on the high seas, and it is rather more consistent with his not knowing that war had broken out than with the knowledge that it had. Again, if he

knew that war had broken out, but decided the safest course was to go to Bombay, it might have assisted him to have arrived with his wireless out of order, supposing a plausible excuse could be given for that. H.M.S. *Dartmouth* evidently thought it likely the captain would make for Marmagoa, if he knew of the outbreak of war, for she set out in the afternoon of the 6th to intercept the *Rheinfels* there. Further, it appears by the answers to interrogatories that the wireless operators were the 3rd and 4th officers. *Prima facie* these officers would normally be attending to their ordinary duties as 3rd and 4th officers and would have little time left for wireless messages. I cannot, therefore, assume that this cargo boat would necessarily pick up all the messages which a passenger liner might, for the latter might keep two operators exclusively engaged in the wireless cabin.

I have been referred by Counsel to the case of *The Gutenfels* No. 2 (8), where Mr. Justice Cator, in giving judgment in the Egyptian Prize Court, said:—

"The sole safe rule upon which a Prize Court can act is to assume that every ship fitted with wireless apparatus receives from its Government, either directly or by transmission from other ships, prompt news of the outbreak of hostilities between its own and any other country."

He, however, held on the facts that the ship was ignorant of the outbreak of hostilities. That case went on appeal to the Privy Council on another point (*The Gutenfels*) (9) where the judgment was varied, and an order made as in the case of the *The Ohile* (1). Their Lordships did not, however, deal with the above proposition, and I do not think I need either. I have arrived at a definite decision on the first point, and I do not think it necessary to arrive at a definite finding either of fact or law on the second point.

Having regard to my decision on the first point, there will be a decree for the condemnation of the ship, her stores and tackle and also the freight which is in the hands of the Collector of Customs of Bom-

(8) (1915) 1 Br. & Col. P. C. 136 at p. 137.

(9) (1916) 2 A. C. 112; 85 L. J. P. C. 146; 2 P. Cas. 36; 114 L. T. 953; 60 S. J. 477; 32 T. L. R. 433.

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bay. He, I am told, occupies the position of Admiralty Marshal. There is also a small sum in his hands of Rs. 1,295-13-1 representing the net proceeds of certain undelivered cargo on the ship. Nearly all the cargo has been delivered under orders made by this Court from time to time, and this small balance represents unclaimed or undelivered cargo. I condemn this balance also as representing cargo on an enemy ship.

As regards the form of the order, the Admiralty Registrar will no doubt look at the Forms of Order contained in the schedule to the English Prize Court Rules (1914), Form No. 53 (see English Manual of Emergency Legislation, page 331). They will require some adaptation to the present case. The draft order is to be shown to me before it is passed and entered.

As regards the costs, I see there are certain reserved costs here. I will give a general direction that the costs of the Crown are to be paid out of the proceeds in the hands of the Collector of Bombay. Subject to those costs, there will be a direction that the Collector do transfer the moneys in his hands to the Crown or as the Crown may direct. If the Crown does not require taxation or any special order as to costs, the whole fund can be transferred.

I will reserve liberty to apply in case there are any other points which may require the Court's direction.

There is one point of practice which I should like to mention, and that is this. The cause has come before me on *viva voce* evidence, and certain officers have been brought down to Bombay for that purpose. One has had to come from such a distant place as Rawalpindi. Should, however, a similar case arise in the future, I think the Advocate General should consider whether it is not possible under the Prize Court Rules, 1914, to give evidence by affidavit. The officers of the ship concerned in the capture can certainly give evidence by affidavit [see Order XV, rule 2 (b)]: and I should have thought that other evidence by affidavit might properly be admitted by the Judge under Order XV, rule 2 (e). There may be cases in which *viva voce* evidence is essential, but in many it is not. Farther, in war time, naval and military officers cannot be spared for attendance in Law

Courts, and the same observation applies to wireless operators and censors or cypher experts. My recollection of the English practice is that affidavit evidence was principally used, and that it was by no means confined to officers of the capturing ship. I think that will probably be found a far more convenient course in every way than what has taken place to-day. Not only will it save the time of the Court, but it will also save officers being taken from their ordinary duties or brought by long journeys from the other end of India.

One other point I should also mention. If any matter of the Hague Convention comes up again, there should be a proper official publication of the Hague Convention for use by the Court. I mean an official publication containing the original French text and the English translation. Counsel for the Crown were provided with this in England, and my recollection is of a blue book with the two texts in parallel columns. If there are no copies of this in Bombay, it should, I think, be obtained from England as the French text is material.

I am also told by the Advocate-General that the text of the Peace Treaty has not yet been received here: and that he does not know whether it has any provision with regard to the 6th Hague Convention. I have not, however, thought it necessary to defer my decision till that information was supplied. The question whether the 6th Hague Convention is binding at all as between England and Germany was left open in *The Gutenfels* (9) and again in *The Prinz Adalbert* (10), and I of course have not dealt with that question.

Judge's Note.—In correcting the shorthand notes of the above judgment, I had occasion to refer to the Batcher Island Radio log, Exhibit C. I there found that in the early morning of 7th August 1914, this station was recording message from Nauen (in Prussia) sent out in cypher. This was not mentioned to me at the hearing and is in favour of the Crown. The answers to interrogatories denied, however, the possession or knowledge of any Code (except the international Code): and as there is no evidence from the Naval Intelligence

(10) (1918) A. C. 500; 87 L. J. P. 145; 3 P. Cas. 7C 14 Asp. M. O. 296; 118 L. T. 161; 34 T. L. R. 229.

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Department to show that German cargo ships would know any cypher code of the German Government, it does not perhaps carry the matter much further. Nor does it follow that the 3rd and 4th officers were then engaged in the wireless cabin. On the whole, therefore, I have thought it unnecessary to have the case set down for further hearing.

The order as eventually drawn up was without prejudice to any question whether the property thereby condemned as prize was droits of the Crown or droits of the Admiralty [see *The Abonema* (11), *The Hillerod*, *The Florida*, *The Albania*, *The Adjudant* and *The Belgia* (3)].

Vessel condemned.

(11) (1919) P. 41 at p. 56; 88 L. J. P. 113.

ALLAHABAD HIGH COURT.

PRIVY COUNCIL APPEAL NO. 31 OF 1919.

November 28, 1919.

Present :—Sir Grimwood Mears, Kt.,
Chief Justice, and Justice Sir P. C.
Banerjee, Kt.

Sheikh MUHAMMAD HASHIM—
DEFENDANT—APPELLANT

versus

RAM SAHAI AND OTHERS—PLAINTIFFS
—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 109, 110
—Suit, value of, in excess of Rs. 10,000—Appeal, value
of, below Rs. 10,000—Appeal to His Majesty in Council
—Leave, whether can be granted—Misjoinder, whether
question of law justifying appeal to Privy Council.

Where the original value of a suit exceeds Rs. 10,000, but in an appeal by one of the defendants to the High Court, the contest is in respect of his liability for a sum less than Rs. 10,000, the case, for the purposes of an appeal to His Majesty in Council, does not come within the purview of the first paragraph of section 110, Civil Procedure Code, nor does it fall under the second paragraph of that section as involving any question regarding property of the value of Rs. 10,000 or upwards, [p. 450, col. 2.]

The question whether the omission to implead one of the plaintiffs in an appeal to the High Court is fatal to the appeal, is not a question of law of general importance involved in the appeal, to justify a certificate that the case is otherwise a fit one for appeal to His Majesty in Council, [p. 451, col. 1.]

Application for leave to appeal to His Majesty in Council.

Dr. S. M. Sulaiman, for the Appellant.

Mr. N. O. Vaish, for the Respondents.

JUDGMENT.—This is an application for leave to appeal to His Majesty in Council. The suit was one for foreclosure of two mortgages, under which a sum of Rs. 14,493 was alleged to be due to the plaintiffs. The defendant, who now seeks to appeal to His Majesty in Council, is the purchaser of a portion of the mortgaged property and he contested the claim. The Court of first instance decreed the claim. The present applicant preferred an appeal to this Court and in that appeal he raised the question of his liability in respect of Rs. 3,800 out of the total amount held by the Court below to be due under the two mortgages. In this Court he omitted to implead as respondent one of the persons who was a plaintiff in the suit. On the ground of this omission the learned Judges who heard the appeal in this Court dismissed the appeal. The appellant now applies for leave to appeal to His Majesty in Council against the decree dismissing his appeal. The value of the subject-matter of the suit was undoubtedly upwards of Rs. 10,000, but the value of the proposed appeal is only Rs. 3,800. Therefore, the case does not come within the purview of the first paragraph of section 110. It is, however, urged that the decree or final order in this case involves directly or indirectly some claim or question to or respecting property of the value of upwards of Rs. 10,000, as mentioned in the second clause of the section. We do not think that the case falls under that clause 2 of section 110. The appeal does not involve any question regarding property of the value of Rs. 10,000 or upwards. The sum of Rs. 3,800, which the appellant seeks to be deducted out of the amount declared by the Court of first instance to be due upon the mortgages, consisted of a principal sum of Rs. 1,125 which was alleged to have been paid to the mortgagee and two other sums in regard to which it was urged that the mortgage was without legal necessity. That was not a question affecting directly or indirectly property of the value of Rs. 10,000 and upwards. The first ground upon which the applicant contends that

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the case fulfil the requirements of section 110 is in our opinion untenable. It was next contended that the case was otherwise a fit one for appeal to His Majesty in Council and that a question of law of general importance was involved in the appeal. We do not agree with this contention also. The question of law which is raised by the applicant is whether the omission to implead in the appeal one of the plaintiffs was fatal to the appeal. It is said that that plaintiff was represented by the manager of the family to which he belonged and that, therefore, the omission of his name from the array of respondents did not affect the array of parties in the appeal.

This question does not appear to have been raised before the Bench which heard the appeal, and we do not find from the record any suggestion that any of the other respondents was the head and manager of the family to which the minor plaintiff Bansidhar (who was not made a respondent to the appeal) was belonged. Under the circumstances, we think that this is not a case which we can certify to be otherwise a fit one for appeal to His Majesty in Council. We, therefore, reject the application with costs including fees on the higher scale.

Application rejected.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER NO. 99 OF 1918.

CIVIL REVISION PETITION NO. 5 OF 1919.
October 8, 1919.Present:—Mr. Justice Seshagiri Aiyar
and Mr. Justice Moore.IDUMBU PARAYAN AND OTHERS—
PLAINTIFFS—DECREE-HOLDERS APPELLANTS
IN THE APPEAL AND PETITIONERS
IN THE C. R. P.

versus

PETHU REDDY AND ANOTHER—DEFENDANTS
Nos. 5 AND 6—RESPONDENTS
IN THE APPEALSENNI PARAYAN AND OTHERS—DEFEND-
ANTS—RESPONDENTS IN THE C. R. P.

Civil Procedure Code (Act V of 1908), O. XXXIV,

r. 8—Partition, suit for—Joinder of alienee of family property—Decree for possession of portion of alienated property on payment of certain amount within specified time—Decree, nature of—Redemption decree—Failure to pay amount on due date—Court, power of, to enlarge time.

In a suit for partition of joint family property, the alienee of the family property was impleaded as a party. The Court found the alienation binding on the family to the extent of Rs. 800 and directed delivery of possession of a portion of the alienated property to the plaintiffs on their paying Rs. 400 to the alienee within a specified date. The plaintiffs failed to pay the amount within the time specified but paid the amount subsequently and applied for and got possession of the property decreed. The District Munsif subsequently reversed his own order on the alienee's application, holding that he had no jurisdiction to enlarge the time. The order was confirmed on appeal:

Held, that the decree directing delivery to plaintiffs was in effect a redemption decree and the Court had, therefore, power to enlarge the time for payment under Order XXXIV, rule 8, Civil Procedure Code. [p. 452, col. 2; p. 453, col. 1.]

Ramaswami Kone v. Sundara Kone, 31 M. 28; 17 M. L. J. 495; 3 M. L. T. 26; *Moideen Kuppai v. Ponnuswamy Pillai*, 26 Ind. Cas. 63; 1 L. W. 882; 16 M. L. T. 430, distinguished.

Appeal against the order of the Court of the Subordinate Judge, Coimbatore, in Appeal Suit No. 28 of 1918, preferred against the order of the Court of the Principal District Munsif, Erode, in E. A. No. 735 of 1917, in E. P. R. No. 1090 of 1917 (in C. S. No. 4 of 1915, on the file of the Additional District Munsif, Erode).

Petition, under section 115 of Act V of 1908 and section 107, clause (2), of the Government of India Act, praying the High Court to revise the order of the Court of the Principal District Munsif, Erode, in C. M. P. No. 76 of 1918, in C. S. No. 4 of 1915, on the file of the Additional District Munsif's Court, Erode.

FACTS appear from the judgment.

Messrs. T. M. Krishnaswami Aiyar and K. S. Ganapathy Aiyar, for the Appellants-Petitioners.—The lower Courts erred in holding that they had no jurisdiction to extend the time for payment. The decree directed possession to be delivered to plaintiffs on their paying a certain amount within a specified time. The decree does not state the consequences of non-payment. It does not state that either the suit was to stand dismissed on failure to pay the amount or that the plaintiffs were to be barred

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of their right to recover the property. Virtually the decree is one for redemption and having condoned the omission of plaintiffs to pay on the due date and accepted payment subsequently, the Munsif should not have reversed his order.

The cases cited by the Munsif are distinguishable. They do not lay down that the Munsif had no jurisdiction to enlarge time. Till there is an order debarring the plaintiff from redeeming, the action is alive and can be revived.

Mr. O. V. Subramanya Aiyar, for the Respondents.—In the absence of an express direction in the decree the lower Courts rightly held that they had no power to enlarge the time. The right to enforce that portion of the decree for possession on payment of money was lost to the plaintiffs the moment the time specified was allowed to lapse.

JUDGMENT.—The application for execution arose out of a partition decree. Some of the members of the family sued their co-parceners for partition and sought to set aside certain alienations in favour of strangers. The decree gave the plaintiffs their share. The Court found that the alienation impeached was binding upon the members of the family to the extent of about Rs. 800 and odd and directed that the plaintiffs do obtain possession of the property in the possession of the alienees after paying a sum of Rs. 400 and odd. In terms and in effect, this portion of the decree was one for redemption. The final decree does not, however, say that, in case the money is not paid within the time fixed, viz., 10th July 1916, the suit for possession of the property shall stand dismissed. Nor does it say that the right to recover possession on subsequent payment is barred to the plaintiffs. The plaintiffs did not pay the amount within the time stipulated. They subsequently applied for possession of the property after paying into Court the amount which was ordered to be paid. The Courts below have held that, as the money was not paid within the time fixed, the plaintiffs are not entitled to any further extension of time and that they are not entitled to recover possession of the property.

In the first instance on payment of the

money by the plaintiffs, they were put in possession. On an application made by the alienees to cancel that order for possession on the ground that the money was not paid in time, the District Munsif reversed his own order and ordered the plaintiffs to restore possession to the alienees. That order has been confirmed by the lower Appellate Court. It is against it that this civil miscellaneous appeal has been presented.

In our opinion, the application for extension of time ought to have been granted by the District Munsif. He quotes a large number of authorities beginning with *Ramaswami Kone v. Sundara Kone* (1) and says that he has no power to extend the time. What these decisions have laid down is that by the mere fact of confirmation of the decree by the Appellate Court, further time is not *ipso facto* given for payment of the money. They are not authorities for the position that the Munsif has no jurisdiction to extend time. Under Order XXXIV, rule 8, last clause, the Court may, upon good cause shown, and upon such terms as it thinks fit, from time to time postpone the day fixed for payment. In *Het Singh v. Tika Ram* (2) where the decree directed that, if the money was not paid within a particular time, the suit should stand dismissed, the learned Judges held that, as there was no bar to redemption, time should be extended and that the decree did not work itself out. If we turn to the earlier portion of Order XXXIV, rule 8, it is clear that until the defendant obtains an order debarring plaintiff from seeking redemption, the right to apply for further extension of time is not lost. In the picturesque language of Kekewich, J., in *Collinson v. Jeffery* (3) by the lapse of time fixed for payment, the action is not dead but is in a comatose condition, it will become dead only when an order is obtained under Order XXXIV, rule 8, debarring plaintiff from redeeming. Till then it is alive and is capable of being revised. Under the last sentence of Order

(1) 31 M. 28; 17 M. L. J. 495; 3 M. L. T. 26.

(2) 14 Ind. Cas. 240; 34 A. 388; 9 A. L. J. 331.

(3) (1896) 1 Ch. D. 614; 65 L. J. Ch. 375; 74 L. T. 78; 44 W. R. 311.

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XXXIV, rule 8, Courts have power to extend time for payment. We are, therefore, of opinion that the lower Courts had jurisdiction and were not precluded, by the fact that the money was not paid within the time limited, from extending the period for payment. There is one decision of this Court which, on the face of it, appears to be conclusive of the arguments advanced by the learned Vakil for the appellants. In *Moideen Kuppai v. I'onnuswamy Pillai* (4) reference was made to sections 148 and 151, Civil Procedure Code, and it was pointed out that these sections have no bearing in regard to applications for extension of time under a mortgage decree. We are not in a position to ascertain what the exact language of the decretal order was in that case. It may be that the order directed that, if the money was not paid within the time limited, the right of redemption would become barred. If that had been specifically mentioned in the decree, no further application by the defendant to bar the right of redemption need have been made. The decree would have worked itself out and would have prevented the Court from exercising its powers, under the last clause of Order XXXIV, rule 8. As we are not in a position to ascertain the facts on which that decision proceeded, we do not regard it as conclusive of the present question.

We have made these observations because the decree appears to be one for redemption. Having regard to the language of the decree and also in view of the charge which the defendants obtained for a portion of the money which was held binding on the family, the decree in this case must be construed as above indicated. In that view, we hold, following *Collinson v. Jeffery* (3) and *Het Singh v. Tika Ram* (2), that it was competent to the District Munsif to extend the time and that there was no good cause for his reversing his original order. We must set aside the orders of both the lower Courts and dismiss the petition for re-delivery of the property made by the defendants. As the mistake has been largely due to the laches of the plaintiffs, we do not think that they are entitled to any costs.

(4) 23 Ind. Cas. 63; 1 L. W. 852; 16 M. L. 430.

Each party will bear his own costs. The civil revision petition is dismissed. No costs.

M. C. P.

Appeal allowed; Petition dismissed.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 1881
OF 1919.

November 22, 1919.

Present:—Sir Henry Rattigan, Kt.,
Chief Justice.

DOGAR MAL, PROPRIETOR OF THE FIRM
NATHU MAL-GUJJAR MAL—PLAINTIFF
—APPELLANT

versus

MULA AND ANOTHER—DEFENDANTS—
RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 85—Suit on bahi account—Balance struck and carried forward—Reciprocal demands—Account, whether mutual, open and current—Limitation applicable.

Plaintiff sued for recovery of a certain sum of money alleged to be due on a *bahi* account. It appeared that plaintiff supplied defendants on occasions not merely with money but with various articles, the values of which were given in the account and debited against the defendants. There were mutual demands between the parties on balances struck up to a certain date, and the account was not closed even on that date, but the balance was carried forward:

Held, (1) that in cases of this kind the Court must look to the dealings as a whole: [p. 454, col. 2.]

(2) that so viewed the accounts between the parties were mutual, open and current: [p. 454, col. 2.]

(3) that the suit was governed by Article 85 of Schedule I to the Limitation Act. [p. 454, col. 1.]

Imrat Lal v. Lal Chand, 7 Ind. Cas. 715; 75 P. R. 1910; 99 P. W. R. 1910; 124 P. L. R. 1910, followed.

Miscellaneous second appeal from the order of the District Judge, Hoshiarpur, dated the 23rd June 1919, reversing that of the Subordinate Judge, 2nd Class, Hoshiarpur, dated the 13th November 1918, and remanding the case for a fresh decree.

Lala Fakir Ohand, for the Appellant.

Bakhshi Tek Ohand, for the Respondents.

JUDGMENT.—The sole question for decision upon this appeal is whether plaintiff's claim to recover Rs. 1,025-4-6, principal, and Rs. 674-11-6, interest, alleged to be

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due on a book account from defendants, is within time or barred by limitation. The Subordinate Judge, second class, held that the suit was within time under Article 85 of the Indian Limitation Act. The District Judge on appeal was of opinion that the accounts between the parties were open, mutual and current up to the 15th of *Bhadon Sambat* 1963 (20th August 1906), and that as in *Sambat* 1961 there was a balance in favour of the defendants, it must be held that there was an occasion for a reciprocal demand at one period at least during the currency of the accounts. The learned Judge, however, held that the previous accounts were closed on the date mentioned when a balance of Rs. 53-6 0 was found due from defendants to plaintiff and that subsequently there was on no occasion any balance due from the plaintiff to the defendants, though there were balances due from the defendants to the plaintiff. He held accordingly that Article 85 did not apply to the case; but as it was admitted by the defendants that certain items were included in the balance upon which the plaintiff's suit might be within limitation under the provisions of Articles 52 and 57 of the Limitation Act, he remanded the case for enquiry with regard to such items only.

Plaintiff has preferred a second appeal to this Court, and after hearing arguments at some length I am of opinion that Article 85 is applicable to the present suit. Both Courts are agreed, as I have already remarked, that up to *Sambat* 1963 the account was open, mutual and current and that reciprocal demands between the parties were possible upon balances struck up to that year. I can find nothing on the record to support the District Judge's view that after the 15th *Bhadon Sambat* 1963 the nature of the accounts altogether changed and that thereafter it was merely a case of plaintiff's advancing moneys and defendants making payments in cash or in kind in liquidation of their debt. As a matter of fact it is clear that the account was not closed on the date specified, as the balance then struck was carried forward to the credit of the plaintiff in the following account. Furthermore, this is not a case of plaintiff's supplying money and defendants' from time to time

repaying plaintiff in money or in goods; for there are items in the account which show that plaintiff supplied defendants on occasions not merely with money but with various articles the values of which are duly given in the account and debited against defendants. The present case is similar in many respects to that reported as *Imrat Lal v. Lal Chand* (1) and I agree with Scott-Smith, J., that in cases of this kind we must look to the dealings as a whole. So viewed, the accounts disclose independent obligations on the part of plaintiffs and of defendants, and were mutual, open and current and could have given occasion for reciprocal demands between them.

Accordingly I accept the appeal and setting aside the order of the District Judge I restore that of the first Court with costs throughout. In the lower Appellate Court the appellant (*Mula Mal*) gave up all grounds of appeal except that of limitation.

Appeal accepted.

(1) 7 Ind. Cas. 715; 75 P.J.R. 1910; 99 P.W. R. 1910; 124 P. L.J.R. 1910.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 57 of 1919.

September 3, 1919.

Present:—Mr. Justice Krishnan.

THE MUNICIPAL CHAIRMAN,

VIRUDUPATTI—DEFENDANT—PETITIONER

versus

SARAVANA PILLAI—PLAINTIFF—

RESPONDENT.

Madras District Municipalities Act (IV of 1884), ss. 54, 97, 101, 262—Suit to recover tax collected, maintainability of—Jurisdiction of Civil Courts—Remedy of person aggrieved.

The only remedy of a party aggrieved by the assessment imposed on him under section 54 of the Madras District Municipalities Act is to appeal to the Council under section 97 of the Act. A suit to recover the amount collected is barred under section 262 of the Act and Civil Courts have no jurisdiction to find that the assessment was erroneous on facts or to go into the question of the amount of a person's income. [p. 455, col. 1.]

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the

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judgment and decree of the Court of the District Munsif, Statut, dated the 22nd August 1918, in Small Cause Suit No. 188 of 1918.

Mr. N. A. Krishna Aiyar, for the Appellant.

JUDGMENT.—It seems to me to be clear that the District Munsif was wrong in holding that section 262 of the District Municipalities Act, IV of 1884, was not a bar to the suit. Clause (2) of that section expressly prohibits a suit in any Court to recover money collected under the authority of the Act, provided that the provisions of the Act have been in substance and effect complied with. There is no case made here that, in assessing plaintiff, any of the relevant provisions of the Act was not complied with, nor is this a suit falling within the proviso to section 262.

Section 54 gives the power to the Chairman to decide the class in which a person has to be placed for professional tax and, in doing so, he has to satisfy himself as to the man's income. The action of the Chairman is subject only to an appeal to the Council under section 97, and section 101 provides that his assessment is final when there is no appeal to the Council, as was the case here. It would thus not be open to the civil Court to find that his assessment was erroneous on facts or go into the question of the amount of the person's income, as that is not a ground on which the application of the prohibition against suits in section 262 can be avoided. In the case cited by the District Munsif, *Municipal Council of Ohidambaram v. Venkatanarayana Pillai* (1), no question based on section 262 was argued or considered and the case is, therefore, of no authority on the point before me. On the other hand, it was ruled in *Municipal Council, Nellore v. Rangayya* (2) that even when the tax was wrongly levied on a house which was not completed and occupied, section 262 barred the suit to recover the tax paid from the Municipality and that the aggrieved party's remedy was only by an appeal under section 97 of the Act.

As I hold this suit was barred by section 262, it must be dismissed. The civil revision

petition is allowed and the decree of the lower Court is set aside and plaintiff's suit is dismissed with costs here and in the Court below.

M. C. P.

Petition allowed.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 653
OF 1897.

August 12, 1919.

Present:—Mr. Justice Marten.¹

In the matter of the INDIAN TRUSTEES
ACT, 1866.

BASIL LANG

versus

MOOLJI KARSONJI

AND

BHAGWAN REVASHANKAR

Trustees Act (XXVII of 1866), ss. 3, 6, 35, 40—Public charitable trust—High Court, power of, to appoint new trustee—Hindu institution—Bombay High Court Rules, r. 75 (z)—Application for appointment of new trustee—Procedure—Practice.

The High Court has power, under section 35 of the Trustees Act read with section 6 of the Act, in the case of a Hindu charitable trust to appoint a new trustee in place of one who has become incapable of acting in the trust. [p. 457, col. 2.]

Applications for the appointment of new trustees should normally be made by petition or summons to be heard in Chambers and the particular Act and section relied on must be specified in the application. [p. 456, cols. 1 & 2.]

Mr. Mirza, for the Applicant.

JUDGMENT.—This is a motion for the appointment of a new trustee in the place of a trustee who is alleged to be of unsound mind. The applicant is his co-trustee.

The trust is an old charitable trust of a public or religious nature created by the Will of a Hindu lady who died in 1873. This suit was begun in the year 1897, and by orders or decrees of the 29th July 1893 and 11th April 1899 the validity of the trust was established: new trustees were appointed: the charity funds were lodged with the Accountant-General to the account of this suit, and the

(1) 24 M. 644.

(2) 19 M. 10.

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income was directed to be paid to the new trustees.

In course of time, there have been certain changes of trustees, and for that purpose the parties have adopted a course which seems to me unnecessarily expensive, *viz.*, of applying by motion in Court for the appointment of new trustees. It was said that this course was adopted, because liberty to apply was reserved. I do not find in the orders that any such liberty was in fact reserved to the applicant. Even if there was such liberty, it does not mean that you are obliged to apply in open Court. It means liberty to apply in accordance with the ordinary practice of the Court. Section 40 of the Indian Trustees Act, 1866, expressly authorizes a petition; and rule 75 (2) of the Bombay High Court Rules provides for such a petition being heard in Chambers. I think, therefore, that applications for the appointment of new trustees should normally be made by petition or summons to be heard in Chambers. There is all the more reason for doing that in the present case, as the matter concerns the personal incapacity of one of the trustees, and such matters are, I think, more properly dealt with in Chambers.

It is no doubt true, as the applicant points out, that on two previous occasions in this suit, the appointment has been made by motion in Court. It would not, therefore, be fair on the present application to penalise the applicant for following these precedents. If, however, in future a further appointment should be necessary, then, if the application be once more made by motion instead of in Chambers, it will, I think, be a matter for the Judge hearing the application to consider whether the applicant should not be disallowed any extra costs thereby caused.

Turning next to the motion itself, Counsel first contended that section 92 of the Civil Procedure Code gave me the necessary jurisdiction. In my opinion, it does nothing of the sort. This suit of 1897 cannot be turned twenty-two years afterwards into a suit for the removal of a trustee, who was not even appointed till 1913. Nor is there any consent in writing of the Advocate General thereto.

The matter is far simpler than that. It is an ordinary application for the appointment of a new trustee in the place of a trustee who is no longer capable of acting in the trusts. I, however, wished to be told under what particular section of the Indian Trustees Act or otherwise this application was being made. Care is, I think, required over appointments of new trustees and vesting orders, and I think it would be a wise precaution if it were made obligatory to specify in the application itself the particular Act and section which are relied on, as indeed is the practice in England at any rate as regards vesting orders [see *Moss's Trusts, In re* (1) and R. S. C. Order LIV (b), rule 4A]. I was not, however, given the necessary information, and in consequence there have been at least two adjournments for that purpose. Section 6 of the Indian Trustees Act, 1866, was next relied on but that applies to vesting orders, and in the present case a vesting order is not required nor indeed is it asked for in the notice of motion.

To-day I have been referred to section 35 of the Indian Trustees Act 1866, which gives power to the Court to appoint a new trustee in all cases in which it shall be expedient to appoint a new trustee or new trustees, and it "shall be found inexpedient, difficult or impracticable so to do without the assistance of the Court." This may be read with section 6, which gives an express power to make a vesting order in the case of a lunatic trustee.

Prima facie, therefore, section 35 would appear to give the Court the necessary jurisdiction. Counsel was unable to refer me to any Indian authority on the point, but I think the careful judgment of Mr. Justice West in *Kahandas Narrandas, In the matter of the petition of* (2) has a distinct bearing on the present case. It disposes, for one thing, of a possible objection that having regard to section 3, the Indian Trustees Act, 1866, does not apply to a Hindu charitable trust such as I have to deal with. There, as here, the application was for the appointment of a new trustee of a Hindu charity.

(1) (1883) 37 Ch. D. 513; 57 L. J. Ch. 423; 58 L. T. 468; 36 W. R. 316.

(2) 5 B. 154.

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able trust. It was objected that the Court had no jurisdiction on petition as opposed to a suit, as the case was not one to which English law was applicable within the meaning of section 3 (see page 170). That objection the learned Judge overruled. Further, I think it reasonably clear that he would have appointed a new trustee under section 35, but for the fact that the trust instrument contained an express power for the respondent (the surviving trustee) to appoint a new trustee with the consent of the petitioner (settlor), and that the respondent was willing to exercise such power. The petition was accordingly directed to be dismissed. It would, however, appear from the foot-note to the report that the parties subsequently agreed to the Advocate General nominating a new trustee, and that such nomination was embodied in the order eventually made.

The English authorities are only useful by analogy: but the analogy is rather close. Section 35 of the Indian Trustees Act, 1866, is practically the same as section 32 of the English Trustee Act, 1850, and section 25 of the English Trustee Act 1893. In *M., In re* (3) Mr. Justice Stirling held that under the Acts of 1850 and 1852 and in cases where no vesting order was required, the Court of Chancery had power to appoint a new trustee in the place of one who had become a lunatic (see page 83): and that the Chancery Division had still that power under the 1893 Act. As regards vesting orders, the law was different, but that depended partly on a consideration of the English Lunacy Act; and since the above decision, the Lunacy Act, 1911, has restored or given to the Chancery Division the necessary jurisdiction in several cases. The case does not, therefore, apply to India as regards vesting orders. But as regards the appointment of new trustees, it is useful as a decision in support of the jurisdiction under legislation very similar to the Indian legislation.

Weston's Trusts In re (4) is a decision by the same Judge to the same effect. There, however, the trustee was suffering from heart disease, old age (eighty) and conse-

quent impairment of mental faculties. The incapacity to act arose, therefore, from physical and not from mental infirmity.

Under the above circumstances, I am of opinion that I have jurisdiction under the Indian Trustees Act, 1866, to appoint a new trustee in the present case. I need not, therefore, consider whether I have any general jurisdiction apart from that Act.

On the facts, I am satisfied that Harilal Narbheram owing to his mental condition is no longer capable of acting in the trusts, and that another trustee should be appointed in substitution for him. I think it unnecessary to direct any inquiry under section 30 as to his state of mind, or to direct the medical evidence to be on oath and brought up to date. I think I may properly save the charity that expense; but I hope that the medical certificate accepted in the present case will not be adopted as a precedent in any other case. Nor have I thought it essential in the present case to have the application served on Harilal Narbheram [see *Memorandum as to Practice* (5)]. I think, however, that the title of the application should be amended by being made in the matter of the Indian Trustees Act, 1866, in addition to the existing title.

In the result, there will be an order appointing Mr. Amratlal Bhagwani to be a trustee in substitution for Mr. Harilal Narbheram. The order should state in effect that Mr. Harilal is unable owing to his infirmity of mind to act further in the trusts. The order will then go on to appoint Mr. Amratlal Bhagwani to be a trustee in substitution for him, and to act jointly with the continuing trustee Mr. Bhagwan Rewashankar (the applicant). Then there will be an order directing the Accountant-General to pay all arrears of income and future income to the new trustees until further order.

The costs are to come out of the estate, except that the costs of hearing are to be confined to the costs of one day's hearing only.

Draft order to be shown to me, before it is passed and entered.

Order accordingly.

(3) (1899) 1 Ch. D. 79; 68 L. J. Ch. 86; 79 L.T. 459; 47 W. R. 267; 15 T. L. R. 51.

(4) (1898) W. N. 151.

(5) (1901) W. N. 85.

THYGARAJA MUDALIAR v. SESHAPPIER.

MADRAS HIGH COURT.

APPEAL No. 33 OF 1918.

August 21, 1919.

Present:—Mr. Justice Spencer and Mr. Justice Kumaraswami Sastri.

THYGARAJA MUDALIAR—DEFENDANT
No. 1—APPELLANT

versus

SESHAPPIER AND OTHERS—PLAINTIFFS
—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 55 (4) (b)
—Vendor and purchaser—Consideration, application of, towards payment to vendor's creditor—Agreement between purchaser and creditor for substitution of liability, absence of—Vendor's lien, enforceability of.

Where by an agreement between a vendor and purchaser, the purchase-money is to be applied by the purchaser in payment of the vendor's debts, and there is no completed agreement between the vendor's creditor and the purchaser for substituting the latter's liability for that of the vendor, the vendor is entitled to enforce his lien against the purchaser for the unpaid sale consideration. [p. 459, 1.]

Appeal against the decree of the Court of the Subordinate Judge, Negapatam, in Original Suit No. 13 of 1916.

FACTS appear from the judgment.

Mr. T. V. Gopalswami Mudaliar, for the Appellant.—The vendor directed the purchaser to pay the sale consideration to third parties. The purchaser communicated this to the vendor's creditors. The vendor cannot, therefore, enforce his lien against the purchaser. The question is one between the creditors of the vendor and the purchaser.

Messrs. A. Krishnaswamy Aiyar and M. Patanjali Sastri, for the Respondents.—There is no substituted contract in this case between the purchaser and the vendor's creditors. The evidence is that the latter expressly declined to receive from the purchaser. Mere communication of the agreement to the vendor's creditor will not do. There must be a completed agreement between the purchaser and vendor's creditor for substitution of the liability. *Sivasubramania Aiyar v. Subramania Aiyar* (1). The vendor does not, under the circumstances, lose his right to enforce the lien.

JUDGMENT.—The 1st plaintiff and his sons, having conveyed certain immoveable properties to the 1st defendant in 1918, in consideration of the 1st defendant paying them Rs. 500 in cash at the time of execution and undertaking to discharge three items of debt to third parties, amounting at the time to Rs. 1,600, Rs. 4,954 and Rs. 946 respectively, brought this suit to enforce their vendor's lien to which they are entitled by section 55, clause 4 of the Transfer of Property Act. It is thereby declared that "the seller is entitled (a) to the rents and profits of the property till the ownership thereof passes to the buyer, (b) where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, to a charge upon the property in the hands of the buyer for the amount of the purchase-money or any part thereof remaining unpaid and for interest on such amount or part."

It has now been established by the Full Bench in *Sivasubramania Aiyar v. Subramania Aiyar* (1) that a direction by the vendor to pay the whole or a part of the purchase-money to a third party does not necessarily imply a waiver by the vendor of his statutory lien. The decisions in *Abdulla v. Mammali* (2) and *Siva Subramania Mudaliar v. Gnanasammunda Pandara Sannadhi* (3), so far as they laid down a contrary principle, were overruled by the Full Bench.

There is an observation in *Raghunatha Ohariar v. Sadagopa Ohariar* (4) that if the assignee enters into direct relations with the third party on the faith of the original direction and renders himself liable to make the payment to the third party, the assignor cannot, in such circumstances, require the assignee to pay the consideration to himself. So also in *Sivasubramania Aiyar v. Subramania Aiyar* (1) Seshagiri Aiyar, J., observed that if the direction is communicated to the proposed payee, a completed contract may arise between the purchaser and the third party which may preclude the vendor from claiming the money. It is now suggested that such is the case

(1) 37 Ind. Cas. 429; 39 M. 997; 31 M. L. J. 530; (1916) 2 M. W. N. 306; 20 M. L. T. 375; 4 L. W. 415 (F. B.).

(2) 5 Ind. Cas. 87; 33 M. 416; 7 M. L. T. 376.

(3) 10 Ind. Cas. 98; 21 M. L. J. 359; 10 M. L. T. 71;

(4) 12 Ind. Cas. 353; (1911) 2 M. W. N. 227; 10 M. L. T. 800; 21 M. L. J. 983; 36 M. 848.

MAKHAN LAL v. MUNICIPAL BOARD OF AGRA.

here. It is argued that a new contract between the vendee and the creditors of the vendors to discharge the debts wipes out the former's liability to the vendors.

Reliance is placed on the mention in the sale-deed Exhibit V of the sum of Rs. 4,954 being received by vendor by transferring the liability to pay the principal and interest on the hypothecation bond executed for Rs. 4,000 to Theyagappa Mudali and on the 1st plaintiff's statement in cross-examination that he had informed Kalyanasundaram Mudaliar, who is Thyagappa's brother, that he had transferred to the 1st defendant the liability to pay the amount to him (Kalyanasundaram Mudaliar). But Kalyanasundaram Mudaliar went into the witness-box and did not say that he agreed to substitute the defendant's liability for the plaintiffs' liability; and the 1st defendant examined as defendants' witness No. 4 only stated that when he met Thyagappa Mudaliar and expressed his readiness to pay his debt according to the directions in the sale-deed, the latter said he would consult his father and that sometime thereafter his father received Rs. 1,700 from him and said that the balance would be taken when necessary. This is the only evidence on the point, and we are not satisfied from it that there was a completed contract between the 1st plaintiff's creditors and the 1st defendant that the 1st plaintiff and his sons should be excused from further liability to pay their debts and that the 1st defendant should be accepted as indebted to them in lieu of the 1st plaintiff and his sons. On this point the appeal fails.

The next contention urged for the appellants was that the suit was not maintainable as the plaintiffs have not performed their part of the contract to put the defendants in possession of the lands sold under Exhibit V, notably those which the 1st plaintiff declares to be included in the village of Agra Nirumalai and the 1st defendant declares to be included in South Radha Manakkudi and Kanna Pillai Kattalai.

Now the survey numbers and the extents of each of the items conveyed to the 1st defendant by Exhibit V are given

in the schedule to the document. In the body of the sale-deed the villages named are those of South Radha Manakkudi and Kanna Pillai Kattalai and there is a residuary clause conveying such of the lands belonging to the plaintiffs "as may have been omitted to be written in the said villages." The onus, therefore, lay on the defendants to show that any of the lands covered by the residuary clause had not been included in the schedule. In the opinion of the Subordinate Judge they did not succeed in discharging this onus, and after referring to the evidence we see no reason to come to a different conclusion. As regards costs the defendants did not prove that they had made any payments before suit and they did not deposit any sum into Court. They were, therefore, rightly liable for the plaintiffs' costs. The result, therefore, is that the appeal fails on all points and is dismissed with costs.

The form of the decree as drawn up in the lower Court is not as it should be. The amounts to be paid to the mortgagees should be calculated up to the date fixed and entered in the decree. This will now be one in this Court. Time for payment is extended to 25th day of November 1919.

M. C. P.

Appeal dismissed.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 59 OF 1919.

November 24, 1919.

Present:—Mr. Justice Lindsay.

Lala MAKHAN LAL—PLAINTIFF—

PETITIONER

versus

THE MUNICIPAL BOARD OF AGRA—
RESPONDENT.

U. P. Municipalities Act (II of 1916), s. 326,
applicability of—Suit to recover refund of octroi duty,
nature of—Limitation applicable.

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Plaintiff instituted a suit against the Municipal Board of Agra to recover a sum of money, to which he was entitled under the rules, as refund of octroi duty on goods exported by him from Agra. The suit was dismissed as having been brought beyond the period of six months prescribed by sub-section (3) of section 326 of the U. P. Municipalities Act. The High Court was moved in revision against the order of dismissal, and it was contended that the provisions of the foregoing sub-section referred only to suits arising out of acts done inadvertently or illegally for which a suit for damages would lie, and that that sub-section did not apply to suits for money demandable from a Municipal Board in consequence of a breach of contract or of a legal relation resembling a contract:

Held, that inasmuch as the plaintiff's cause of action had its origin in the refusal of the Municipal Board to pay a sum which it was legally bound to pay, the suit as framed was a suit for compensation within the description of suits in sub-section (1) of section 326 and was not founded upon a breach of contract or the breach of some relation resembling a contract and that, therefore, the rule of limitation contained in sub-section (3) of the section was applicable to it. [p. 461, col. 2.]

Revision against the order of the Small Causes Court Judge, Agra, dated the 5th of September 1918.

Mr. Nihal Ohand, for the Applicant.

The Hon'ble Mr. N. P. Ashthana, for the Respondent.

JUDGMENT.—This case involves the interpretation of section 326 of the United Provinces Municipalities Act (United Provinces Act No. II of 1916). The suit out of which this application has arisen was brought by the plaintiff-petitioner, Lala Makhan Lal, against the Municipal Board of Agra. The claim was to recover a sum of Rs. 218-10-6. According to the facts set out in the plaint the plaintiff is a cloth dealer in Agra who at various times had exported from Agra cloth of considerable value. He claimed that he was entitled, by reason of this export, to have from the Municipal Board a refund of octroi duty. He put in a claim to the Board and his case is that the Board refused to pay to him the full amount to which he was entitled. The balance, which, he said, was owing to him from the Municipal Board, came to Rs. 218-10-6. In paragraph 6 of the plaint, it was stated that the cause of action had arisen on the 31st of October 1917 when the Board refused to pay him the balance claimed.

One of the pleas which was raised by way of defence was that the suit was barred by limitation. This was founded on the provision of sections 326 of the United Provinces

Municipalities Act, sub-section (3). The Court below gave effect to the plea and dismissed the plaintiff's suit on the ground that it was time-barred. I am not concerned here with any other pleas which were raised in the written statement. The argument, before me is that the Court below misinterpreted section 326 and was wrong in holding that the suit was barred by limitation.

The law relating to the refund of octroi duty is contained in statutory rules which were made under the provisions of the Municipalities Act. On referring to the Municipal Manual, Volume II, page 21, paragraph 73, I find it stated that "a person who exports from a Municipality any goods on which, if they were being imported, octroi would be leviable shall be entitled to receive payment of a sum equivalent to that octroi. This payment (the rule declares) shall be described as refund." It seems clear, therefore, that under the provisions of these rules, which have the force of law, a legal duty is imposed upon a Municipal Board to grant a refund of octroi duty in the cases contemplated by the rules and with the duty a corresponding right arises in favour of the exporter.

Turning now to the provisions of section 326 of the Municipalities Act we find that sub-section (1) provides for the giving of notice of intention to sue when any person desires to institute a suit against a Board, or against a member, officer or servant of a Board, in respect of an act done or purporting to have been done in its or his official capacity. The sub-section requires that a notice of the claim shall be given in the manner prescribed in the sub-section but with these provisions of this sub-section we are not concerned. Coming then to sub-section (3) we find it laid down that "no action such as is described in sub-section (1) shall, unless it is an action for the recovery of immovable property or for a declaration of title thereto, be commenced otherwise than within six months next after the accrual of the cause of action." It is obvious that the actions referred to in sub-section (3) are the suits which are referred to in sub-section (1), and it was by applying the terms of sub-section (3) to the facts of this case that the Court below came to the conclusion that the suit was barred. In order to avoid the application of this special

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law of limitation it was argued in the Court below that the plaintiff was not seeking damages or compensation and consequently the suit was not a suit of the nature described in sub-section (1), the result being that the period of limitation laid down in sub-section 3 could not be applied. The same argument has been repeated here, though in a somewhat different form. It has been contended that section 326, sub-section (1), refers only to suits arising out of acts done inadvertently or illegally, for which a suit for damages will lie. It has been said that the sub-section does not apply to suits for money demandable from the Board or a member, officer or servant of a Board. The argument in another way is, that the suits referred to in sub-section (1) are suits based upon tort or *quasi* tort and do not include suits for which the cause of action assigned is a breach of contract or of a legal relation resembling contract.

Several cases have been cited before me, to which I need not refer in giving this judgment. None of them lays down any interpretation on this particular section and as I am of opinion that the wording of the section is quite clear, I deem it unnecessary to refer to any of these authorities.

In the first place it seems to me that section 326, sub-section (1), refers to all suits in which it is intended to bring a suit in respect of an act done or purporting to have been done by a Board or by a member, officer, or servant of a Board in its or his official capacity, that is to say, suits in which the cause of action has arisen out of an act done or purporting to have been done by a Municipal Board or by any of its members or servants. There is no attempt in the sub-section to define suits in accordance with the nature of the relief sought. It is quite true that in prescribing the formalities which must be observed when a notice of an intended suit is being given, it is laid down that the intending plaintiff must specify the nature of the relief sought and also the amount of compensation claimed, that is to say, if the claim is a claim for compensation the amount which the plaintiff desires to recover must be specified. But it is not right to say that there is any justification in the language of the sub-section for the contention that suits are to be divided into suits in which compensation is being sought and into suits in

which no compensation is being sought. If we refer to sub-section (3), the point becomes perfectly clear. I have already quoted the language of this section and pointed out that it lays down a rule of limitation for all suits referred to in sub-section (1), "except suits for the recovery of immoveable property or for a declaration of title." I might also refer to the language of sub-section (4), which shows that in a suit to which sub-section (1) applies, relief may be sought by way of injunction. The fact appears, therefore, that the intention of the section is that all suits which claim to have their origin in an act done or purporting to have been done under colour of the Act by a Municipal Board or its members or servants are subject to the special law of limitation laid down in the section.

If the argument of the learned Counsel for the petitioner is that this suit is not based on tort, I am unable to agree with him. I have already pointed out that a legal duty is laid upon a Municipal Board in virtue of the rule which has been framed under the Act and which relates to refund of octroi duty. A breach of a legal duty is a tort and gives rise to an action. I do not accept the argument that this action is founded upon a breach of contract or the breach of some relation resembling a contract. I do not see how it can be argued that there was any contract between the parties in this case by which the defendant Board was legally bound to hand over this money to the plaintiff. The duty is laid upon a Board by a rule carrying the force of law, and, consequently, as the plaintiff alleges a breach of the legal duty, he cannot be heard to say that his action was not founded on tort. I have already pointed out that in paragraph 6 of the plaint the cause of action, which was alleged, was the refusal by the Municipal Board to pay over to the plaintiff the money to which, he said, he was entitled under the rules. Further, I am of opinion that, as framed, the suit is a suit for compensation. The plaintiff is in reality asking for damages by way of reparation for the tortious act committed by the defendant Board, and in that view even according to the argument of the learned Counsel for the petitioner the suit is one of the suits described in sub-section (1) of section 326.

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For these reasons I am satisfied that the judgment of the Court below is correct and should be maintained. The application is dismissed accordingly with costs to the opposite party, including fees in this Court on the higher scale.

Application dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 1317 OF 1918.

September 4, 1919.

Present:—Mr. Justice Krishnan.

S. A. NATESA AIYAR—PETITIONER

versus

S. A. MANOYYA AIYAR—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIII, r. 5—Application for leave to sue in forma pauperis, rejection of—Construction of document filed with plaint—Adjudication on merits, legality of—'Cause of action,' meaning of—Jurisdiction.

The expression 'cause of action' used in clause (d) of rule 5 of Order XXXIII, Civil Procedure Code, means a subsisting cause of action at the date of the application to sue *in forma pauperis*, that is, one which has not been extinguished by limitation. In deciding this point the Court must, however, confine itself to the allegations in the petition and must not go beyond them. [p. 463, col. 1.]

A Court should not reject an application under Order XXXIII, rule 5, of the Civil Procedure Code on the ground that on the construction of a document filed along with it no cause of action is disclosed. The construction of the document, whether easy or difficult, should be reserved for the trial of the suit. [p. 463, cols. 1 & 2.]

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order, dated the 26th August 1918, of the Court of the Subordinate Judge, Mayavaram, in Original Petition No. 40 of 1918.

FACTS appear from the judgment.

Mr. K. Jagannadha Aiyar, for the Petitioner.—The lower Court erred in rejecting the pauper application on the construction of Exhibit A. Whether Exhibit A conferred an absolute or only a life-estate was a question to be determined at the trial of the suit. At that stage of the proceedings the Court had to confine only to the question of the pauperism of the applicant and not deal

with the merits. It could reject the application if no cause of action was disclosed, but that should be patent on the petition itself.

Messrs. T. R. Vencatrama Sastriar, K. Narasimha Aiyangar and A. Krishna-swami Aiyar, for the Respondents.—The Munsif had jurisdiction to reject the application if there was no cause of action. A perusal of the deed of settlement filed with the petition disclosed, in the opinion of the Court, that the plaintiff had no right to sue. Whether the Court was correct in its view or not, it had jurisdiction to pass the order it did.

JUDGMENT.—In this case the learned Subordinate Judge rejected petitioner's application for leave to sue *in forma pauperis* without any trial of the question of his pauperism, on the grounds that as regards a portion of his claim he had no cause of action and as regards the rest he was barred by limitation.

The question of the existence or non-existence of a cause of action in this case depended on whether petitioner's mother Baghirathi Ammal had obtained a life-estate or an absolute estate under the deed of settlement executed by his grandfather in 1885. He alleged in his petition that only a life estate had been granted to her and on that allegation his petition clearly disclosed a cause of action. The Subordinate Judge, however, referred to the deed of settlement, which was mentioned in the petition and had been filed along with it and was marked as Exhibit A and construing it he held that it gave Baghirathi an absolute estate, and that in consequence the petitioner had no cause of action to recover any share in the properties sold by her on the ground that the sale was not for proper necessity.

It is contended that the Subordinate Judge acted illegally or with material irregularity in construing Exhibit A at this stage of the proceedings and his order based on such construction should be set aside. A very similar question arose in *Gopal Ohandra Neogy v. Bigoo Mistry* (1) where a Bench of the Calcutta High Court, following a previous ruling of the same Court in *Debo Das v. Mohunt Ram Charn Das* (2), held

(1) 8 C. W. N. 70.

(2) 2 C. W. N. 474.

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that under section 409 of the old Civil Procedure Code of 1882 the lower Court was not justified in basing the rejection of an application to sue *in forma pauperis* on its construction of a Will which had been filed with the petition. As pointed out in that case, the construction of the document filed was properly the function of the Court at the trial of the suit and not before the suit was instituted. The new Code has made no material difference on this question.

These rulings were recently followed in this Court in a case under the new Code in the case of *Kalliani Amma v. Matathil Veetil Achuthan Nair* (3), which itself followed a previous ruling of a Bench of this Court in *Govindasami Pillai v. Municipal Council, Kumbakonam* (4). In the latter case it was held that, upon an application for leave to sue *in forma pauperis*, the Court should not go into any difficult question of limitation as to which there had been difference of judicial opinion and that Order XXXIII, rule 5, clause (d), of the Code of Civil Procedure which requires, the Court to reject the application when the petitioner's allegations do not show a cause of action, applied only when the absence of a cause of action appeared clearly on the face of the petition. In fact it had been ruled sometime ago by a Full Bench of this Court in *Rathnam Pillai v. Pappa Pillai* (5) that on a pauper application the enquiry on evidence should be confined entirely to the question of the applicant's pauperism and no evidence as to the merits of the case should be gone into.

No doubt under clause (d) the Court must reject the application if the allegations do not show a cause of action, and that, means a subsisting cause of action at the date of the petition, one which had not been extinguished by limitation; but to decide the point, the Court must confine itself to the allegations in the petition and must not go beyond them. Following the authorities above cited, so far as they bear on the present question, I must hold the Subordinate Judge was not justified in construing Exhibit A for rejecting the

pauper application. Though it was filed with the petition and referred to in it, it is after all only a piece of evidence; I do not think the terms of the document can be properly treated as a part of the allegations in the petition. Even if, as the Subordinate Judge thinks, the matter is free from difficulty, which, however, is not clear with reference to Schedule 6 properties, at least the construction of the deed should have been left to the trial of the suit and should not have been determined at this stage. The question should not, in my opinion, be made to depend on the uncertain test of the construction being easy or difficult of determination.

In the view I take, it is not necessary to consider the arguments with reference to the question of limitation. The application must be allowed and the order of the Subordinate Judge set aside and the petition remanded to him for fresh disposal according to law. Costs to abide and follow the final result of the petition.

M. C. P.

*Order set aside;
Petition remanded.*

ALLAHABAD HIGH COURT.
PRIVY COUNCIL APPEAL No. 37 OF 1919.
November 28, 1919.

Present:—Sir Grimwood Mears, Kt.,
Chief Justice, and Justice Sir P. C.
Banerjee, Kt.

MUZAFFAR ALI AND OTHERS—DEFENDANTS
—APPELLANTS

versus

MUHAMMAD JAWAD—PLAINTIFF—
RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 109—Suit, value of, below Rs. 10,000—Question in dispute one of evidence—Appeal to His Majesty in Council—Leave, whether should be granted.

Where the subject-matter of a suit is less than Rs. 10,000 in value, and the sole question upon which the decision of the case rests is one of evidence, the point is not one of general interest and importance to justify the grant of a certificate that the case is a fit one for appeal to the Privy Council. [p. 464, col. 2.]

(3) 53 Ind. Cas. 239; 10 L. W. 174; (1919) M. W. N. 573; 37 M. L. J. 309.

(4) 45 Ind. Cas. 95; 41 M. 620; 34 M. L. J. 399.

(5) 13 M. L. J. 292 (F. B.).

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Application for leave to appeal to His Majesty in Council.

Mr. S. A. Haider, for the Appellant.

Dr. S. M. Sulaiman, for the Respondent.

JUDGMENT.—This is an application for leave to appeal to His Majesty in Council in a case in which the value of the suit and of the proposed appeal is under Rs. 10,000. But it is said that this is an appeal which is otherwise fit to be brought to the attention of the Privy Council, by reason of the fact that the appeal will turn upon a question of general interest and importance. Now the one point which has been argued is a point which is really a matter of evidence. In the suit one main question was as to the amount of the dower of a lady, named *Musammât Sakina Begam*. That was in dispute and with a view to influence the Court the *kabinnama* (deed of dower) of her sister was produced and was put forward to add weight to the contention that her dower was probably the same amount, or approximately the same amount, as that alleged by the defendants to have been the dower of *Musammât Sakina Begam*. Now the Counsel, who appears to support this application, says that in a case in which the question before the Court is as to the amount of the agreed dower, it is incompetent for the Court to permit evidence to be given of any customary dower which may happen to prevail in the particular family to which the lady belongs, and in support of that proposition he has brought our attention to a case which is found reported as *Fazil Khan v. Musammât Karm Begam* (1). When that case comes to be looked at, it is found to be a proposition for a most elementary point of law, and the elementary point of law that that case decides is that when a Judge has a duty to decide case A, he must not turn away and decide case B. In that case the plaintiff came forward and asserted that the dower was a specified sum due under a contract. At the end of the case the Judge gave her a decree based not on a contract but based upon something which he found to be a customary dower prevailing in the lady's family. Well he had no right to turn an action of contract into an action based upon a custom. But here the question arises in rather a different

form. Neither the trial Court nor the High Court here admitted the *kabinnama* for the purpose of turning a claim by contract into a claim of custom—but they used it, as they were entitled to use it, in order that having looked at the document it should have some weight on their minds as to the probability of the truth of the case on either side; and as the Court has already pointed out, section 11 of the Evidence Act contemplates just the very thing. You may get sets of circumstances which are strongly evidentiary of the truth of what witnesses say, and those sets of circumstances may be so sufficiently near to the issue in the case as to make it right and proper for them to be brought to the notice of the Court so that the Court should be influenced by them. Now we feel that where there is litigation as to the amount of dower which a lady says was due to her by virtue of a contract, that it is some evidence, at all events certainly receivable evidence, that in her family there was a custom that her dower should be so much, that 2, 3 or 4 of her sisters had been married, that they had each received dower of that amount, we feel that evidence of that kind would raise a presumption, if there were no outstanding points of difference, that her dower would in like circumstances be somewhere about the same amount as the customary dower. It would be evidence which a Judge would be at liberty to reject but also at liberty to give weight to. But of course he must not give a decree on the basis of customary dower. He should give his decree on the basis that the lady, having alleged a contract has proved an agreement to his satisfaction. It is a pure point of evidence and no authority dealing with the law of evidence has been cited to us. Under these circumstances we are of opinion that not only it is not a point of general interest but it is not a point really arguable. The application must, therefore, be dismissed with costs, including fees on the higher scale. We order accordingly.

Application dismissed.

(1) 27 Ind. Cas. 113; 105 P. R. 1914; 241 P. L. R. 1915.

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BOMBAY HIGH COURT.

CRIMINAL APPEAL No. 410 OF 1919.

July 22, 1919.

Present:—Mr. Justice Shah and Mr. Justice Hayward.

EMPEROR—APPELLANT

versus

MARUTI SANTU MORE—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 164, 533—Evidence Act (I of 1872), ss. 21, 26, 80, 91—Confession, oral, made before a Magistrate, admissibility o.

Per Shah, J.—A confession made to a Magistrate during the course of an investigation which is not reduced into writing is inadmissible in evidence and cannot, therefore, be proved by oral evidence. [p. 469, col. 1.]

Per Hayward, J.—An oral confession made to a Magistrate is *prima facie* relevant under sections 21 and 26 of the Evidence Act, though it has to be proved by oral testimony and not by the production of any writing duly recorded by any Magistrate under section 80 of the Evidence Act. [p. 472, col. 1.]

Criminal appeal by the Government of Bombay from an order of acquittal passed by the Additional Sessions Judge, Satara.

Mr. S. S. Patkar, Government Pleader, for the Crown.

Mr. M. H. Mehta, for the Accused.

JUDGMENT.

SHAH, J.—In this case two persons were charged in connection with the murder of a forest guard, named Aba Gudhan, accused No. 1 with the murder under section 302, Indian Penal Code, and accused No. 2 with the abetment thereof under sections 302 and 114, Indian Penal Code, and with causing the evidence of murder to disappear under section 201, Indian Penal Code. They were tried by the Additional Sessions Judge of Satara with the aid of Assessors. The Assessors were of opinion that accused No. 1 was guilty of murder and that accused No. 2 was not guilty of the abetment thereof; but they were divided in opinion as to the guilt of accused No. 2 on the charge under section 201, Indian Penal Code. The learned Judge found that the charge against accused No. 1 was not established, and accordingly acquitted him. He also found that the charge of the abetment of murder against accused No. 2 was not proved and acquitted him of that charge; he found him guilty under section 201

and sentenced him to rigorous imprisonment for four years.

The Government of Bombay have appealed against the acquittal of accused No. 1 and we are now concerned with his case only.

It is not necessary to set forth the prosecution case in detail. The general outlines of the story have been stated in the second paragraph of the judgment of the lower Court at page 51 of the print which I adopt for the purpose of this judgment.

It is found by the trial Judge that the deceased Aba left Umberkanchan on the 23rd November 1917 for Kolekarwadi and was murdered on his way to that place on the very day, and this is not now disputed. The question in this appeal is whether the accused No. 1 is shown to be the murderer as alleged by the prosecution.

It is urged in support of the appeal, first, that the oral confession made by the accused No. 1 to the 2nd Class Magistrate of Patan on the 1st January 1918 has been wrongly excluded from consideration and that the said confession is true and voluntary; secondly, that the lower Court is wrong in treating the evidence of certain witnesses (Exhibits 21—25) as unreliable as regards accused No. 1; thirdly, that the accused No. 1 pointed out the scene of offence where some blood stains and the upper end of an umbrella, which it is suggested is the broken end of the deceased's umbrella, were found, and lastly, that the confession of accused No. 2 supports the prosecution case.

The first point relating to the admissibility of the oral confession raises an important question of law. In the lower Court the Public Prosecutor did not rely upon this confession. It has been relied upon by the learned Government Pleader here, and the question of its admissibility has been fully argued before us.

The facts which led up to the confession are these. The murder was committed on the 23rd November 1917. The fact of the murder was known on the 4th December, when the dead body was discovered in the limits of Karale, some miles away from Kolekarwadi. The Police investigation commenced on the 20th December and

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until 30th December apparently nothing was known about the offenders. On the 31st December the accused No. 1 was arrested, and on the following day he was sent to the Second Class Magistrate at Patan for a remand. The evidence of the Magistrate is as follows:—"The Sub-Inspector of Malhar Peith sent to me accused No. 1 Maruti Santu on 1st January 1918 for a remand. I understand that report to mean that the Police wanted that the accused No. 1 should be remanded to their custody. Then I questioned accused No. 1. I also asked him if he was ill-treated or tortured by the Police. Accused No. 1 complained of no torture or ill-treatment. I questioned accused No. 1 in respect of some property referred to in the Police Sub-Inspector's report. I did not reduce that statement to writing, as there is a circular order of the District Magistrate prohibiting Magistrates from recording confessions in cases which are not triable by them. The statement which accused No. 1 made to me was voluntary statement on his part. I refused to hand over accused No. 1 to Police custody and kept him in my custody until he was sent to the Sub-Divisional Magistrate, on the 9th January 1918."

It is clear that the alleged confession was made in the course of the Police investigation and before the inquiry or the trial commenced. It could have been recorded under section 164, Criminal Procedure Code, but was not recorded. The question is whether any oral evidence in proof of the confession is admissible or, in other words, whether the confession is required by law to be reduced to the form of a document within the meaning of section 91 of the Indian Evidence Act.

At the outset I may mention that in my opinion the reason assigned by the Magistrate for not recording the confession does not affect the question of law. The circular of the District Magistrate referred to by the witness is not before us; and I am not prepared to accept the statement of the witness as accurately representing the effect of the circular. If what he states be right, the District Magistrate has issued a circular which is directly opposed to the explanation to section 164, Criminal Procedure Code, which provides that it is not

necessary that the Magistrate recording a confession should be a Magistrate having jurisdiction in the case. It is quite possible that the so-called circular is merely a recommendation to the Magistrates to see that the directions contained in Supplemental Criminal Circular No. 17, Clause 20, for the guidance of the Police are duly followed. But whatever the circular may be, it cannot change the provisions of section 164 and it has no legal effect so far as the present point is concerned.

I shall first consider the provisions of the Indian Evidence Act and the Code of Criminal Procedure bearing on this point without any reference to the reported cases. The generality of the provisions of section 21 of the Indian Evidence Act relating to admissions is qualified by the provisions of sections 24 to 29 relating to confessions. Section 25 renders any proof of a confession made to a Police Officer inadmissible. Section 23 provides that no confession made by a person while he is in Police custody can be proved against him unless it be made in the immediate presence of a Magistrate. This is subject to the provisions of section 91, which provides that no evidence shall be given in proof of any matter which is required by law to be reduced to the form of a document except the document itself or secondary evidence of its contents when that is admissible. In the present case it is clear that no evidence is admissible to prove the contents of the confession, if the confession is a matter required by law to be reduced to writing. This brings me to the provisions of section 164, which provides for the recording of confessions in the course of an investigation under Chapter XIV or thereafter before the commencement of the inquiry or trial. It is urged that the provisions of section 164 are merely permissive and have no compulsory force, as the expression used in sub section (1) is "may record." The confession in question was such as could have been recorded under section 164 by the Magistrate. On a consideration of the provisions of the section and its obvious purpose it seems to me to be clear that such a confession is a matter required by law to be reduced to writing within the meaning of section

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91 of the Indian Evidence Act. Sub-section (2) provides that such confessions (i.e., confessions referred to in sub-section 1) shall be recorded and signed in the manner provided in section 364. The words of section 364 are mandatory. Sub-section (3) requires that no confession shall be recorded unless the Magistrate has reason to believe that it is voluntarily made. The terms of the memorandum which the Magistrate is required to make at the foot of the record show the anxiety of the Legislature not only to see that a confession is voluntarily made and that it is accurately recorded, but to convey an assurance with the record that the Magistrate making it was in fact satisfied at the time both as to its voluntary nature and as to its containing a full and true account of the statement. Taking the provisions of the section as a whole it seems to me that though the Magistrate has the power to refuse to record it if he is not satisfied that it is voluntarily made, he has no such option where he is satisfied that it is voluntarily made. The expression "may record" appears to have been used as the Magistrate has to ascertain whether the confession is voluntarily made. The section is no doubt permissive in that sense. But it is obligatory in the sense that it must be recorded if it is found to be voluntarily made. It is hardly consistent with the purpose and terms of this section to hold that the Magistrate has the option of refusing to record it, even when he is satisfied that it is voluntarily made, if it is to be proved as a confession later on.

The provisions of section 533 have no direct application to the present case. But both its terms and its existence indicate, if at all, that a confession under section 164 requires to be made in writing. Under this section oral evidence is admissible under certain circumstances when the record of the confession does not satisfy the requirements of section 164. But the section has no application where there is no record of the confession and no attempt whatever has been made to comply with the provisions of section 164. The fact that a provision is made to admit evidence within certain defined limits tends to indicate that no evidence

outside those limits is intended to be admitted. Further the last clause of section 533, which refers to section 91 of the Indian Evidence Act, also tends to show that the Legislature has impliedly acquiesced in the view that the record of a confession would be a matter required by law to be reduced to the form of a document.

In my opinion this construction of section 164 is permissible in view of the observations in Maxwell on the Interpretation of Statutes, pages 388, 389 (5th Edition): "Statutes which authorise persons to do acts for the benefit of others or, as it is sometimes said, for the public good or the advancement of justice have often given rise to controversy when conferring the authority in terms simply enabling and not mandatory. In enacting that 'they may' or 'shall if they think fit' or 'shall have power' or that 'it shall be lawful' for them to do such acts a Statute appears to use the language of mere permission; but it has been so often decided as to become an axiom that in such cases such expressions may have—to say the least—a compulsory force and so would seem to be modified by judicial exposition. On the other hand in some cases the authorised person is invested with a discretion and then those expressions seem divested of that compulsory force and probably that is the *prima facie* meaning." It is needless to cite instances of other Statutes, in which the word 'may' is held to have a compulsory force, as after all whether the word 'may' has a compulsory force in a particular Statute must depend upon the terms and the purposes of that Statute.

An examination of the corresponding provisions of the Code of 1872 in the light of the decisions under that Code appears to me to support the same inference. Sections 122 and 346 of that Code correspond roughly to the provisions of sections 164 and 364 in the Code of 1882 and in the present Code. In the Code of 1872 there was no separate section corresponding to section 533 of the Codes of 1882 and 1898; but the last paragraph of section 346 contained provisions of a limited scope which in the Codes of 1882 and 1898 took the wider form of section 533. Under the Code of 1872 it was held by a Full Bench of this Court, and the view was

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followed in other cases, that where the record of a confession was inadmissible in evidence owing to some defect in recording it, no evidence was admissible to prove the terms of that record and that a confession was a document that was required by law to be reduced to writing for the purpose of section 91 of the Indian Evidence Act; see *Reg. v. Bai Ratan* (1), *Reg. v. Daya Anand* (2), *Reg. v. Shivya* (3) and *Empress v. Daji Narsu* (4). In each of these cases there was some record of the confession which was held to be inadmissible. But the point of these decisions, as I read them, so far as it is relevant to this case, is that in spite of the use of the word 'may' in section 122 the confession was held to be a document required by law to be reduced to writing within the meaning of section 91. It is likely that section 533 was enacted to relax the rigour of this view. This section is more comprehensive than the last paragraph of section 346 of the Code of 1872. The history of these provisions suggests an inference in favour of the view which I take of section 164.

I may refer here to two decisions of the Chief Court of the Punjab which the learned Government Pleader has invited our attention to. That Court held in *Shere Singh v. Empress* (5) and *Buta v. Empress* (6) in effect that section 164 merely authorised but did not require the Magistrate to reduce the confession to writing and that oral evidence to prove it was admissible. The later decision was under the Code of 1882 and there was some record, though a defective record, of the confession. The evidence sought to be admitted was clearly within the scope of section 533 of the Code of 1882. The earlier decision was under the Code of 1872 and in this case also there was some defective record of the confession. But there the learned Judges did not accept the view taken by the Full Bench in *Bai Ratan's case* (1). I do not see any reason why now we should be asked to ignore the view taken by this Court and to accept the view taken in the Punjab cases as a correct interpretation of section 122. It is

quite possible that section 533 represents a compromise by the Legislature between the two conflicting views. In the Code of 1882 the provisions of sections 122 and 346 were reproduced with some modifications which do not affect the present point. The change effected by section 533 does not touch this case. All that I feel concerned to point out is that a confession under section 164 of the Codes of 1882 and 1898 requires no less to be in writing than one under the Code of 1872.

It is significant that the learned Government Pleader has not been able to cite a single instance in which a confession that could have been but was not in fact recorded under section 164, was allowed to be proved by the oral evidence of the Magistrate to whom it might have been made. The case of *Emperor v. Gulabu* (7) is against the contention urged on behalf of the Crown. I do not think that the fact that the Magistrate was conducting an inquiry in that case is sufficient to differentiate it from the present case. Here the accused was produced before the Magistrate for a remand apparently under section 167 of the Code of Criminal Procedure and the provisions of section 364 apply through section 164. The *ratio decidendi* of that case would apply to the present case.

It is argued that it is anomalous that an oral confession made to any third person should be provable whereas such a confession made to a Magistrate should not be capable of proof. It is also urged that at any rate the evidence of the Magistrate in his private capacity should be held to be admissible. This argument ignores the distinction which the Legislature has recognised between a confession made when the accused is free (not in Police custody) and that made to a Magistrate in the course of an investigation under Chapter XIV. For reasons which it is not difficult to conjecture, the Legislature has provided a special rule as to the recording of confessions made in the course of an investigation under Chapter XIV before the inquiry or the trial has commenced. And that rule must be given effect to. Besides the accused appeared before the witness as a Magistrate and the accused was

(1) 10 B. H. C. R. 166.

(2) 11 B. H. C. R. 44.

(3) 1 B. 219.

(4) 6 B. 288; 6 Ind. Jur. 480.

(5) 21 P. R. 1881 Cr.

(6) 52 P. R. 1887 Cr.

(7) 19 Ind. Cas. 307; 35 A. 260; 11 A. L. J. 286; 14 Cr. L. J. 211.

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questioned by the Magistrate in his official capacity and not as a private individual. I do not think it proper to draw a distinction which is not based on facts and which has the effect of defeating the provisions of law. It seems to me that the contention on behalf of the Crown is directly opposed to the policy of section 164 and of the Criminal Circulars issued from time to time by this Court as to the recording of confessions.

Even if the oral evidence were admissible I do not see how it would be prudent to rely upon it, when such strict safeguards as are indicated by section 164, Criminal Procedure Code, and the Criminal Circular No. 17 are considered desirable to ensure that the confession is voluntary and that it accurately represents what the accused has said. The oral evidence necessarily given after many days would lack that degree of assurance which the written record is expected and required to give. Anyhow as I feel clear that the confession said to have been made before the Magistrate of Patan cannot be proved, I need not consider any further the value of that confession.

The next thing relied upon by the Government Pleader is the evidence of the witnesses, Exhibits 21—25. This is really the most important evidence against the accused; and I have given very anxious consideration to all that has been urged in favour thereof on behalf of the Crown. It is urged, not without force, that there is nothing to show why these five witnesses should falsely implicate accused No. 1. At the same time there are certain general considerations which cannot be ignored and which tell in favour of the accused. In the first place, there is the broad consideration that a Court of Appeal has not the advantage of seeing the witnesses which the trial Court has, and when that Court has not been able to trust certain witnesses, the Court of Appeal should be slow to differ from that Court in its appreciation of that evidence. With regard to two out of these five witnesses the learned Judge has made definite remarks. One of them (Exhibit 21) is said to have given his evidence in a reckless manner and the other (Exhibit 24) did not favourably

impress the learned Judge. Generally speaking, these witnesses failed to inspire the confidence of the trial Court, and we have to give due weight to that fact. Secondly, all these witnesses knew about this murder, if their evidence is true, on the 23rd November. They said nothing about it until the 30th December. The Police investigation commenced on the 20th December and even then for ten days they did not break their silence. It must have been known in the village that the investigation was going on and if any of the real culprits were minded to concoct a story to save themselves, they had ample time and opportunity to do so. This circumstance derives some support from the fact that accused No. 2 adopted the unusual and rather suspicious course of going to Karad and surrendering himself to the Police there, who had nothing to do with the investigation on the 31st December, and of making a confession before the Magistrate at Karad on the 2nd. Accused No. 2 is a relation of Babaji and Laxman, who are witnesses in the case. Thirdly, we have the fact that though these witnesses except Dhondi speak of the presence of accused No. 2, their evidence on that point has not been relied upon and that view of their evidence has been accepted or at least acquiesced in by the Crown, as there is no appeal against his acquittal on the charge of the abetment of murder. Fourthly, we have the fact that three out of these five witnesses, *viz.*, Aba, Laxman and Dhondi, admittedly took part in the removal of the dead body, and it is obvious that they are interested in saving themselves from the suspicion which would otherwise attach to them as regards this murder. Lastly, there is nothing to show as to how these persons came to be known to the Police for the first time as witnesses who knew of the murder but were not concerned with it. They came rather suddenly on the scene on the 30th and 31st December, and all of them except Dhondi said that accused No. 1 had murdered the deceased in the presence of accused No. 2. These are, in my opinion, weighty considerations and while apparently there is a bulk of evidence in favour of the prosecution, its quality is open to question.

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Now it is important to remember that the motive, such as it is, equally affects accused Nos. 1 and 2. It seems to me that the evidence in the case points rather to the general unpopularity of the deceased in the village of Kolekarwadi and not to any particular enmity with accused No. 1. It appears from the evidence of the witness Dnyanu (Exhibit 18) that the deceased had conveyed a *takid* through him to the villagers to assist him in removing weeds from the forest plantation, and on the day of the murder he had asked the witness to inform one Govinda Taral of Kolekarwadi that he was going to Kolekarwadi that very day and that the villagers were wanted for removing the weeds. The witness had conveyed the intimation. Thus it was probably known that he was going to the village that day, and the prospect of his presence for further work must have quickened the feelings against him in connection with the impounding of cattle. I do not see any particular force in the suggestion that the motive for the crime was probably the circumstance that the accused Nos. 1 and 2 had a special grievance against him in respect of the compensation which they along with two others had to pay to the Forest Department. But, however that may be, I do not see how accused No. 1 can be particularly singled out as having a special motive to commit this crime as distinguished from the witnesses or accused No. 2. The murder was committed in the field of the witness Laxman (Exhibit 23), whom the Judge suspects as being probably concerned in the murder. Such property as is identified is produced by the witness Laxman and accused No. 2. Laxman produced the umbrella with the broken end belonging to the deceased and accused No. 2 produced the axe and the pen-knife which belonged to the deceased. The explanation which the three witnesses who helped in the removal of the dead body have given as to how they came to be called by accused No. 1 to help him is entirely unsatisfactory. There is nothing on the record beyond the fact that he is the son-in-law of the Patil to show that accused No. 1 is a man with any particular influence in the village. Under these circumstances the evidence of these witnesses

must be viewed with great caution and suspicion, when they say that accused No. 1 alone murdered the deceased. It is needless to discuss this evidence in detail. I do not attach any importance to minor discrepancies in their evidence. I have considered this evidence with care, and I am not satisfied that they state the truth when they attribute the whole responsibility for the actual murder to accused No. 1; no doubt the Assessors have believed them as to accused No. 1; but they find on that evidence that accused No. 2 is not guilty. I am unable to accept that appreciation as either consistent or satisfactory.

The learned Judge was not prepared to rely upon this evidence and I cannot say that he was wrong in withholding his confidence from this evidence as regards accused No. 1.

I have no doubt in this case that the deceased was murdered on his way to Kolekarwadi by the villagers; and it is possible that the accused No. 1 may have been the murderer or one of the murderers. I have considered the theory that accused No. 1 is at least one of the murderers. But on the evidence which is led to show that he was the murderer, it is difficult to accept that theory. On this evidence it is as likely as not that he was concerned only in the removal of the dead body like some of the witnesses and not with the murder. I do not think that the evidence is sufficient to establish his guilt on the charge of murder.

The circumstance that he pointed out the scene of offence where the broken end of an umbrella, probably the umbrella of the deceased, was found at some distance does not carry the case against him any further. It shows his knowledge of the place of murder; but there are several witnesses who have that knowledge and if they can possess that knowledge without being guilty of murder, I do not see any reason why in the case of accused No. 1 any further inference should be drawn. This knowledge is consistent with his innocence on the charge of murder.

Lastly, the confession of the co accused made before the Magistrate at Karad is relied upon as showing the guilt of accused No. 1. Apart from the obvious infirmity of such a confession when it is retracted before

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the Committing Magistrate and at the trial, as in this case, I do not see how this confession can be any better evidence than the evidence of the witnesses which I have already dealt with. It would be rather anomalous that a confession made by a person which is not good enough to establish his own guilt, should be relied upon to establish the guilt of a co-accused. Even treating him as a witness, which he is not, I would not trust him as regards accused No. 1, having regard to his subsequent retractions and his suspicious conduct in going to Karad, and in making the confession there. I have dealt with these items of evidence separately. But taking them all together I am not satisfied that accused No. 1 is shown to be guilty of murder.

I would, therefore, dismiss the appeal. The bail bonds to be cancelled. It is to be regretted that the brutal murder of the Forest Officer remains unpunished. It may be possible, however, to initiate proceedings, if they have not been already initiated, against the persons concerned in the removal of the dead body under section 201, Indian Penal Code.

HAYWARD, J.—The accused Maruti Santu has been acquitted of the charge of the murder, on the 23rd November 1917, of the forest beat guard Aba Gudhan in Kolekarwadi, a forest village in the Taluka of Patan. The two Assessors were of opinion that the accused was guilty but a different view was taken by the Additional Sessions Judge of Satara. Hence this appeal by the Government of Bombay.

The accused Maruti had suffered together with other villagers for grazing cattle without permission in the forest of Kolekarwadi which was in the beat of Aba Gudhan, and no love was lost between the villagers and the forest guards as explained by witness No. 6, the forest round guard Laxman Dhondi, and witness No. 2, the Range Forest Officer, Mr. Lobo. On the 23rd November 1917 Aba Gudhan sent word through the witnesses Nos. 8 and 9, Dnyau and Govinda Mahars, that he wanted the villagers to help in weeding the forest plantation and the same day set out for Kolekarwadi. He carried his axe of office and his umbrella and was helped by the witness No. 10, Daji Mahar, on

his way to Kolekarwadi. It is alleged that the accused Maruti Santu and another Maruti named Maruti Raoji met Aba Gudhan that same afternoon and that Maruti Santu struck him on the head with an axe while Maruti Raoji was struggling with him. This was seen from ninety yards off by witness No. 12, Aba Santu, and from a greater distance by witness No. 11, Babaji Baloo. The two Marutis were also seen standing besides the prostrate man by the other men who were attracted by their cries, namely, witnesses Nos. 13 and 14, Laxman and Daulata. This occurred in the Nagli fields in the hills of the village of Kolekarwadi. It is further alleged that the two Marutis that same night forced the witnesses Aba Santu and Laxman and witness No. 15, Dhondi, to help them take the dead body seven miles off into the forest of the village of Karale. It was there found on the 3rd December 1917 and showed three axe wounds on the head upon examination by the Sub-Assistant Surgeon. The two Marutis were implicated by an informer on the 30th December 1917. Maruti Santu pointed out the scene of the murder, on the 31st December 1917, where blood was found and the broken end of the umbrella of Aba Gudhan. He was arrested and admitted his guilt, but the admission was not recorded in writing on the 1st January 1918 by the Second Class Magistrate of Patan. The rest of the umbrella was produced the same day by the witness Laxman and a two anna piece removed from the dead body was also produced by the witness Dhondi. Maruti Raoji subsequently produced the pen-knife and axe of Aba Gudhan. He had admitted his guilt after surrender and the admission had been recorded in writing on the 2nd January 1918 by the First Class Magistrate of Karad. The Assessors were both satisfied on this evidence of the guilt of Maruti Santu but not of the guilt of Maruti Raoji. They were divided as to the guilt of Maruti Raoji of the minor offence of getting rid of evidence of the murder. The Additional Sessions Judge disagreed with them as to the guilt of Maruti Santu and agreed with one of them as to the guilt of Maruti Raoji of the minor offence of getting rid of evidence of the murder. This appeal

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relates to the acquittal of Maruti Santu of the murder. No appeal as regards Maruti Raoji has been made by the Government of Bombay.

It is clear on these facts that the decision depends mainly on the weight to be given to the evidence of the witnesses Aba, Babaji, Laxman, and Daulata. Aba was certainly a direct witness, and some of the criticisms in the judgment would hardly appear justified on the record, but at the same time he was himself implicated in the removal of the dead body and has given an improbable explanation of his help in that matter. Babaji was no doubt an unsatisfactory witness. He denied any direct knowledge of the matter until cross-examined as to what he had stated to the Committing Magistrate. Laxman and Daulata were again not entirely satisfactory. They both gave rather improbable explanations of their help being sought for the removal of the dead body, and it was Laxman who produced the umbrella while the witness Dhondu, who also assisted in the removal of the body, produced the two anna piece said to have belonged to the deceased. It ought not moreover to be forgotten that these witnesses did not relate their version of the matter till more than a month after the murder. The Assessors believed these witnesses and their statements have indeed left the impression on my own mind of substantial truth, but they no doubt laboured under the infirmities indicated and it would not be possible, therefore, profitably to press this view against those held both by the Additional Sessions Judge and my learned brother.

The confessions do not materially modify the position. The confession of Maruti Santu was oral and not entitled to great weight, in view of the fact that it was not thought worth while to take the usual steps to have it formally recorded in writing. It was, however, *prima facie* relevant under sections 21 and 24 to 26, though it had to be proved by oral testimony and not by the production of any writing duly recorded by any Magistrate under section 80 of the Indian Evidence Act. The confession of Maruti Raoji, on the other hand, though recorded in writing, was not one "affecting himself" as regards the murder. It really exonerated himself from the

murder. It was, therefore, not relevant against any other person tried jointly for the murder under section 30, though it had been duly proved by the production of the writing recorded by the First Class Magistrate under section 80 of the Indian Evidence Act. It is not strictly necessary in this view to discuss whether the oral statement was not irrelevant as matter required by law to be reduced to writing within the meaning of section 91 of the Indian Evidence Act by reason of the provisions of sections 164 and 533 of the Criminal Procedure Code. It seems desirable, however, to point out that oral statements during investigations have nowhere expressly been required to be reduced to writing. It was, therefore, held in *Reg. v. Uttamchand Kapurchand* (8) that oral statements were not rendered irrelevant under section 91 of the Indian Evidence Act by reason of the reference to the writing in section 162 of the Criminal Procedure Code; though it was assumed on the other hand in *Reg. v. Bai Ratan* (1) that oral statements were rendered irrelevant under section 91 of the Indian Evidence Act by the permission to record them in writing given to Magistrates under section 164, Criminal Procedure Code. The assumption though subsequently repeated, requires scrutiny, as the word used was 'may' record and not 'shall' as in the provision relating to record of evidence on enquiries and trials, and 'may' could never mean 'shall' so long as the English language should retain its meaning as declared in *Baker, In re, Nichols v. Baker* (9), by Cotton, L. J. If the statements should be recorded in writing under the permissive power, then no doubt they 'shall' be recorded in a particular manner and 'shall' have a memorandum at the foot as to the manner in which they were recorded, and no doubt the manner in which they were recorded would be matter required by law to be in writing and no other proof of that matter would have been relevant but for the exclusion of section 91 of the Indian Evidence Act by section 533 of the Criminal Procedure Code. But if the statements should not be recorded in writing under the

(8) 11 B. H. C. R. 120.

(9) (1890) 44 Ch. D. 262 at p. 270; 59 L. J. Ch. 661; 62 L. T. 817; 38 W. R. 417.

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permissive power, then they would be unaffected either expressly or impliedly by reference to the provisions of section 91 of the Indian Evidence Act in provisions relating to proof of the recorded writings under section 533 of the Criminal Procedure Code. If, moreover, it was intended to make oral statements, which would be relevant when made to private persons, irrelevant when made to Magistrates, then there would surely have been express provision that such statements should not be proved except by writings duly recorded by Magistrates. It would not have been left to mere implication from the provisions relating to the manner of proof of such writings when recorded by Magistrates under section 533 of the Criminal Procedure Code. This was no doubt urged without success in *Emperor v. Gulabu* (7) before a Bench of the Allahabad High Court. But it should, in my opinion, be given further reflection with due deference to those learned Judges, should the matter hereafter be brought up in this Court.

Appeal dismissed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 339 OF 1919.
(CRIMINAL REVISION PETITION NO. 283 OF 1919).

October 8, 1919.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Burn.

GOPALA AIYAR AND OTHERS—COUNTER-
PETITIONERS—PETITIONERS

versus

KRISHNASAWMY IYER *alias*
APPA AIYER—PETITIONER—
RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 144, 145, 146, 435, 439—Preliminary order under s. 145, interference with, in revision, whether competent—Order under s. 145 during subsistence of another order under s. 144, legality of—Joint possession, applicability of s. 145 (6) to—'Evicted,' meaning of—Receiver, appointment of, under s. 145, powers of, extent of—Attachment, order of, scope of—Attachment of moveables, validity of—Enquiry when rival lessees claim

under separate trustees—Revisional powers of High Court, when to be exercised—Government of India Act, 1915 (5 & 6 Geo. V, C. 61), s. 107.

It is competent for a Divisional Magistrate to initiate proceedings under section 145, Criminal Procedure Code, during the subsistence of an order passed by a Sub-Magistrate under section 144 of the Code. [p. 475, col. 1.]

The High Court will not ordinarily interfere with a preliminary order under section 145 of the Criminal Procedure Code except where such order is manifestly illegal. [p. 476, col. 2.]

Mewa Lal v. Emperor, 44 Ind. Cas. 41; 3 P. L. J. 147; (1917) Pat. 363; 4 P. L. W. 359; 19 Cr. L. J. 249, not approved.

The word 'evicted' in section 145 (6) applies to cases where a person is found to be disentitled to the extent of possession which he claims as well as to cases where he is found not to be entitled to possession at all. [p. 476, col. 1.]

Section 145 of the Criminal Procedure Code is not applicable where the contesting parties are entitled to joint possession. [p. 475, col. 2.]

An attachment under section 146 of the Criminal Procedure Code connotes more than a Civil Court attachment and implies the taking and keeping possession of the property attached by the Magistrate. [p. 476, col. 1.]

Mewa Lal v. Emperor, 44 Ind. Cas. 41; 3 P. L. J. 147; (1917) Pat. 363; 4 P. L. W. 359; 19 Cr. L. J. 249, dissented from.

There is no objection to the appointment of a Receiver under section 145 of the Criminal Procedure Code, though the powers of such Receiver are not those of a Receiver appointed under section 146 (2) of the Code but are limited to taking possession of the properties and submitting an inventory thereof. [p. 476, col. 2.]

Section 145 of the Criminal Procedure Code does not give powers to a Court to attach moveables. [p. 476, col. 2; p. 477, col. 1.]

Per *Sadasiva Aiyar, J.*—The High Court can interfere with orders under Chapter XII, Criminal Procedure Code, only by virtue of the powers vested in it by section 107 of the Government of India Act. [p. 476, col. 2.]

A Magistrate can take action under section 145 of the Criminal Procedure Code when rival lessees claiming under separate trustees to be in actual possession are likely to cause a breach of the peace. [p. 477, col. 1.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, and section 107 of the Government of India Act, praying the High Court to revise the order of the 1st Class Sub-Divisional Magistrate, Kumbakonam, dated the 1st July 1919, in Miscellaneous Case No. 33 of 1919 (Miscellaneous Case No. 14 of 1919 on the file of the Court of the Stationary 3rd Class Magistrate, Kumbakonam).

FACTS.—A Magistrate, on a dispute between trustees as to the possession and

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management of the temple, dispossessed both and appointed a Receiver. The question was whether the Magistrate had jurisdiction to do so.

Mr. T. Rangachariar, for the Petitioners.—A Magistrate has no jurisdiction to pass an order under section 145, Criminal Procedure Code, where the disputants are persons entitled to joint possession, even though there may be a fear of a breach of the peace. The proper section applicable in such a case is section 144: *Nritta Gopal Singh v. Chandi Charan Singh* (1). See also *Radha Raman Ghose v. Baliram* (2). A mere right of management is outside the scope of section 145: *Akaloo Ohandra Das v. Mohesh Lall* (3) (co-owners). *Makhan Lal Roy v. Baroda Kanta Roy* (4). The case of a Hindu manager is different as he is entitled to have exclusive possession: *Bhaskaruni Kesavrayudu v. Bhaskaruni Ohalapati Rayadu* (5). In the present case the dispute is only as regards the management. See *Kandasami Asari v. Narayana Asari* (6), *Veerabhadra Pillai v. Shunmugam Pillai* (7), *Sunkara Kylasa Mudaliar v. Kuthalinga Mudaliar* (8).

In any case, the Magistrate ought to have confirmed the persons whom he found to be in possession and not to have dispossessed both parties. The power to attach under section 145 is a temporary check to enable him to take a definite course. Once he acts under section 145, he has no power to appoint a Receiver under section 146. For a Receiver is appointed under section 146 after due enquiry. See *Muhammad Koolayappa Rowthan v. Sheik Abdul Khaddir Rowther* (9). The appointment of such a Receiver was set aside in *Subadramma v. Satyam Swami* (10). See also *Srinivasa Pillay v. Sathayappa Pillay* (11), *Mewa Lal v. Emperor* (12).

(1) 10 C. W. N. 1088; 4 Cr. L. J. 215.

(2) 32 C. 249; 8 C. W. N. 885; 1 Cr. L. J. 847.

(3) 4 Ind. Cas. 696; 11 Cr. L. J. 28; 36 C. 986.

(4) 11 C. W. N. 512; 3 Cr. L. J. 296.

(5) 31 M. 318; 18 M. L. J. 343; 8 Cr. L. J. 205; 4 M. L. T. 301.

(6) 26 Ind. Cas. 644; 2 L. W. 107; 16 Cr. L. J. 52.

(7) 32 Ind. Cas. 668; 17 Cr. L. J. 76.

(8) 47 Ind. Cas. 877; 19 Cr. L. J. 977.

(9) 25 Ind. Cas. 324; 27 M. L. J. 169; 15 Cr. L. J. 572.

(10) 7 Ind. Cas. 895; 8 M. L. T. 314; (1910) M. W. N. 821; 11 Cr. L. J. 536.

(11) 14 Ind. Cas. 759; 13 Cr. L. J. 295.

(12) 44 Ind. Cas. 41; 3 P. L. J. 147; (1917) Pat 363; 4 P. L. W. 359; 19 Cr. L. J. 249.

Under no circumstances can a Magistrate appoint a stranger as Receiver, for valuable evidence may be destroyed or lost.

Next, no order *ex parte* can be passed under section 145: *Lachmi Singh v. Bhusi Singh* (13).

Lastly, the Magistrate has removed the jewels of the temple to the Court. I submit that section 145 has no application to moveable property. They ought to be returned to the persons from whose possession they were taken.

Mr. K. V. Krishnaswamy Aiyar, for the Respondents.—Section 145 applies to this case, as here the real dispute is to exclusive possession between rival lessees from the conflicting trustees. So *Nritta Gopal Singh v. Chandi Charan Singh* (1) has no application.

Farther, one of the trustees in the present case has set up a right to exclusive possession in defiance of the other trustees. So also section 145 applies.

[SADASIVA AIYAR, J.—Even if the contention be frivolous?]

That is a matter for enquiry.

[SADASIVA AIYAR, J.—Is it your contention that the Magistrate can make the Pooja arrangements, etc.?]

Yes. That was the case in *Sundara Pandaram v. Vallinayaka Nadan* (14).

[SADASIVA AIYAR, J.—The best way to punish the parties would be to close the temple.]

That would be punishing the public who are entitled to worship.

[SADASIVA AIYAR, J.—But where is the provision by which the Magistrate can take up the rights and duties of a trustee on himself or confer it on a Receiver?]

The Magistrate is not a trustee but does the work on behalf of the trustees. See *Sundara Pandaram v. Vallinayaka Nadan* (14). I submit that the Receiver has all the powers of a Receiver in law. Where a word is used in an enactment, it is a fundamental rule of interpretation that the word is to have the same meaning throughout the enactment. There is, therefore, no

(13) 43 Ind. Cas. 817; 19 Cr. L. J. 225.

(14) 2 Weir 110.

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principle underlying the distinction sought to be drawn between a Receiver appointed under section 145 and one under section 146.

Mr. T. V. Mutukrishna Aiyar, in reply.—The rule of interpretation contended for is too wide to be correct.

[SADASIVA AIYAR, J.—You may add: "Provided that is the convenient meaning."]

(Then he replied generally and) cited again *Mewa Lal v. Emperor* (12).

ORDER.

BURN, J.—This is an application to revise an order made by the Sub-Divisional Magistrate, Kumbakonam under section 145, Criminal Procedure Code, on 1st July 1919. There are in fact two orders, the first is the one contemplated by clause (1) of the section and the second is an order of attachment and the appointment of a Receiver, which purports to have been made under clause (4), proviso (2), of the section. Both orders are called in question.

The defendants are the four co-trustees of a temple. Three of them are on one side and one on the other. The former will be referred to as party No. 2 and the latter as party No. 1. The first move was made by party No. 2 by a petition for action under section 144, Criminal Procedure Code. This was disposed of by the Stationary Sub-Magistrate by orders passed on 23rd January 1919 and 27th June 1919. Party No. 1 was restrained from interfering with the temple and its properties. The hearing was adjourned to 10th July 1919 for production of evidence by him. On the 27th June 1919 party No. 1 presented an application to the Sub-Divisional Magistrate for cancellation of the order under section 144 and for action under section 145. Thereupon the Sub-Divisional Magistrate stayed further proceedings by the Stationary Sub-Magistrate and made the orders now complained of.

The first objection is that the Sub-Divisional Magistrate had no authority to pass such orders until the proceedings of the Stationary Sub-Magistrate had been cancelled. In the circumstances of the case section 145 was the appropriate provision under which action should be taken. The facts show that a personal order against party No. 1 would be ineffective to prevent a breach of the peace. I think the Sub-Divisional Magistrate had jurisdiction.

The second objection is that there was no material before the Magistrate on which he could come to a conclusion that a breach of the peace was probable. It is true that party No. 1 had alleged, for purposes of impugning the order of the Stationary Sub-Magistrate, that there was no evidence that a breach of the peace was likely to occur. The Magistrate has, however, to consider all the information before him and it cannot be said that this was not sufficient to justify his action. It is enough to refer to the allegations of party No. 2 in paragraph 5 of the petition of 19th June 1919 and of the fact that each party averred that it had let out the temple lands. The cultivation season was at hand and it was very probable that the rival lessees would come to blows. The third objection is that the Magistrate had no jurisdiction "to initiate proceedings or pass any order under section 145, Criminal Procedure Code, in the present case, where admittedly all the trustees were entitled to joint possession and management of the temple and its properties." It is important to note that the proceedings have not got beyond the issue of the preliminary order. The inquiry contemplated by the section as to the actual possession has not yet been made. A Magistrate acting under section 145 is not directly concerned with the title or rights of the parties. He may have to secure the possession of a person who has not merely got no title but who has obtained his possession by force, provided he has been able to maintain it for two months preceding the preliminary order.

As I read the contentions of the contesting parties, each is setting up exclusive possession. This is a matter which must be inquired into. The legal position of the parties may be of importance in judging of the weight to be given to the evidence as to actual possession. Circumstances which in the case of a stranger would indicate exclusive possession in himself may, in the case of co-owners or co-trustees, be quite consistent with actual possession remaining in all of them. If the contesting parties are in joint possession, then it is clear that no order can be made under section 145, clause (6). These are matters which have to be considered by the Magistrate before arriving at his decision. Interference at this stage is uncalled for and would in fact

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amount to prejudging the issue which has to be determined [cf. *Srinivasa Pillay v. Sathayappa Pillay* (11)]. A number of rulings have been cited on behalf of the petitioners before this Court. I think it is unnecessary to refer to them in detail. They all relate to cases when the inquiry as to possession had been completed and all the facts and the findings were before the High Court. There are observations in *Makhan Lal Roy v. Baroda Kanta Roy* (4), which are so wide as to lend support to the contention advanced before us, but this decision is in conflict with the decision of a bench of this Court in *Narayana Asari v. Kandasami Asari* (15) and the remarks have been explained as *obiter dicta* in a latter ruling of the Calcutta High Court itself: vide *Basanta Kumari Dasi v. Mohesh Chandra Laha* (16).

An argument has been based on the wording of clause 6 of section 145, i. e., that when the dispute is between persons who are admittedly entitled to joint possession, neither can be "evicted" at the instance of the other and that, therefore, section 145 must be held to be wholly inapplicable to such cases. In my opinion this is putting too narrow a construction on the clause. I think "evicted" may be taken to apply to cases where a person is found to be disentitled to the extent of possession which he claims as well as to cases where he is found not to be entitled to possession at all.

The fourth objection is as to the attachment and appointment of a Receiver. It was argued that the Magistrate had no authority to take possession of the properties in dispute. When an attachment is made under section 146, the taking and keeping of possession is contemplated. I see no reason to suppose that attachment under section 145 has any other meaning. One object of the provision appears to be to keep effective control of the subject in dispute so as to prevent the contesting parties from creating a breach of the peace in their attempts to obtain physical possession. With all respect I am unable to agree with the view expressed by Mullick, J., in *Mewa Lal v. Emperor* (12) that such action has no

greater force than any Civil Court attachment.

A mere restraint on alienation would generally be of no use in preventing a breach of the peace, and this is the object with which section 145 is enacted. In order to keep possession a Magistrate must ordinarily act through some agent appointed by him in this behalf. In this case he has been designated a "Receiver." It may be that another name would be more appropriate and that a person appointed with reference to an attachment under section 145 has not the powers which a Receiver appointed under section 146 (2) can exercise. It is unnecessary to consider this question, as the record does not disclose that the individual appointed was authorised to do more than take possession of the properties in dispute and submit an inventory of them or that there is anything in the particular circumstances of this case which made it improper for the Magistrate to authorize him to do so. In my opinion the order does not call for modification.

The last objection is that the order is bad in so far as it directs the attachment of moveables. This objection must be upheld, as section 145 is inapplicable to such articles. In certain circumstances it may be the duty of a person entering into possession of immoveable property under the orders of a Magistrate to take proper steps to secure the movables which are on the property at the time: *Kochunny v. Manavikrama Rajah Amyal* (17), but the order of attachment is unsustainable and must be set aside.

The order of the Magistrate will be modified as indicated above. In other respects the petition is dismissed.

SADASIVA AIYAR, J.—The Court has no power to interfere with orders passed under Chapters XI and XII of the Criminal Procedure Code except by the use of section 107 of the Government of India Act, because section 435 (3) of the Criminal Procedure Code precludes the use of the powers of revision contemplated in clause (1) of section 435. I need not say that interference under section 107 of the Government of India Act should only be made in exceptional cases.

(15) 29 Ind. Cas. 541; 3 L. W. 164; 16 Cr. L. J. 525.

(16) 19 Ind. Cas. 541; 40 C. 982; 17 C. W. N. 944; 14 Cr. L. J. 269.

(17) 14 Ind. Cas. 318; (1912) M. W. N. 540; 13 Cr. L. J. 222.

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As my learned brother has pointed out, no final order has been made by the Sub-Divisional Magistrate. Hence it is undesirable to interfere at this stage except with such portions of the Sub-Divisional Magistrate's order as are clearly against law. The attachment of movables under section 145, Criminal Procedure Code, is clearly such an illegal order and I agree with my learned brother that that portion of the lower Court's order should be reversed. As to what should follow the removal of the attachment it is for the Deputy Magistrate to look into and I am not prepared to give advice on the matter at this stage.

Whether there is a likelihood of the commission of a breach of the peace by the four trustees themselves may be a doubtful point, and the learned Sub-Divisional Magistrate says merely that the rival lessees on both sides "are likely to break each other's heads very soon as the cultivation season has commenced." These rival lessees have not been made parties to this revision case and though the learned Sub-Divisional Magistrate may not have passed any express order directing the names of the lessees to be entered in the record as parties to the proceedings before him, his proceedings have virtually made them such parties and whatever may be the law on the question—whether one co-trustee in actual physical exclusive possession or in actual exclusive possession by receipt of rents could invoke section 145 for the protection of such exclusive possession against his co-trustees who are entitled to revoke his authority to be in such exclusive possession—no case has been cited in which it has been held that the Magistrate could not take action under section 145, when rival lessees claiming under separate trustees to be in actual possession are likely to cause a breach of the peace.

It seems to me that in such a case, the Magistrate has ample jurisdiction to pass order after inquiring which of the two sets of rival lessees are in actual possession and to secure them in such possession. It may be that in the final order passed under clause 6 after the enquiry under clause 4 of section 145 the Magistrate may ignore the trustees and confine his order so as to affect the rival lessees alone. The jurisdiction of the Magistrate thus being established, I am not inclined at this stage to consider the conflicting rulings

quoted before us and I shall only note them below for the information of the Sub-Divisional Magistrate: *Nritta Gopal Singh v. Ohandi Oharan Singh* (1), *Makhan Lal Roy v. Baroda Kanta Roy* (4), *Radha Raman Ghose v. Baliram* (2), *Akalu Ohandra Das v. Mohesh Lal* (3), *Gurudas Kundu Chowdhury v. Rai Kedar Nath Kundu Chowdhury* (18), *Basanta Kumari Dasi v. Mohesh Ohandra Laha* (16), *Emperor v. Debendra Nath Bose* (19), *Veerabhadra Pillai v. Shunmugam Pillai* (7), *Sankara Kylasa Mudaliar v. Kuthalinga Mudaliar* (8), *Iachmi Singh v. Bhusi Singh* (13), *Bhaskaruni Kesavrayudu v. Bhaskaruni Ohalapati Rayadu* (5), *Kandasami Asari v. Narayana Asari* (6), *Narayana Asari v. Kandasami Asari* (15), *Mewa Lal v. Emperor* (12), *Subadramma v. Satyam Swami* (10), *Muhammad Koolayappa Rowthan v. Sheik Abdul Khadhir Rowther* (9), *Kachaunny v. Manavikrama Rajah Amyal* (17) and *Srinivasa Pillay v. Sathayappa Pillai* (11).

My decision in *Kandasami Asari v. Narayana Asari* (6) was reversed by a bench of this Court in *Narayana Asari v. Kandasami Asari* (15) but was followed by single Judges of this Court in two later decisions. But I have no stronger view either way and I shall not be sorry if it be held that actual physical possession of even a confessed agent can be protected as against his admitted principal by the Magistrate in order to preserve the peace. As regards the cancellation of the Sub-Magistrate's order before taking action under section 145, I think that such order may be taken as having been impliedly passed, even if it is necessary to do so, and the order passed by the Sub-Magistrate has become spent even if it has not been cancelled. I might finally state, with great respect, that I have grave doubts as regards the correctness of the opinion expressed in two of the cases cited to the effect that the power to appoint a Receiver of attached property is given under clause (2) of section 146, only when the attachment is made under section 146 (1), but not when it is made under section 145. It may be fairly argued that the fact that clause (2) is a part of section 146 is not sufficient to narrow the scope

(18) 11 Ind. Cas. 592; 38 C. 889; 12 Cr. L. J. 408
15 C. L. J. 184.

(19) 1 C. L. J. 632; 2 Cr. L. J. 658.

JOSEPH PERRY, *In re*.

of the plain words of clause (2) which relate to all property attached by the Magistrate. (See *Craies on Statutes* at page 107.) However, it is unnecessary to express a final opinion on this question, as the petitioners cannot be aggrieved whether the properties are in the direct custody of the Court or in that of a Receiver or custodian appointed by the Court.

Order modified.

M. C. P.

CALCUTTA HIGH COURT.

INSOLVENCY JURISDICTION.

April 30, 1919.

Present:—Mr. Justice Rankin.

In re JOSEPH PERRY.

Presidency Towns Insolvency Act (III of 1909), s. 36—Evidence Act (I of 1872), s. 21—Deposition of insolvent under s. 36, Presidency Towns Insolvency Act, admissibility of, against insolvent in criminal proceedings.

The deposition of an insolvent reduced into writing taken under section 36 of the Presidency Towns Insolvency Act may be put in evidence against him in a criminal proceeding. [p. 478, col. 1.]

The general principle of law is that any statement made by a man on oath may be used as evidence against him as an admission. The only principle on which an exception can really be founded, is the principle that a man is not to incriminate himself. But this is a principle which is not open to an insolvent who, once he has been adjudicated, is bound, because he has been adjudicated, to give information touching his conduct, dealings and affairs, even though he incriminate himself thereby. [p. 479, cols. 1 & 2.]

Mr. J. Camell (with him Mr. B. O. Ghose), for the Insolvent.

Mr. A. A. Avetoom (with him Mr. K. N. Chaudhuri), for the Official Assignee.

JUDGMENT.—In this case the learned Counsel for the accused has taken objection to the admissibility in evidence of the deposition reduced into writing taken under section 36 of the Presidency Towns Insolvency Act. That is a deposition made by the accused himself, the insolvent in the case, and it is tendered against him in this enquiry on the principle that what a man says himself may be put in evidence against him as an admission. Objection has been taken to that, and if I may say so, very properly taken from the point of view of Counsel for the accused, that, whereas by Statute the public examination of a debtor is, under certain precautions, expressly said to be capable of

being used in evidence against him, there is no such careful provision in section 36 and that on principle the deposition taken under section 36 ought not to be allowed.

Now what is the objection to allowing anything that the accused may have said to be put in evidence against him? The first objection that I can see is that it may be said that the deposition was not voluntary but was one that the accused was compelled and obliged to make by the order of the Bankruptcy Court. The authorities which I shall refer to in a moment show that in the case of judicial proceedings taken before the Court that is not an objection. The case of a judicial proceeding taken before the Court is one in which the principle of voluntariness does not really apply at all. All that voluntariness for this purpose really means is that it shall not be under threat or under promise of reward, and when it is a judicial proceeding these considerations do not apply.

The next principle on which it can be objected to is this, that it is a maxim of the law of England and I hope and believe of the law of India, that nobody shall be obliged to incriminate himself, and that is certainly a very valuable maxim. The only thing that is necessary to say about it is that both in England and in India it is just one of the penalties or disabilities of becoming a bankrupt that that principle does not apply. A bankrupt, under section 36, cannot refuse to answer a question on the ground that he may incriminate himself. Any witness other than the insolvent may refuse to answer a question upon that ground, if that ground is really applicable. These really are the objections in principle.

From the point of view of authority the position is this. The English equivalent of the last sub-section of section 27 of our Act lays it down that the notes of public examination shall be read over either to or by the insolvent and signed by him, and may thereafter be used in evidence against him and shall be open to inspection of any creditor for a reasonable time. It was expressly held in the case of *Reg. v. Erdheim* (1) that that method of proving the answers, in public examination is not the only method. It is the best method to produce the notes

(1) (1896) 2 Q. B. 260; 65 L. J. M. C. 176; 74 L. T. 734; 44 W. R. 607; 3 Manson 142.

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signed by the debtor himself; but it was one of the matters decided in the case of *Reg. v. Erdheim* (1) by a Court, which is of great authority, that even when that has not been done, and the notes are taken but not signed by the debtor, if the person who took the notes gives his evidence, that is quite allowable; in other words that while the Statute points to one way of putting notes in evidence it does not say that that is to be the only way. That being so, the ground of the distinction between public examination and private examination for this purpose has not got very much in it. I find that there is an express authority, namely, the case of *Reg. v. Widdop* (2), where the principle of *Reg. v. Scott* (3), *Reg. v. Skeen* (4) and *Reg. v. Robinson* (5), was applied to a private examination. *Reg. v. Widdop* (2) was a case where a man had been made bankrupt under the English Bankruptcy Act of 1869, and the question that arose there was a question as to the admissibility in evidence against him of the depositions taken under sections 96 and 97 of the English Act of 1869. Sections 96 and 97 of that Act are the precise lineal ancestors of our section 26; they are the private examination sections and not the public examination sections. There can be no doubt, therefore, that there is authority, and the best authority, for holding that there is no difference for this purpose between a public examination and a private examination of the debtor. I base my decision both upon that authority and also upon this, that the particular method of putting in evidence, which is contemplated by sub-section (6) of section 27, is not the only method, and the moment this is found, there is really very little difference between them. The general principle of law remains. It is the general principle of law which is found stated, and correctly stated, in the case of *Hall, Ex parte, Cooper, In re* (6), by Jessel, M. R.—the principle, though subject to exceptions, but after all the main principle, that "Any statement

(2) (1872) 2 C. C. 3; 42 L. J. M. C. 9; 27 L. T. 693; 21 W. R. 176; 12 Cox C. C. 251.
 (3) (1856) Dears. & B. C. C. 47; 25 L. J. M. C. 128; 2 Jur. (N. S.) 1096; 4 W. R. 777; 7 Cox C. C. 164; 105 R. R. 359.
 (4) (1859) Bell C. C. 97; 28 L. J. M. C. 91; 5 Jur. (N. S.) 151; 7 W. R. 255; 8 Cox C. C. 141.
 (5) (1867) 1 C. C. R. 80; 36 L. J. M. C. 78; 16 L. T. 605; 15 W. R. 936; 10 Cox C. C. 467.
 (6) (1882) 19 Ch. D. 580 at p. 583; 51 L. J. Ch. 556; 48 L. T. 549.

made by a man on oath may be used against him as an admission." The only principle on which in this case an exception can really be founded, is the principle that a man is not to incriminate himself. That is a principle which is not open to an insolvent who, once he has been adjudicated, is bound, because he has been adjudicated to give information touching his conduct, dealings and affairs, even though he incriminates himself thereby.

Under these circumstances, I shall not rule out the evidence that it is proposed to tender, and I overrule the objection.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 343 OF 1919.

October 14, 1919.

Present:—Mr. Justice Seshagiri Aiyar
and Mr. Justice Moore.RAMASAMI BOYAN—PRISONER
No. 1—APPELLANT

versus

EMPEROR—RESPONDENT.

Evidence Act (I of 1872), s. 27—Confession leading to discovery of property, admissibility of—Confession, retracted, value of—Corroboration, whether necessary.

The information that leads to the discovery of property under section 27 of the Evidence Act, to be admissible, must be the direct cause of the discovery and not merely introductory to further investigation. [p 480, col. 2.]

Queen-Empress v. Commer Sahib, 12 M. 153; 2 Weir 738, followed.

A confession that is afterwards retracted should not be made the basis of a conviction, unless it is corroborated in material particulars and by independent testimony. [p. 481, col. 1.]

Appeal against the order of the Court of Session of the North Arcot Division in Calendar Case No. 34 of 1919.

FACTS appear from the judgment.

Mr. L. A. Govindaraghava Aiyar, for the Appellant.—The circumstances relied on by the Sessions Judge should not have been made the basis for the conviction of the accused. The discovery of the ear rings was not the direct result of information given by the 1st accused. The 1st accused said that the 2nd accused had the ear-rings and the 2nd accused voluntarily produced them. The information should not have been admitted under section 27 of the Evidence Act.

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The evidence of the Police Inspector in regard to this matter was discrepant in material particulars.

The confession, Exhibit L, should not have been used as evidence. The confession was retracted in the Sessions Court. It was not corroborated by independent evidence. See *Queen-Empress v. Rangi* (1), *Queen-Empress v. Bharmappa* (2), *Queen-Empress v. Raru Nair* (3).

The Public Prosecutor, for the Crown.—The information given by the 1st accused as to the ear rings led the Police to question the 2nd accused, who thereupon produced the jewels. It was in consequence of the 1st accused's information that the ear-rings were discovered. It was clearly admissible under section 27 of the Evidence Act.

As to the confession, Exhibit L, there was material corroboration in the evidence of P. W. No. 12.

JUDGMENT.—We are unable to uphold the conviction in this case. The murder is said to have been committed on the 3rd February 1919. The learned Sessions Judge, who has written a very clear judgment, relies mainly on four circumstances as incriminating the 1st accused. He first of all refers to the fact that certain ear-rings were recovered in consequence of the information given by the 1st accused. In order to bring that information within section 27 of the Indian Evidence Act, the information must have had the direct effect of leading to the recovery of the jewels. As was pointed out in *Queen Empress v. Commer Sahib* (4) if the information is only introductory to further investigation, it will not be evidence under section 27. Assuming that the prosecution evidence is accepted in its entirety, what happened is that the 1st accused, on being questioned, informed the Police Officer that the ear-rings were in the possession of the 2nd accused. Thereupon the 2nd accused was questioned and he produced the ear-rings from his box. In our opinion the information given by the 1st accused was not the direct cause of the production of

the ear-rings and consequently it does not come within section 27 of the Evidence Act. Moreover, as pointed out by Mr. Govindaraghava Aiyar, the evidence in regard to this matter is inconclusive. The Police Inspector says in one place that the 1st accused gave information about the 2nd accused having the ear-rings. In another place he says that the 1st accused refused to give information and, therefore, recourse was had to questioning the 2nd accused. The other witnesses who speak to this matter, namely, P. Ws. Nos. 2, 3 and 4, do not support the Police Inspector as regards the 1st accused having given the information. Therefore, we are not prepared to accept the evidence of the Police Inspector on this part of the case. We are unable to agree with the Sessions Judge that the statement of 1st accused was admissible under section 27 as it led to the discovery of the jewel. Therefore, we must put aside this evidence.

The second circumstance referred to by the learned Sessions Judge is that there was enmity between the 1st accused and the deceased on account of the woman Sita (P. W. No. 12). The learned Judge has overlooked the fact that among Wadders divorce is common and by the removal of the *thali*, the man and the woman became entitled to re-marriage. Such being the case we are not prepared to attach much weight to this circumstance, although we agree with the learned Judge in thinking that there probably was ill-feeling between the accused and the deceased.

The third circumstance mentioned by the learned Judge is the ownership of the spade (Material Object No. 2). The Judge points out that it was produced by the 2nd accused that it is an ordinary kind of spade, and beyond the evidence of P. W. No. 12 there is nothing to show that it belonged to the deceased. The last and the most important circumstance on which the learned Judge relies is the confession, Exhibit L, made to the Committing Magistrate. This confession was retracted in the Sessions Court. The law in regard to the relevancy and materiality of a retracted confession has been well established in this Court. In *Queen-Empress v. Rangi* (1), Kernan, J., points out the

(1) 10 M. 295; 2 Weir 361.

(2) 12 M. 123; 2 Weir 376.

(3) 19 M. 482; 2 Weir 745.

(4) 12 M. 153; 2 Weir 738.

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qualifications under which a retracted confession can be admitted in evidence. Undoubtedly since then the invariable rule in this Court has been that unless a confession is corroborated in material particulars and by independent testimony, it should not be the basis of a conviction. *Queen-Empress v. Bharmappa* (2) and *Queen-Empress v. Raru Nair* (3) accepted this principle. In other High Courts the same view has been taken, *vide Emperor v. Lalit Mohan Chakravarti* (5) and *Emperor v. Kehri* (6).

The learned Public Prosecutor contended that there is corroboration in material particulars in regard to the confession. The circumstances to which he has referred us only touch, so to say, the fringe of the confession and not the important matter in respect of which it was made. The fact that Sita was being kept by the deceased is not a matter which would corroborate the confession; nor is the production of the ear-rings any corroboration because the confession itself was made long after. What is almost destructive of the confessional statement is the fact that P. W. No. 12, Sita, at no time admitted that she and the deceased were seen together and that her husband inflicted the injuries which ultimately resulted in the death of Hanuman. Even before the Sessions Judge she did not say anything about their meeting and their being discovered by her husband. If there was any truth in the confession of P. W. No. 12 who bore no good will towards her husband, she would have complained at once to the Village Munsif and to the father of the deceased. In these circumstances we are unable to place any reliance upon the confessional statement which was retracted in the Sessions Court and of the truth of which there is really no corroboration. For these reasons we are unable to uphold the conviction. We set it aside and direct the prisoner to be set at liberty.

M. C. P.

Conviction set aside.

(5) 8 Ind. Cas. 1059; 38 C. 559; 15 C. W. N. 98; 12 Cr. L. J. 2.

(6) 29 A. 434; 4 A. L. J. 310; A. W. N. (1907) 140; 5 Cr. L. J. 360.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 164 OF 1919.

July 14, 1919.

Present:—Mr. Justice Shah and Mr. Justice Hayward.

NASIR WAZIR—ACCUSED—APPLICANT
versus

EMPEROR—OPPOSITE PARTY.

Prevention of Cruelty to Animals Act (XI of 1890), s. 3 (a)—Abandonment of animal, whether ill-treatment.

An owner who abandons an animal, with the result that the animal is left to starve in the streets, is not guilty of an offence under section 3 (a) of the Prevention of Cruelty to Animals Act. Such abandonment does not amount to "ill-treatment" within the meaning of the section. [p. 482, col. 2; p. 483, col. 2.]

Criminal application for revision from conviction and sentence passed by a Bench of Honorary Presidency Magistrates.

Mr. R. S. Pandit (with him Mr. M. M. Kotasthane), for the Applicant.

Mr. S. S. Patkar, Government Pleader, for the Crown.

JUDGMENT.

SHAH, J.—The accused in this case has been convicted by a Bench of Honorary Presidency Magistrates of ill-treating his horse on the 21st of May last, under section 3, clause (a) of Act XI of 1890. His plea of guilty is recorded in these terms: "I admit having turned my horse out to starve. It was on the road for twenty-five days." The question in this application is whether the conviction under section 3 (a) is right.

In substance what the accused did was that he abandoned his horse. After he turned his horse out, he apparently exercised no control over the animal and the horse was practically left uncared for in the public streets. The section provides among other things that "if any person in any street or in any other place, whether open or closed, to which the public have access, or within sight of any person in any street or in any such other place cruelly and unnecessarily beats, overdrives, overloads or otherwise ill-treats any animal," he shall be liable to punishment by way of fine or imprisonment. All the acts of cruelty mentioned in this clause, *viz.*, beating, overdriving and overloading

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suggest that the person concerned exercises an immediate control over the animal at the time. In the present case the accused is said to have ill-treated the horse by turning it out to starve.

It was suggested, on behalf of the accused in the course of the argument, that it would not be ill-treating the animal within the meaning of section 3 (a) to let it starve. I am, however, not prepared to accept this argument. It may be that where the person is in a position to exercise control over the animal and to prevent starvation, he may effectively ill-treat an animal by starving it.

But it seems to me that in the present case the accused ceased to exercise any control over the animal when he turned it out in the streets. In order that he can ill-treat his horse under section 3 (a), it seems to me essential that in fact he must be in a position to exercise control over the animal at the time of the alleged ill-treatment. The statement of the accused is consistent with his having abandoned the animal altogether. The Act does not prohibit in terms a total abandonment of the animal by the owner; and the scheme of the Act does not suggest any such prohibition. It is apparently open to the owner under the Act to get rid of an animal, if so minded, by killing it or by abandoning it. It is clear from section 5 that the Act does not prohibit the killing of an animal; it prohibits the killing of an animal in an unnecessarily cruel manner. There is no express provision relating to the abandonment of an animal by its owner.

It may be that in the case of animals thus abandoned by their owners in the City of Bombay the provisions of sections 52 and 53 of the Bombay City Police Act, IV of 1902, may afford some remedy. For under those provisions it is the duty of every Police Officer and it is lawful for any other person to seize and to take to any public pound for confinement therein any cattle found straying in any street, and if the owner does not come forward to claim the animal, the procedure laid down in section 53 can be followed. Outside the Presidency Towns, the provisions of the Cattle Trespass Act may serve the purpose more or less to the same extent as the provisions of the City

of Bombay Police Act just referred to. I do not suggest that the provisions relating to the impounding of cattle afford an adequate remedy for an evil arising in consequence of the abandonment of animals by their owners. But I feel clear that such an abandonment is not prohibited by the Prevention of Cruelty to Animals Act; and the starvation of the animal after it is abandoned is not any ill-treatment of the animal by a person who has ceased to exercise any control over it. In the present case there is nothing to show, and it is not suggested in the argument before us, that the subsequent conduct of the accused indicated any attempt or intention on his part to resume control over the horse after he turned it out on or about the 1st May. I do not think, therefore, that the conviction under section 3 (a) can be sustained.

If the evil resulting from the animals being thus abandoned in the streets assumes any appreciable proportion, it would be a matter for the Legislature to consider whether the Act should not be suitably amended.

I would, therefore, set aside the conviction and sentence and direct the fine, if paid, to be refunded.

HAYWARD, J.—The accused Nasir Wazir is a hack victoria driver and some time in May last turned his horse out into the street, where it was subsequently found wandering by an agent of the society for the prevention of cruelty to animals. He admitted at his trial that he had turned the horse out to starve and on that plea he was found guilty under section 3 (a) of Act XL of 1890.

The accused's act in turning out his horse to starve in the streets of a large town would no doubt be ill-treatment, in the ordinary meaning of the term. But the question to be decided here is whether it is ill-treatment which has been made punishable by law. It has been argued that his act amounted to mere abandonment and at most to a passive ill-treatment, similar to that of the man who left an injured horse to die and was held to have committed no offence in the case of *Everitt v. Davies* (1) in England. It has been urged that this passive ill-treatment is distinguishable from the wilful leaving of a horse

(1) (1878) 38 L. T. 360; 26 W. R. 332.

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standing without food in a cab in a street, which was held to have been an offence in the case of *Anderson v. Wood* (2) in Scotland. It has been argued, on the other hand, that the abandonment of the horse to starve comes within the words "cruelly beats, overdrives, overloads or otherwise ill-treats" in clause (a), as the words "has in his possession for sale any animal suffering pain by reason of starvation or other ill-treatment" occur in clause (c) and as the starvation here resulted in a street, which would be a public place within the meaning of section 3 of Act XI of 1890.

It seems to me, however, that abandonment of a horse in this manner, however morally reprehensible, has not been made expressly punishable by law. Abandonment has not been forbidden and alone would not amount to ill-treatment. It is not akin to cruelly beating, overdriving, or overloading, and could not without strain of language be brought within the connected words "otherwise ill-treats." It cannot, moreover, be said without loose speaking that an abandoned horse is starved by the man who was previously its owner, any more than it could strictly speaking be said that a dismissed workman was being starved by his former master. It might, on the other hand, properly be said that a horse kept standing in a cab without food was being starved by its driver, just as it might truly be said that a workman who was being sweated was being starved by his employer. It has also to be noticed that starving a horse has not been made *per se* an offence. It is no offence under the enactment to starve a horse in a stable. It would at most be an offence to starve a horse on a cab-stand when it might be punishable as ill-treatment in a public place under clause (a), or to offer it when suffering pain from starvation for sale in a street when it would be punishable as an offence in a public place under clause (b) of section 3 of the Act. It would also be an offence to use a horse which had become unfit to work through starvation under section 6 and it might also be an offence to let an animal, disabled by starvation, die in a street or other public

place under section 7 of the Act. But it would, in my opinion, be an abuse of our authority to hold that abandonment of a horse was an offence because starvation might result, when no express provision has been made to that effect in the Act and when that Act—XI of 1890—has, as indicated, been strictly limited in its operation by the Legislature. It should be observed that starvation ought not to result in the town of Bombay, if it were recognized practically that any person might and every Police Officer ought to take any horse found straying in any public place to be found under section 52 of the Bombay City Police Act, IV of 1902. It must also be presumed that there were good reasons for the restrictions imposed in the operation of the law, which was to have force not merely in presidency towns but throughout the rural districts of India.

Conviction and sentence set aside.

ALLAHABAD HIGH COURT.
CRIMINAL APPEAL NO. 981 OF 1919.

November 13, 1919.

Present:—Mr. Justice Piggott and
Mr. Justice Dalal.

JHABBU—APPELLANT

versus

EMPEROR—RESPONDENT.

*Criminal Procedure Code (Act V of 1898), s. 465—
Sessions trial—Unsoundness of mind of accused—
Accused incapable of making defence—Procedure.*

Where in a case before a Court of Session the attention of the Court is invited to the fact that by reason of unsoundness of mind the accused is incapable of making his defence, the provisions of section 465, Criminal Procedure Code, make it obligatory on the Sessions Judge, as a preliminary to the hearing of evidence on the charge, to try the issue whether or not the accused, as he stands before the Court, is of unsound mind and consequently incapable of making his defence. In the absence of a clear finding on this point the entire proceedings in the Sessions Court are vitiated. [p. 485, col. 1.]

Criminal appeal against the order of the Sessions Judge, Bareilly, dated the 21st of August 1919.

(2) (1881) 9 Ct. of Sess. 4th Series Just. Cas. 6; 19 Sc. L. R. 142.

JHABBU v. EMPEROR.

Dr. J. N. Misra, for the Appellant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—Jhabbu, blacksmith, has been found guilty under section 302, Indian Penal Code, of the murder of *Musammam* Resham, the wife of his own brother Jhamman. In his petition of appeal to this Court, Jhabbu says that he did not kill his brother's wife; that he was not in his proper senses at the time when the woman was killed, or for some time previously, and that he does not know who killed her. In the Sessions Court Jhabbu refused to answer any of the questions put to him by the Sessions Judge. In the Court of the Committing Magistrate he was asked whether he had struck his sister-in-law *Musammam* Resham with a hammer, causing her such bodily injury as led to her death. To this he replied, "I do not remember if I did so." Only one further question was asked of him and in reply to that he said that he did not know why he was being accused of the crime. The case for Jhabbu has been very satisfactorily argued before us by Counsel, and as so laid before us that case involves two distinct points. There is of course the question whether the learned Sessions Judge was or was not right in holding that the accused was not entitled to an acquittal under the general exception of insanity as defined by section 84, Indian Penal Code. This question, however, can only arise after the Court is satisfied that the accused was properly and legally tried, in other words, that the procedure laid down in sections 464 and 465 of the Criminal Procedure Code was duly followed by the Committing Magistrate and by the Sessions Judge respectively. The vernacular record shows that, when the case was first brought before the Committing Magistrate, the latter undoubtedly found reason to believe that the man was of unsound mind and consequently incapable of making his defence. He so far complied with the provisions of the law that he caused enquiry to be made into the fact of such unsoundness and caused the accused's person to be examined by an officer who is described as the Civil Assistant Surgeon of Bareilly. So far as the record goes, it is not quite clear whether the officer in question was the proper

officer to perform this duty under the provisions of the section in question, but in any case the Committing Magistrate failed to follow up his action by examining the Civil Assistant Surgeon and reducing his examination to writing, as required by law. In saying this we are not overlooking the fact that, when the Civil Assistant Surgeon was examined by the Magistrate on the 7th of August 1919, that is almost a month and a half after the accused Jhabbu had first been brought before the Magistrate, he did depose that during the period between the 4th July and the 22nd July 1919 he had kept Jhabbu under observation and had come to the conclusion that he was sane and could understand what he was doing. This, however, is unsatisfactory for two reasons. In the first place, section 464 of the Criminal Procedure Code clearly contemplates that a Magistrate who has once found reason to doubt the soundness of mind of an accused person brought before him shall examine the medical expert whose opinion has been taken as a preliminary to the holding of the enquiry and not, as was done in this case, at the very close. In fact the Committing Magistrate was bound to enquire, before he began to record evidence in this case, whether the accused Jhabbu was or was not incapacitated by unsoundness of mind from making his defence. He did not record any finding to that effect before entering upon the enquiry, and his subsequent examination of the Civil Assistant Surgeon does not really cover the defect. Moreover, the evidence of the medical expert, as it stands, is directed to the state of the accused's mind between the 4th and the 22nd July 1919; what the Magistrate had to find was that the accused person before him was capable of making his defence when the enquiry commenced, that is to say, on the 2nd of August. This we might have passed over as an irregularity not material to the case, if we could have felt satisfied that the Sessions Judge himself had fully complied with the provisions of section 465 of the Criminal Procedure Code. So far as the record goes, it would seem that the learned Sessions Judge was satisfied from the Committing Magistrate's record, and perhaps from the appearance of the accused person before him, that there was no reason to

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doubt Jhabbu's soundness of mind or his capacity of making his defence. In our opinion, however, the record discloses strong reasons for casting doubt on this point. There is evidence on the record that the accused had been in custody at Budaun, not long before the commission of the alleged offence, as a dangerous lunatic. We notice that Counsel who represented the accused at the Sessions trial particularly asked that evidence might be taken as to these proceedings at Budaun and invited the attention of the Court to the fact that the accused seemed to be incapable of making a proper defence, at any rate to this extent that the learned Counsel was unable to obtain any instructions from him. Under these circumstances we are of opinion that the provisions of section 465, Criminal Procedure Code, were obligatory on the Court and that, as a preliminary to the hearing of evidence on the charge, the learned Sessions Judge should first of all have tried the plain issue whether or not the accused person, as he stood before him, was of unsound mind and consequently incapable of making his defence. The proof of the fact of the soundness or unsoundness of mind of the accused is to be deemed part of his trial before the Court, and in the absence of a clear finding on this point, we are of opinion that the entire proceedings in the Sessions Court are vitiated and ought to be set aside. We accordingly set aside the conviction and sentence in this case, but we do not acquit the accused of the offence charged. We order that he be placed on his trial again before the Sessions Court of Bareilly and that the trial do commence with the proceedings required by section 465, Criminal Procedure Code, leading up to a formal finding as to the capacity of the accused for making a defence. If the accused is now found to be capable of making a defence, the trial will proceed, and the onus will be laid on the accused of satisfying the Court that, on the date on which he committed the crime, he was by reason of unsoundness of mind incapable of knowing the nature of his act, or that he was doing what was either wrong or contrary to law. There has been some argument before us as to the law on this point. We are content to refer to the case

of *Muhammad Husain v. Emperor* (1), partly because one of us was a party to that decision, and also because it contains a complete discussion, from three different points of view, of the law on the subject of criminal, as distinguished from medical, insanity, and a review of a number of previous authorities. In conclusion we may say that in our opinion it is important, both as bearing on the enquiry under section 465, Criminal Procedure Code, and on the question of the guilt or innocence of the accused, that the evidence of the medical expert who examined Jhabbu at Budaun should, if possible, be brought upon the record. With these directions we return the case to the Court of Session at Bareilly for a new trial as ordered. Pending his re-trial the accused should be detained in custody as an undertrial prisoner.

Case returned.

(1) 18 Ind. Cas. 641; 15 O. C. 321; 14 Cr. L. J. 81.

BOMBAY HIGH COURT.

CRIMINAL APPEAL No. 332 OF 1919.

July 24, 1919.

Present:—Mr. Justice Shah and
Mr. Justice Hayward.

CHATUR NATHA—ACCUSED

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 302, 304, 323, 325—Death of child caused accidentally in scuffle—Offence.

A woman who was holding a child in her arms intervened unexpectedly in a scuffle between the accused and her husband on a dark night. The accused aimed a blow at the husband with his stick, but it accidentally struck the child and caused his death:

Held, that the accused was guilty only of the offence of causing simple hurt, inasmuch as he could not have intended to cause or to have known that he was likely to cause either death or grievous hurt. [p. 486, col. 2.]

Criminal appeal against the conviction and sentence passed by the Sessions Judge, Ahmedabad.

Mr. R. J. Thakore, for the Accused.

Mr. S. S. Patkar, Government Pleader,
for the Crown.

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JUDGMENT.

SHAH, J.—In this case in spite of the argument to the contrary, we are satisfied that accused No. 2 did cause injury to the baby, which resulted in its death. There is clear evidence in the case that accused No. 2 dealt the blow and there is no reason to distrust the evidence which has been believed by the trial Judge and the Assessors. The question, however, as to what offence has been committed by the appellant is one of some difficulty. The learned Sessions Judge was of opinion that it was not likely that the blow would have caused the death of an adult, but it might well have caused grievous hurt. On that basis, he found that the accused No. 2 was guilty of causing grievous hurt. The circumstances under which this blow came to be inflicted are briefly these. The woman with the child in her hand intervened, apparently unexpectedly, in the course of a scuffle between accused No. 2 and his party on the one hand and her husband and his brother on the other hand. It was about the middle of a dark night that this took place and the blow which was aimed by accused No. 2 at the husband of the woman, whom he intended to attack, fell unknowingly on the child. It is clear that the accused No. 2 had the intention of thereby causing hurt to a person, and, therefore, he would be guilty of causing simple hurt. The learned Judge has expressed his opinion, and I agree with him, that the blow could not have caused the death of an adult and such a blow could not be treated as evidencing any intention on the part of the accused to cause the death of the person against whom he aimed it. There is equal difficulty, in my opinion, in treating this as a case of grievous hurt. It is difficult under the circumstances of the case to hold that the accused intended to cause or knew himself to be likely to cause grievous hurt. There is no doubt that he had a stick in his hand. But we do not know anything about the size and nature of the stick. It is not established on the evidence that the stick with the iron rings produced in the case was the stick used on the occasion. Taking it to be an ordinary stick which the accused No. 2 used at the time, there is a

reasonable doubt in my mind as to whether under the circumstances he could be said to have intended to cause or to have known himself to be likely to cause grievous hurt. He did not know that he was hitting a baby and the nature of the blow, taken with reference to the person against whom it was aimed, cannot be taken to indicate the necessary intention or knowledge as to causing grievous hurt. The conviction under section 325 does not appear to me to be justified. The proper conviction under the circumstances would be under section 323 of the Indian Penal Code.

I would accordingly alter the conviction to one under section 323 of the Indian Penal Code and reduce the sentence to rigorous imprisonment for one year.

HAYWARD, J.—I concur. The accused has not, in my opinion, been proved to have intended to cause or to have known that he was likely to cause grievous hurt. It is true that he went armed with a stick with others to assault his enemies in the middle of the night. But it has not been proved what was the nature of the stick which he took, and it cannot be presumed that it was a dangerous weapon in default of any evidence of serious injuries having been given to the men whom he went to assault. The only injury apparently was the injury to the child and that on the evidence was accidental. It was no doubt in the result grievous, but he could not properly be held in the circumstances guilty of voluntarily having caused that grievous hurt. He would, therefore, be liable to conviction under section 323 and not under section 325 of the Indian Penal Code.

Conviction altered; Sentence reduced.

PEARY LAL MULLICK v. SURENDRA KISHORE MITTER.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 654 OF 1919.

November 13, 1919.

Present:—Justice Sir Syed Shamsul Huda,
Kt., and Mr. Justice Ghose.

PEARY LAL MULLICK—2ND PARTY—
PETITIONER

versus

SURENDRA KISHORE MITTER

AND OTHERS—1ST PARTY—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 133—
Claim based on substantial grounds—Order directing
party to establish claim in Civil Court, legality of.*

Where in a proceeding under section 133 of the Criminal Procedure Code the Magistrate finds that the claim of right set up is based on substantial grounds, he has no jurisdiction to make an order directing that party to establish his claim in a Civil Court. [p. 488, col. 2.]

Rule against an order of the Sub Divisional Magistrate, Barrackpore, dated 1. th May 1919.

FACTS appear from the judgment.

Babu Manmatha Nath Mukherjee, with him Babu Probodh Chandra Chatterjee) for the Petitioner.—The petitioner before your Lordships is the second party in a proceeding under section 133 of the Code of Criminal Procedure. It was alleged that I had obstructed a public pathway leading to a Ghat which I claimed as my private property. The learned Magistrate took evidence and found that my claim was *bona fide* and in consequence he dropped the proceedings against me, but at the same time ordered me to go to the Civil Court within three months to establish my claim. It is against this latter order that a rule was issued by this Hon'ble Court.

The learned Magistrate has found that the claim of right set up by me cannot be summarily dismissed as *mala fide*. He is, therefore, justified in dropping the proceedings against me under section 133, Criminal Procedure Code. But I submit that the learned Magistrate had no jurisdiction to direct me to go to the Civil Court within three months to establish my claim. When my claim of right was found to be *bona fide* and not a mere pretence to oust the jurisdiction of the Court, the learned Magistrate had no jurisdiction to make the order complained of. Refers to *Manipur Dey v. Bidhu Bhushan Sarkar* ().

(1) 26 Ind. Cas 146; 42 C. 158; 18 O. W. N. 1086; 15 Cr. L. J. 898.

Babu Dasarathi Sanyal (with him Babus Nanda Gopal Banerjee, Kanaidhan Dutt and Hari Oharan Banerjee) for the Opposite Party.—The mere raising of the question of *bona fides* is not sufficient. There must be strong reasons for the *bona fides* of the claim. I have shown that there was an uninterrupted user of the Ghat by the public for over 30 years, that there was a *kabuliyat* to the effect that the Ghat will be used by the public for religious rites and that the Ghat was repaired by the public from public funds.

[SHAMSUL HUDA, J.—The main question is, whether the Magistrate can say to one of the parties to go to the Civil Court first?]

Under the circumstances of the case the Magistrate was justified in making the order.

It is open to the Magistrate to order the second party to go to the Civil Court to establish his claim within a reasonable time: *Luckhee Narain v. Ram Kumar* (2), *Belat Ali v. Abdur Rahim* (3). If the claim of the second party is *bona fide*, it is reasonable to expect that he will not hesitate to go to a Civil Court to have his right declared.

The claim of the second party must also be a well founded claim: *Luckhee Narain v. Ram Kumar* (2).

Babu Manmatha Nath Mukherjee in reply.—I submit that the decision in *Luckhee Narain v. Ram Kumar* (2) is erroneous and subsequent decisions based on it have only perpetuated the error.

Refers to arguments of Counsel (Mr. Dutt's) in *Luckhee Narain v. Ram Kumar* (2).

When there is a *bona fide* claim of right, the parties are to be referred to the Civil Court and the jurisdiction of the Criminal Court will be ousted. Refers to *Basaruddin Bhuiyah v. Bahar Ali* (4) and *Askar Mea v. Sabdar Mea* (5).]

There is no authority for the proposition that where my claim is found to be *bona fide*, I have further to show that my claim is well founded, [Refers to *Queen-Empress v. Bissessur Sahu* (6)] The question of well-founded or ill-founded claims does not arise. Moreover, the learned Magistrate had nowhere found that my claim was not well founded.

(2) 15 C. 564.

(3) 8 C. W. N. 143; 1 Cr. L. J. 70.

(4) 11 O. 8.

(5) 12 O. 137.

(6) 17 C. 562.

SORAB MERWANJI ALPAIVALLA v. EMPEROR.

[SHAMSUL HUDA, J.—If you do not go to the Civil Court within three months under the order of the Magistrate, can fresh proceedings be taken against you?]

If the order of the Magistrate stand, then of course fresh proceedings may be taken. It is open to the Magistrate to refer both the parties to the Civil Court, but not one of them: *Sarojbasini Devi v. Sripati Oharan* (7).

JUDGMENT.—In this matter a Rule has been issued calling upon the District Magistrate and the opposite party to show cause why the order of the Sub-Divisional Magistrate of Barrackpore, dated the 19th May 1919, referred to in the petition herein should not be set aside or such other order passed in the matter as to this Court may seem fit, on the first ground mentioned in the petition which runs as follows:—“For that having found your petitioner’s claim to be *bona fide* the learned Magistrate had no jurisdiction to direct your petitioner to go to the Civil Court within three months to establish his claim.”

It appears that on the 5th November 1918, an application was made by the opposite party before the Sub-Divisional Magistrate, alleging that the Ghat referred to in the petition together with the way leading to it was a public one and that the same had been obstructed by the petitioner and praying for an order under section 133 of the Code of Criminal Procedure. On this application a conditional order was passed by the Magistrate on the 23rd November 1918 ordering the removal of the obstruction complained of within 20 days, or show cause against the same. Certain proceedings thereafter followed and on the 9th December 1918 the learned Magistrate found that the claim of right, as made by the petitioner, was made in good faith and he accordingly set aside the conditional order and dropped the proceedings. The petitioner was, however, directed to go to the Civil Court within a period of three months, and against this portion of the order this Court was moved and the matter finally came on before this Court on the 14th February 1919, when it was ruled that inasmuch as the learned Magistrate had made the order of the 9th December 1918 without taking evidence that

might be adduced by the parties, the order should be set aside and the case remitted to the Magistrate to be taken up from the point at which it stood before the order was made. The learned Magistrate has now taken evidence and he finds that the claim of right set up by the petitioner cannot be dismissed summarily as *mala fide*. He has, however, while dropping proceedings under section 133, Criminal Procedure Code, directed the petitioner to go to the Civil Court. Against this portion of the order the present Rule has been obtained.

We have now heard the learned Vakils for the petitioner and the opposite party at length and have considered the authorities cited before us, and in particular the cases in *Luckhee Narain v. Ram Kumar* (2) and *Belat Ali v. Abdur Rahim* (3). As we read the judgment of the learned Magistrate, he nowhere found that the claim of the petitioner was not well founded; in fact taking the judgment as a whole the conclusion is irresistible that the Magistrate was of opinion that the claim of right set up by the petitioner was based on substantial grounds. In this view of the matter, we think the Magistrate had no jurisdiction to make the order complained of and we accordingly make the Rule absolute. We do not think it necessary to consider whether, if and when a claim is found to be *bona fide* and not a mere pretence to oust the jurisdiction of the Court, it is necessary to consider further, as appears to have been laid down in *Luckhee Narain v. Ram Kumar* (2), whether the claim is well founded and if not well founded, whether the Magistrate has a right to direct one of the parties to go to the Civil Court within a reasonable time and on his failure to do so to resume the proceedings.

Rule made absolute.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 186
OF 1919.

August 7, 1919.

Present:—Mr. Justice Shah and
Mr. Justice Hayward.

SORAB MERWANJI ALPAIVALLA

—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY,

Bombay Tramways Act (I of 1874), s. 24—Bye-laws

(7) 28 Ind. Cas. 799; 42 C. 702; 19 C. W. N. 332; 16 Cr. L. J. 415.

SORAB MERWANJI ALPAIVALLA v. EMPEROR.

framed by tramways company—Notice modifying bye-laws not sanctioned by Governor in Council, validity of.

A notice issued by the Bombay Tramway Company modifying a bye-law framed by the Company under section 24 of the Bombay Tramways Act and duly sanctioned by the Governor in Council, has no legal effect unless it is sanctioned by the Governor in Council. [p. 490, col. 2; p. 491, cols. 1 & 2.]

Criminal application for revision from the conviction and sentence passed by the Chief Presidency Magistrate, Bombay.

Mr. G. N. Thakor, for the Applicant.

Messrs. Campbell and Vicaji, for the Company.

JUDGMENT.

SHAH, J.—The petitioner before us was charged before the Chief Presidency Magistrate with the breach of two bye-laws under the Bombay Tramways Act (Bombay Act I of 1874). It was alleged against him that he did not leave a tram car when asked to do so, even though the interior of the car contained the full number of passengers, and, secondly, that he travelled on the rear platform of the tram car contrary to the provisions of bye-law No. 6.

The trial Magistrate has found the accused guilty of both the charges, and sentenced him to pay fines in respect of those charges.

The facts are not in dispute. On the 4th March last the petitioner was found standing on the rear platform of a tram car near Bori Bunder when, it may be taken for the purposes of the present petition, the tram car was full. He was asked to leave the car, but he refused to do so, and hence the prosecution. The bye-laws in question have been framed under section 24 of the Bombay Tramways Act. The Bombay Electric Supply and Tramway Company, Ltd., who are in the position of grantees under the Act in virtue of the provisions of section 31 of the Act, have power to make regulations from time to time under section 24 of the Act, among other things, for regulating the travelling in or upon any carriage belonging to them; and for better enforcing the observance of all or any such regulations it is lawful to the grantees, subject to confirmation thereof by the Governor in Council, to make bye-laws for any of the purposes mentioned in the section and from time to time repeal or alter such bye laws,

The bye-laws, including bye-laws Nos. 6 and 7, were duly confirmed by the Governor in Council, and published as required by the section. Subsequently in February 1917, a notice to passengers was issued by the Traffic Manager of the Company allowing until further notice three passengers, who may wish to do so, to stand on the rear platform of all cars excluding the front car of a two-car tram. In February 1919, however, this notice was in effect cancelled and a new notice to passengers was issued by the Managing Director under which only three persons (in addition to any Conductor or Inspector on duty there) belonging to any of the four classes of persons mentioned in the notice were to be permitted to stand on the rear platform of a tram car, and passengers other than those mentioned in the first clause of the notice or in excess of the prescribed number were prohibited from standing on the rear platform and were told that any passenger acting contrary to the terms of the notice would render himself liable to removal and to prosecution under the Company's bye-laws. Both these notices have been quoted in the judgment of the lower Court. It is an admitted fact that neither the first notice of February 1917 nor the second notice of February 1919 was confirmed by the Governor in Council. It is argued on behalf of the petitioner that the first notice must be assumed for the purpose of this application to have been validly issued and must be taken to have effected a modification of bye-law No. 6; and that the second notice issued by the Tramway Company is illegal so far as it modifies the first notice. On the other hand it is argued that neither notice has any legal validity so far as it modifies bye-law No. 6 and that any person offending against bye-law No. 6 can be proceeded against according to law. It is further argued on behalf of the Company that under section 24, apart from the bye laws, the Company has the power to make regulations for travelling in or upon any carriage and that though these notices may not have the force of bye laws any breach of which is punishable under the Act, in so far as neither notice is restrictive of any right of a passenger travelling by a tram car, they were properly issued by the Tramway Company in

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order to regulate the traffic. The terms of bye-law No. 6 providing that no person shall travel on the platform of any car are clear, and the act of the accused is clearly contrary to the terms of this bye-law. His action is not contrary to the terms of the notice of February 1917, but that notice was cancelled in February 1919, and as a matter of fact the petitioner has acted in contravention of the terms of the second notice. In the view I take of these notices it is unnecessary to consider whether the accused would be justified in standing on the rear platform as he did either under the first notice or under the second notice. In my opinion both these notices within certain limits involve a modification of bye-law No. 6 and to that extent require the confirmation of the Governor in Council under section 24 to have any legal effect. As the modifications of the bye-laws involved in these notices have not been confirmed by the Governor in Council, for the purposes of this case it must be taken that neither the first notice nor the second notice existed. The propriety of the act of the accused under the Tramways Act must be judged with reference to the terms of bye-law No. 6; and it is clear on the facts that he acted contrary to the terms of that bye-law.

As these two notices to passengers have been discussed before us, I think it is right to point out that when a rule in the terms of bye-law No. 6 is framed and when any modification of that rule is contemplated, it is but right that it should be made in the manner provided by law, that is it should be duly confirmed by the Governor in Council and published as required by section 24. In practice such notices involving modification of any bye-law without such confirmation are apt to mislead the travelling public. For instance under the first notice the passengers would naturally be under the impression that so long as the number mentioned in the notice is not exceeded, any person can stand on the rear platform, though even then every one of the three persons other than the servants or officers of the Company would be offending against bye-law No. 6; and under the second notice so far as it refers to classes of persons other than the servants or officers of the Company in the first clause, the result would

be the same, i. e., any such person not being a servant or officer of the Company would be offending against bye-law No. 6, even though he may be permitted to stand on the rear platform under the notice. That is a state of things brought about by these notices, which is not desirable as it in effect involves a differential treatment of persons offending against bye-law No. 6.

The other two points raised on behalf of the petitioner may be briefly dealt with. The first is that these rules were not put up in a conspicuous place inside the tram car as required by section 17 of the Act and bye-law No. 28. It is clear, however, that the consequence of not properly complying with these provisions is not specified, and I do not think that any non-compliance by the Company with this provision can afford any valid answer to the charge against the petitioner. I do not express any opinion as to whether the bye laws were put up in a conspicuous place inside this particular car as required by the Act. The Magistrate's finding on this point is rather halting; but for the purpose of this petition it is not necessary to examine that finding.

The second point urged on behalf of the petitioner is that the terms of the second notice are unreasonable. I do not think that the question really arises for our consideration, as bye-law No. 6 remains unaffected thereby. In so far as the notice purports to modify the operation of bye-law No. 6, it requires the confirmation of the Governor in Council, which has not been obtained.

The last point urged on behalf of the petitioner is that in any case the conviction under bye-law No. 7 is not justified under the circumstances. Taking the bye-laws Nos. 6 and 7 together, it seems to me that the bye-law No. 7 contemplates a person remaining in the interior of a car, when the car contains the full number of passengers for which accommodation is provided in such interior. No doubt it provides that the person, when asked to leave the car, shall do so. But it seems to me that in the present case the accused never got into the interior of the car and was throughout standing on the rear platform. His action, therefore, properly falls within the scope of bye-law No. 6 and is outside the

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scope of bye-law No. 7. In any case his act amounted to a breach of bye-law No. 6 and he could not be properly convicted in respect of the same act under the following bye-law.

I would, therefore, set aside the conviction and sentence in respect of the charge under bye-law No. 7 and direct the fine, if paid, to be refunded. I would confirm the other conviction and sentence.

HAYWARD, J.—I concur. The accused has, in my opinion, been rightly convicted of the offence of refusing to get down from the platform of the car when so requested under bye-law No. 6, but he has, in my opinion, been wrongly convicted of remaining in the interior of the car when requested to go out under bye-law No. 7 of the bye-laws under section 24 and 25 of the Bombay Tramways Act, I of 1874.

The accused was admittedly travelling on the platform which has been treated, it seems to me, as outside the car by bye-law No. 6. He never entered the interior of the car, which would seem to me not to include the platform according to the ordinary meaning of the words used in bye-law No. 7. The conviction was, therefore, in my opinion, right under bye-law No. 6 but wrong under bye-law No. 7 of the bye-laws confirmed by the Governor in Council under sections 24 and 25 of the Bombay Tramways Act, I of 1874.

It has, however, been urged that the prosecution was invalid, because notice had been issued in February 1917 by the Tramway Company, stating that owing to shortage of cars they did not intend to enforce the bye-law prohibiting passengers from travelling on the platform pending further orders during the war, and it has been urged that it was not open to them, after having once issued that notice, to modify it by the subsequent notice of February 1919, in which they intimated that they intended in future to enforce the bye-law more strictly and only to permit the privilege to some specified persons, mainly officials of the Police and the Company, as they had obtained a further supply of cars since the end of war. It has, however, not been disputed that neither of these notices could have had the legal effect of modifying the bye-law, because neither of these notices had been confirmed by the

Governor in Council as required under sections 24 and 25 of the Bombay Tramways Act, I of 1874. It is not necessary to discuss what the position would have been if contrary to their notices an unsuspecting passenger had been prosecuted for travelling on the platform by the Tramway Company, because that is not the case here, and it would be exceedingly improbable that any such prosecution would be instituted by a responsible body like the Tramway Company. The case here is a perfectly simple one. The offender had full intimation of the withdrawal of the previous privilege, he was shown the notice intimating that the bye-law would in future have to be more strictly enforced, he nevertheless deliberately with full knowledge of the position refused to comply with the perfectly reasonable and legitimate demands of the officers of the Tramway Company. This, therefore, in my opinion, is not a case in which the offender is entitled to any sympathy. It was entirely his own fault. He acted with full knowledge that he was liable, if he disobeyed the request of the officers, to prosecution under the bye-laws that had been sanctioned and never modified by the Governor in Council under sections 24 and 25 of the Bombay Tramways Act I of 1874.

It seems to me, therefore, that it is incumbent on us to confirm the conviction and sentence of Rs. 20 for the offence against the bye-law No. 6, but on the other hand to reverse the conviction and direct the re-payment of the fine of Rs. 15 inflicted under bye-law No. 7 of the bye-laws as confirmed by the Governor in Council under sections 24 and 25 of Bombay Tramways Act I of 1874.

Order accordingly.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 184 OF 1919.

CRIMINAL REVISION PETITION No. 151 OF 1919.

September 11, 1919.

Present:—Mr. Justice Spencer and
Mr. Justice Krishnan.

In re GANDI APPARAZU—ACCUSED—
PETITIONER.

*Criminal Procedure Code (Act V of 1898), ss. 406,
435, 436, 439—Penal Code (Act XLV of 1860), ss.*

GANDI APPARAZU v. EMPEROR.

147, 304—Enquiry by Magistrate—Petition by complainant to District Magistrate for commitment to Sessions, rejection of—Accused acquitted in respect of offence under s. 147 and discharged in respect of offence under s. 304—Sessions Judge, order by, directing commitment, legality of.

The Police charged the accused before a Sub-Magistrate under sections 147, 323 and 325 of the Penal Code. During the course of the enquiry P. W. No. 1, who had initiated proceedings before the Police, applied to the District Magistrate to commit the case to the Sessions Court. The District Magistrate rejected the petition, holding that the petition was incompetent and that the Police alone had a *locus standi* to move in the matter. The Sub-Magistrate acquitted the accused of the offence under section 147 of the Penal Code. After the termination of the trial P. W. No. 1 applied to the Sessions Judge under section 436, who ordered the committal of the accused under sections 147 and 304 of the Penal Code:

Held, (1) that the committal under section 147, Indian Penal Code, was illegal as the accused had been acquitted in respect of the charge under that section; [p. 492, col. 2]

(2) that the commitment under section 304 was valid as the Sub-Magistrate, who had evidence of facts pointing to an offence under that section, must be deemed to have impliedly discharged the accused of that offence and it was competent for the Sessions Judge to set aside that order *suo motu*. [p. 492, col. 2; p. 493, col. 1.]

Kalimuthu v. Emperor, 26 M. 477; 2 Weir 542, distinguished.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Sessions Judge, Godavari at Rajahmundry, dated the 29th January 1919, in Criminal Revision Case No. 1 of 1919 (C. C. No. 13 of 1918) on the file of the Sub-Divisional Magistrate, Cocanada, and Revision Case No. 2 of 1918, on the file of the Court of the Sub-Magistrate at Coringa.

FACTS appear from the judgment.

The Hon'ble Mr. T. Richmond, for the Petitioner.—The Sessions Judge acted without jurisdiction in ordering committal under sections 147 and 304, Indian Penal Code. In respect of the charge under section 147, there is the additional fact that the accused were acquitted by the Magistrate. Section 403 is a bar to the taking of further action.

A similar application at a prior stage was rejected by the District Magistrate and the Sessions Judge, who is a co ordinate authority with the District Magistrate, cannot revive the matter and pass an order opposed to the order of the District Magistrate; see *Kalimuthu v. Emperor* (1).

(1) 26 M. 477; 2 Weir 542.

Mr. V. L. Ethiraj, for the Public Prosecutor.—The application to the District Magistrate was at a stage of the proceeding when no final order was passed by the Magistrate. The District Magistrate held that the petition itself did not lie, as it was a Police charge-sheet and the application for commitment should have been made by the Police. The ruling in *Kalimuthu v. Emperor* (1) does not apply. The facts in that case were different. In this case the trial had come to a close and, with all the facts before him, the Magistrate refused to frame a charge under section 304, Indian Penal Code, though he did not, in so many words, record an order of discharge under that section. It was quite open to the Sessions Court to take action *suo motu* and set aside that implied order of discharge.

ORDER.—It is contended on behalf of the petitioner, the 1st accused, that the learned Sessions Judge had no jurisdiction to order his committal to the Sessions on charges under sections 147 and 304, Indian Penal Code, and that his order to that effect must be set aside.

As regards the charge under section 147, Indian Penal Code, we think the contention is well-founded as the accused was acquitted by the Sub-Magistrate on that charge under section 258, Criminal Procedure Code. So long as that order of acquittal stands, he cannot be again charged and tried for that offence on the same facts. Section 403, Criminal Procedure Code, is a bar to it. It was not open to the Sessions Judge to set aside that acquittal or to treat it merely as an order of discharge, as he seems to have done. His order, so far as it refers to section 147, Indian Penal Code, must, therefore, be set aside.

But the charge under section 304, Indian Penal Code, stands on a different footing. Though the complaint alleged facts against this accused constituting an offence under section 302, Indian Penal Code, the Sub-Magistrate disbelieved the evidence on the point and did not frame any charge under section 302 or 304, Indian Penal Code. His action amounted in law to an order of discharge on those counts, even though no express order of discharge was recorded by him. See *Krishna Reddi v. Subbamma* (2). That being so, it was open to the Sessions Judge under sections 436,

(2) 24 M. 136; 2 Weir 544.

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Criminal Procedure Code, to act *suo motu* and set aside the implied discharge and direct the committal of the accused to the Sessions on being satisfied that he had been improperly discharged, as the offence under section 304, Indian Penal Code, is one exclusively triable by the Sessions Court.

But it is argued that the District Magistrate had passed a previous order on an application by the complainant refusing to set aside that discharge and that that order prevents the Sessions Judge, who is a co-ordinate authority with the District Magistrate, from re-opening the matter and reliance is placed on the ruling in *Kalimuthu v. Emperor* (1). It was ruled in that case that under clause (4) of section 435, Criminal Procedure Code, it was not competent to the District Magistrate to entertain an application to commit when the Sessions Judge had already refused to pass such an order and that the reason of the prohibition applied equally to cases in which the authorities acted *suo motu*. It would not, of course, matter whether the District Magistrate or the Sessions Judge acted in the first instance, as they are co-ordinate authorities under the section.

It seems to us, however, that this ruling is not applicable to the facts of the present case. What happened here was that, as soon as the Sub-Magistrate framed charges under sections 147, 323 and 325, Indian Penal Code, against the 1st accused and while the case was still pending before him, the 1st prosecution witness put in an application to the District Magistrate under section 435, Criminal Procedure Code, asking him to call for the records and direct a committal of the case to the Sessions. The prosecution was a Police prosecution, though it was on the information of P. W. No. 1. The District Magistrate sent the petition to the District Superintendent of Police, recording on it that he was not inclined to stay proceedings or to call for the records; finally he rejected the petition on the ground that the Police, in whose hands the case was, were satisfied with the procedure of the Magistrate. Now it will be noticed that at the time the application was made, there was no express order of discharge as to section 304, Indian Penal Code, nor could an order of discharge be implied under the authority of *Krishna Reddi v. Subbamma* (2), above referred to, as

the trial had not come to a close, as in that case, and it was still open to the Sub-Magistrate to frame further charges and commit under section 347, Criminal Procedure Code, if he thought fit to do so. There was thus no order of discharge to revise and the application cannot be looked upon as one for that purpose. The District Magistrate also seems to have treated it as an incompetent application, as he declined jurisdiction under section 435, Criminal Procedure Code, and refused to call for the records on the ground that the Police were the proper parties to apply and not P. W. No. 1. This case is, therefore, clearly distinguishable from the case quoted. Neither the application nor the order of the District Magistrate, who refused to entertain it and to consider it on the merits, can thus properly be treated in our opinion as a bar to the action taken *suo motu* by the Sessions Judge in this case. We may observe that if we considered that there was any difficulty in upholding the Sessions Judge's order, we should have ourselves given notice to the accused and directed his committal to the Sessions under our revisional powers, if we considered it necessary in the ends of justice to do so, as the objection taken cannot apply in any case to our exercise of the powers vested in us. But as the objection to the Sessions Judge's order, so far as it refers to section 304, Indian Penal Code, fails, it is not necessary to do so.

On the merits there seems to be good reason for directing a trial of this accused in the Sessions Court. Both the Deputy Magistrate to whom the case of the other accused was sent up for enhanced punishment by the Sub-Magistrate and the Sessions Judge consider that the way in which the Sub-Magistrate dealt with the case was quite improper. There was a considerable body of evidence against this accused, and the Sub-Magistrate should have properly committed him to the Sessions and not taken upon himself to discredit the case against him on the ground of *alibi* by giving him 'the benefit of the doubt,' as he did.

The order of committal by the Sessions Judge will, therefore, be confirmed subject to section 147, Indian Penal Code, being struck out of it.

M. C. P.

Order modified.

SOHAN SINGH v. EMPEROR.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 618 OF 1919.

September 16, 1919.

Present:—Mr. Pratt, J. C.

SOHAN SINGH—APPLICANT

versus

EMPEROR—RESPONDENT.

Burma Municipal Act (III of 1898), Ch. VI, s. 180
(1)—Order directing disposal of surface water, legality of—Disobedience of order, whether offence.

There is nothing in Chapter VI of the Burma Municipal Act which empowers a Town Committee to pass general orders or directions regarding the disposal of sullage or surface water. The neglect to comply with such an order, therefore, is not an offence under section 180 (1) of the Act.

Mr. J. C. Chatterjee, for the Applicant.

JUDGMENT.—Sohan Singh has been convicted by the Headquarters Magistrate, Meiktila, under section 180 (1) of the Municipal Act of disobeying a lawful direction given by the Committee under the powers conferred by the previous Chapter (Chapter VI).

The direction was passed at a meeting of the Committee in July 1918 and was as follows:—

"No house-owner shall allow sullage or other water to be discharged from his house on any Municipal road or property but must carry out a connection with the nearest drain or dispose of such refuse water in some other way as may be approved by the President or Vice-President of the Town Committee."

This direction of the Committee is obviously a bye-law, even if it is called by another name, and has not been confirmed by the Local Government.

It is, therefore, not valid as a bye-law.

I can find nothing in Chapter VI of the Municipal Act, which empowers a Town Committee to pass general orders or directions of this nature regarding the disposal of sullage or surface water.

Sections 114, 115 and kindred sections provide for special notices regarding drainage, sewage and water-supply.

The notice in question, however, was based on a general order for which there is, so far as I can find, no legal authority.

I remanded the case for evidence as to the section or rule of law under which the order in question purported to be passed.

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The evidence of the Vice-President does not answer the problem but explains that the resolution dated 31st July 1918 is really a direction to the officials of the Town Committee as regards their duties under section 115 of the Municipal Act.

This is not the obvious interpretation of the resolution, but, assuming its correctness *argumenti causa*, it is clear that a house-owner cannot be convicted under section 180 because he disobeys a direction issued to officials of the Town Committee regarding their duties. The notice issued by the Vice-President called attention to the order of the Town Committee, pointed out that it was infringed by the applicant and requested him to take steps to carry out the order within a month.

As the Committee had no power to pass such a general order, the neglect to comply with it on receipt of a notice was no offence.

I set aside the conviction and sentence.

Sentence set aside.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 515 OF 1919.

November 11, 1919.

Present:—Mr. Justice Ryves.

LACHMI NARAIN AND OTHERS—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Companies Act (VII of 1913), s. 76 (1)—General meeting, what is—Default in holding general meeting—Offence.

Section 76 of the Companies Act, 1913, does not differentiate between a general meeting and an extraordinary general meeting of a company. Where, therefore, an extraordinary general meeting of a company was held within fifteen months of the last general meeting, it was held that no offence had been committed under section 76 (1) of the Act. [p. 495, col. 1.]

Criminal revision against the order of the Magistrate, First Class, Cawnpore dated the 25th July 1919.

Messrs. K. N. Katju and R. K. Malaviya, for the Applicants.

The Assistant Government Advocate, for the Crown.

EMPEROR V. VISHVANATHA VISHNU JOSHI.

JUDGMENT.—In this case a number of directors of the Kharidar Kapra Company, Limited, Cawnpore, were tried for an offence under section 76 of the Indian Companies Act, and convicted and ordered to pay a fine. Under that section a general meeting of every company shall be held once at the least in every year, and not more than 15 months after the holding of the last preceding meeting, and, if not so held, the Company and every officer of the Company who is knowingly a party to the default shall be liable to a fine. The last ordinary general meeting of the Company was held on the 6th of February 1919. There was no other general meeting of the Company within 15 months from that date. A written statement was shown to the Court but returned on the ground that it was not necessary to file it. Referring, however, to that written statement the Magistrate holds that the directors admit that technically an offence under section 76 (1) of the Companies Act has been committed. He, therefore, apparently has not gone into the other facts of the case. Reading the written statement it seems to me that there was no admission of any offence under section 76. I find as a matter of fact that an extraordinary general meeting of the Company was held on the 10th of April 1919. This was within 15 months of the last general meeting. There is nothing in section 76 which differentiates an extraordinary general meeting from a general meeting. It seems to me, therefore, that no offence under section 76 has been made out. I, therefore, allow the application, set aside the conviction and direct that the fines, if paid, be refunded. I order the book to be returned.

Application allowed.

BOMBAY HIGH COURT.
CRIMINAL REFERENCE No. 8 OF 1919.
June 20, 1919.

Present:—Mr. Justice Shah and
Mr. Justice Hayward.

EMPEROR—PROSECUTOR

versus

VISHVANATH VISHNU JOSHI—
ACCUSED.

Criminal Procedure Code (Act V of 1898, ss. 4 (o), 190—Cattle Trespass Act (I of 1871), s. 20—Magistrate empowered to take cognisance of offences, whether can take cognisance of offence under s. 20, Cattle Trespass Act.

A Magistrate of the Second Class, who is authorised under section 190 of the Criminal Procedure Code to take cognisance of offences upon receiving complaints, has power to take cognisance of complaints under section 20 of the Cattle Trespass Act.

Criminal reference made by the District Magistrate, Satara.

JUDGMENT.—We think that the Second Class Magistrate had jurisdiction to deal with the complaint. The only ground upon which the District Magistrate has suggested that he had no jurisdiction is that he was not specially authorized by the District Magistrate to deal with complaints under section 20 of the Cattle Trespass Act. There is no suggestion, however, that this Second Class Magistrate was not authorized under section 190 of the Code of Criminal Procedure to take cognisance of offences upon receiving complaints, and it must be taken for the purposes of this reference that he was so authorised. No further special authority to take cognisance of complaints under section 20 of the Cattle Trespass Act is needed in view of the definition of the word "offence" in section 4, clause (o), which includes any act in respect of which a complaint may be made under section 20 of the Cattle Trespass Act. It is clear from the Second Schedule of the Code of Criminal Procedure that offences under special Acts punishable with imprisonment for less than one year or with fine only are triable by any Magistrate. We think, therefore, that the Second Class Magistrate had jurisdiction to deal with the complaint. This conclusion derives support from the

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decision in *Budhan Mahto v. Issur Singh* (1).

We direct the record and proceedings to be returned.

Order accordingly.

(1) 34 C. 926; 6 Cr. L. J. 363.

PATNA HIGH COURT.

CRIMINAL REVISION No. 406 of 1919.

December 9, 1919.

Present:—Mr. Justice Coutts and Mr. Justice Adami.

YUSUF ALI KHAN.—PETITIONER

versus

EMPEROR.—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 192, 439, 529—Revision—Point not urged before trial Magistrate or Sessions Judge, whether can be taken in revision—Transfer of case by Magistrate not authorised to transfer—Irregularity.

Where a point is not urged in the Court of first instance or before the Sessions Judge on appeal, the High Court will not interfere in revision unless there has been a miscarriage of justice.

The transfer by a Sub-Divisional Magistrate of a case under section 192, Criminal Procedure Code, when the case has already been transferred to him by the District Magistrate, is a mere irregularity covered by section 529 of the Code.

Criminal revision against the order of the Sessions Judge of Cuttack, dated the 6th November 1919, dismissing an appeal of the petitioner from the order of the Deputy Magistrate of Cuttack, dated the 25th October 1919, convicting the petitioner.

Messrs. Yunus and Hasan Jan, for the Petitioner.

The Assistant Government Advocate, for the Opposite Party.

JUDGMENT.

COUTTS, J.—The facts of this case are shortly as follows:—

The District Magistrate of Cuttack directed the prosecution of one Yusuf Ali under section 161, Indian Penal Code, and transferred the case to the Sadar Sub-

Divisional Magistrate for disposal. After keeping the case for some time on his file the Sadar Sub-Divisional Magistrate transferred it to another Magistrate, who heard the case and disposed of it convicting the accused.

An appeal was preferred and the conviction and sentence was upheld by the Sessions Judge.

Now this application in revision is made on three grounds: *first*, that the conviction is bad because the Sub-Divisional Magistrate had no power to transfer the case under section 192, Criminal Procedure Code, *secondly*, that there has been no consideration of the defence case and *thirdly*, that there is no independent evidence.

With regard to the first point it appears that it was never taken either in the Court of first instance or before the Sessions Judge, and it has been the rule of this Court that it will not interfere in such cases unless there has been a miscarriage of justice. Moreover, in any case, it appears to us that the case is one which is covered by section 529, Criminal Procedure Code, and if there was any irregularity, it is cured by the provisions of that section.

We find no substance in either of the other contentions. The case has been very carefully considered both in the Court of first instance and by the learned Sessions Judge on appeal. In both Courts the whole evidence was carefully examined and we can see no reason to interfere.

The application is dismissed.

ADAMI, J.—I agree.

Application dismissed.

SENA YASIM SAHIB v. KADUR EKAMBARA IYER.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1654 OF 1918.

September 30, 1919.

Present:—Mr. Justice Spencer and

Mr. Justice Krishnan.

SENA YASIM SAHIB AND ANOTHER—

DEFENDANTS NOS. 1 AND 2—APPELLANTS

versus

KADUR EKAMBARA IYER—PLAINTIFF—
RESPONDENT.

Evidence Act (I of 1872), s. 115—Estoppel—Trustee—Breach of trust—Alienation of trust property, for personal use—Suit, subsequent, as trustee, for possession on behalf of trust, maintainability of.

A trustee who alienates trust property for his own private purposes is not estopped from instituting a suit as trustee to recover the property for the benefit of the trust. [p. 498, col. 2; p. 499, col. 2.]

Syed Gulam Nabi Sahib v. Nagammal 6 M. L. J. 270 and *Subbiah Chetty v. Mandaleswara Katari*, 4 Ind. Cas. 164; 19 M. L. J. 305, followed.

Gulzar Ali v. Fida Ali, 6 A. 24; A. W. N. (1883) 182; *Sidhu Sahu v. Gopi Charan Das*, 18 Ind. Cas. 969; 17 C. L. J. 233 and *Mahamaya Debi v. Haridas Haldar*, 27 Ind. Cas. 400; 42 C. 455; 19 C. W. N. 208; 20 C. L. J. 183, distinguished.

Per Krishnan, J.—A trustee who tries to set right a wrong he has done should not be prevented from doing so by any estoppel based on a former breach of trust by him, at any rate where he derives no personal benefit from his later action. [p. 50, cols. 1 & 2.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Chingleput, in Appeal Suit No. 6 of 1918 (Appeal Suit No. 223 of 1917 on the file of the District Court, Chingleput), preferred against the decree of the Court of the Additional District Munsif, Chingleput, in Original Suit No. 51 of 1916 (Original Suit No. 16 of 1915 on the file of the District Munsif's Court, Conjeevaram.)

FACTS.—The trustee of certain properties alienated certain items (of which he was in possession as Kudivaramdar) by way of mortgage to the defendants for Rs. 400 required for his daughter's marriage. In the present suit he claimed to recover the properties on behalf of the trust. The defendants' contention was that the mortgage was of both the Melvaram and the Kudivaram and that the plaintiff was estopped from contending that the Melvaram was not included. The plea of estoppel was overruled in the Court below and the suit decreed.

Mr. N. Rajagopalan (with him Mr. M.

Govindarajulu Naidu), for the Appellants.—*Juggutmohini Dossee v. Sokheemoneey Dossee* (1), on which the lower Court has relied, has been discussed elaborately in *Sidhu Sahu v. Gopi Charan Das* (2) and *Mahamaya Debi v. Haridas Haldar* (3). Though the trust will not be prejudiced by any act of the trustee, it is necessary, in order to check frauds by trustees, that they should be prevented from recovering the properties, so as to act as a warning to the beneficiaries that it is time for them to remove the trustee. Hence also why succeeding trustees are allowed to sue. It is the malefactor that is estopped. See *Gulzar Ali v. Fida Ali* (4). Estoppel is purely personal.

Mr. V. Ramesam, for the Respondent.—Public policy should be vindicated by protection being afforded to trusts. Where a trustee seeks to recover trust properties, there is nothing personal in the action. It is the trust that sues and the decree, though only in the name of the trustee, is for the trust. An exact case is reported as *Subbiah Chetty v. Mandaleswara Katari* (5). See also *Juggutmohini Dossee v. Sokheemoneey Dossee* (1), *Syed Gulam Nabi Sahib v. Nagammal* (6). The question has been elaborately discussed in *Srimati Mallika Dasi v. Ratanmani Ohakervarti* (7). The principle is enunciated also in *Higgs v. Northern Assam Tea Company, Limited* (8), *Webb v. Commissioners of Herne Bay* (9), *Doe d Levy v. Horne* (10).

Bona fides on the part of appellants has not been proved but presumed. It should not be presumed. See *Piruvengkatachariar v. Venkatachariar* (11) and *Venkatarama Aiyar v. Venkatarama Aiyer* (12).

(1) 14 M. I. A. 249 at p. 306; 10 B. L. R. 19 (P. C.); 17 W. R. 41; 2 Suth. P. C. J. 512; 3 Sar. P. C. J. 23; 20 E. R. 795.

(2) 18 Ind. Cas. 969; 17 C. L. J. 233.

(3) 27 Ind. Cas. 400; 42 C. 455; 19 C. W. N. 208; 20 C. L. J. 183.

(4) 6 A. 24; A. W. N. (1883) 182.

(5) 4 Ind. Cas. 164; 19 M. L. J. 305.

(6) 6 M. L. J. 270.

(7) 1 C. W. N. 493.

(8) (1863) 4 Ex. 387; 38 L. J. Ex. 233; 21 L. T. 336; 17 W. R. 1125.

(9) (1870) 5 Q. B. 642; 39 L. J. Q. B. 221; 22 L. T. 745; 19 W. R. 241.

(10) (1842) 3 Q. B. 730 at p. 766; 12 L. J. Q. B. 2; 3 G. & D. 239; 7 Jur. 38; 61 R. R. 397; 114 E. R. 698.

(11) 23 Ind. Cas. 621; 26 M. L. J. 218.

(12) 50 Ind. Cas. 969; 9 L. W. 318; (1919) M. W. N. 180.

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The discussion on the point now in dispute in *Sidhu Sahu v. Gopi Oharan Das* (2) and *Mahamaya Debi v. Haridas Haldar* (3) was totally unnecessary. I submit that in view of the express ruling in *Subbiah Ohetty v. Mandaleswara Katari* (5) the Calcutta cases are not binding. Further, those cases follow American decisions which the Privy Council have expressly dis-
countenanced.

Mr. Rajagopalan, in reply.—*Bona fides* is a question of fact and the finding cannot be challenged in second appeal.

The law on the question of estoppel is unsettled. See Ghose on Mortgage, Volume I, page 301. In *Subbiah Ohetty v. Mandaleswara Katari* (5) the sale of the properties was in execution of a decree against the trustee. There is a great distinction between a sale forced upon a trustee and a deliberate alienation by the trustee himself.

[KRISHNA, J.—In *Subbiah Ohetty v. Mandaleswara Katari* (5) the trustee stated that the property was his and yet he was held not to be estopped.]

The estoppel is personal and will not act on the trust. The statement of the trustee was relied on only as a last resort.

JUDGMENT.

SPENCER, J.—The point of law argued in this second appeal is whether the trustee of a temple, who himself mortgaged land which was afterwards sold in Court auction at the instance of the mortgagee, can sue, on behalf of the temple, to recover the landlord's interest, which was dedicated to the temple by the trustee's father, or whether he is estopped from setting up a claim against a *bona fide* purchaser for value that it is trust property. The District Munsif found that he was estopped and dismissed the suit. The Subordinate Judge, in appeal, reversed the District Munsif's decree and gave the plaintiff a decree for possession of the Melvaram interest.

Estoppel *in pais* creates a personal disability attaching to an individual and his representative of denying the truth of a thing which he has led others by his acts or representations to believe to be true.

If a trustee alienates trust property for his own purposes he acts, not as trustee,

but in breach or repudiation of his trust. Therefore, as Telang, J., in *Shri Ganesh Dharnidhar Maharajdev v. Keshavray Govind Kulgavkar* (13) points out, the estoppel arising out of the conduct of the mortgagor in representing the trust property to be his own property works not against succeeding trustees, but against the heirs of the alienor in his personal capacity. In *Syed Gulam Nabi Sahib v. Nagammal* (6) it was recognized that the right of suing for the recovery of possession of trust property wrongfully alienated was not confined to succeeding trustees, but might be exercised by the same trustee who made the alienation in order to set right the wrong done to the trust.

That a man can act in one capacity when he makes a representation that a village is his private property and in another capacity when he claims as trustee to recover the village as trust property of the idol, is well illustrated by *Subbiah Ohetty v. Mandaleswara Katari* (5).

I think that we should follow that decision and pronounce against the plea of estoppel in this case. As regards the decision in *Mahamaya Debi v. Haridas Haldar* (3) it seems to me that, if a legal custom is found to exist whereby a *sebait* may transfer his turn of worship, the act of mortgaging his turn is not an act done by virtue of his trusteeship but one which he does in exercise of his private right of worship. In that way estoppel may arise in such cases, although it is noticeable that Beachcroft, J., who sat with Mookerjee, J., preferred to reserve his opinion on the question of estoppel and to base his decision on the existence of a valid custom of transferability.

At page 468,* Mookerjee, J., first lays down the principle that a mortgagor cannot set up against his mortgagee the title of another person. He then extends this even to a case where the mortgagor is a trustee, acting in a public capacity and not for his own benefit, and he quotes an English decision as an authority for this proposition, *Doe d Levy v. Horne* (10). The learned Judge in the next step proceeds on the strength of some American decisions to apply the same principle to cases (13) 15 B. 625.

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where the trustee mortgages the trust property which he has no right to mortgage. With due respect I am not prepared on the strength of the American authorities to follow him in the application of estoppel to cases where the trustee acts to the prejudice of the trust, especially after the recent warning expressed by the Judicial Committee of the Privy Council against the danger of Courts in India allowing themselves to be guided by the rulings of foreign Courts. The appeal fails and is dismissed with costs.

KRISHNAN J.—The only question raised in this second appeal is one of estoppel and it is raised on the following facts as found by the lower Appellate Court.

The plaint land originally belonged to plaintiff's father, Sellam Battar. He dedicated the Melvaram right in it to the Ekambaranathar Swami idol in the big Conjeevaram temple for the performance of certain religious ceremonies and charities in that temple and directed that the eldest member of his family should be the trustee for the time being of the trust he created. He retained the Kudivaram himself. On his death the property as well as the trusteeship passed to the plaintiff. Some time thereafter plaintiff mortgaged the plaint land for his own private purposes to meet the expenses of his daughter's marriage. In doing so, he did not make any mention of the trust or reserve the Melavaram right. Indeed, it was his case in the lower Courts that he mortgaged only the Kudivaram right, but the language of the mortgage deed being against that contention, the lower Courts have decided that he mortgaged the whole land, and that finding is not now disputed. The mortgagee sued for sale of the land and got a decree, and the land was sold in due course in Court auction and was purchased by one Umamaheswara Mudelly. The defendants are transferees for value from that purchaser. Plaintiff now sues, as the trustee of the aforesaid trust, for a declaration that he is entitled to the Melvaram right in the land as such trustee and for the recovery on behalf of the trust of the Melavaram due for three years before suit. The learned Subordinate Judge, finding the dedication proved, held that the mortgage and the Court sale did not

affect the rights of the idol and overruling the plea that plaintiff was estopped from suing for the Melavaram right by his conduct in mortgaging the whole property as his own, gave a decree as sued for.

It is argued for the appellants that the question of estoppel has been wrongly decided by the lower Appellate Court for, it is contended, the estoppel arising against a mortgagor disputing the title he has himself granted will apply against the plaintiff in whatever capacity he may sue.

Plaintiff is now suing solely as the trustee of the trust in favour of the idol for property in which he has no personal interest whatever. The suit is in effect on behalf of the idol by its trustee or manager, the plaintiff. That by dedication of the Melvaram right to the idol it became the property of the idol is clear from the observations of their Lordships of the Privy Council in *Maharanee Shibessouree Debia v. Mothooranath Achorjo* (14). It is then difficult to see how a personal estoppel *in pais* arising against the plaintiff from his conduct can be pleaded in this suit, or why the idol should be made to suffer for anything done by the plaintiff in his private capacity because he happens to be the trustee at the time of the suit. It is conceded before us that in making the mortgage the plaintiff did not act in any way as the trustee of the endowment. He did not even mention the existence of the trust. It is also conceded that the plea of estoppel will not avail if the trust were represented by any other trustee. Should we then uphold the plea of estoppel in this case, a plea which is really more against the *cestui que trust* than against the plaintiff, as he is claiming no beneficial interest for himself in the suit Melvaram, merely on account of what one may call the accident of plaintiff being the trustee? I think the answer should be in the negative.

A very similar plea of estoppel was raised before a Bench of this Court in *Subbiah Ohetty v. Mandaleswara Katari* (5) with only this difference that whereas here the plea is based on the act or conduct of the trustee, there it was based

(14) 13 M. I. A. 270; 13 W. R. P. C. 18; 2 Suth. P. C. J. 300; 2 Sar. P. C. J. 528; 20 E. R. 552.

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on a representation made by the trustee, a difference which is not material regarding the applicability of the rule of estoppel under section 115 of the Evidence Act, and the learned Judges rejected the plea. Their observations on page 307 are very instructive on the question and seem to me to apply exactly to the facts of this case.

A similar view was taken by another Bench of this Court in an earlier case in *Syed Gulam Nabi Sahib v. Nagammal* (6), where the right of a trustee who wrongfully alienated trust property to set right the wrong done by him to the trust by himself suing the alienee for recovering possession was recognised. It is true, as the learned Counsel for appellants points out, that the view taken in that case on another point, namely, that the alienee's possession did not become adverse to the trust during the time the trustee who made the alienation continued in office, has since been departed from: see *Raja of Palghat v. Raman Unni* (15), but this, instead of weakening the force of the decision on the first point, has rather enhanced it; for it will be an anomaly if limitation by adverse possession is allowed to run against the trust when the person representing the trust is held to be estopped from suing for possession. The trust may thus lose the property by adverse possession without the trustee being able to prevent it.

Our attention was also drawn to certain observations of the Privy Council in the case of *Juggatmohini Dossee v. Sokheemoney Dossee* (1) "that a former abuse of trust, in another instance, cannot be pleaded against a trustee who seeks to prevent a repetition of abuse * * * and that the Court could not with any propriety say we will decline to protect the property and leave it exposed to further loss and decline to make a declaration that it is trust property, merely because they would not trust the plaintiff with its administration." Though, as pointed out by Mookerjee, J., in *Sidhu Sahu v. Gopi Oharan Das* (2), this observation in terms applies only to a repetition of an abuse of trust, I think it, in effect, supports the view that a trustee who is trying to set right

(15) 42 Ind. Cas. 22; 41 M. 4; 33 M. L. J. 26; 6 L. W. 195; (1917) M. W. N. 552.

a wrong he has done, should not be prevented from doing so by any estoppel based on a former breach of trust by him, at any rate where he derives no personal benefit from his later action. Following the above rulings and, particularly the reasoning adopted in the case in *Subbiah Chetty v. Mandaleswara Katari* (5), I would hold that the defendant's plea of estoppel was rightly disallowed.

The Counsel for the appellants has, however, drawn our attention to the cases reported as *Gulzar Ali v. Fida Ali* (4), *Sidhu Sahu v. Gopi Oharan Das* (2) and *Mahamaya Debi v. Haridas Haldar* (3) which, he contends, support his argument that his plea of estoppel is good in spite of the fact that this suit is brought by the plaintiff as trustee. These cases will, on examination, be found to be clearly distinguishable from the present case.

In the case in *Gulzar Ali v. Fida Ali* (4) the facts show that the plaintiff Fida Ali had a very considerable beneficial interest in the suit property and that though he sued as a trustee, he was trying to recover the property for himself. The learned Judges say in the opening sentence of their judgment: "Fida Ali virtually asks us to allow him to take advantage of his own wrong and to recover the land, in suit," and they again remark later, "we make no remark with regard to the beneficiaries under the trust as they, having made no effort to figure in the suit, do not appear to be interesting themselves in the matter." It is in these circumstances that the plea of estoppel was held good against the plaintiff and we cannot, therefore, take that judgment as laying down generally, as the appellants' Counsel urges, that a trustee suing for trust property which he has mortgaged for his own private purpose is estopped from doing so, irrespective of whether he has a beneficial interest in it or not. In the case before us as the trustee is suing entirely for the benefit of the trust and he is not attempting to take any advantage for himself, it is clearly distinguishable from the case cited, which is thus of no help to the appellants.

The two Calcutta cases cited as *Sidhu Sahu v. Gopi Oharan Das* (2) and *Mahamaya Debi v. Haridas Haldar* (3) were both decided by the same Bench. In the former the

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question was whether a trustee can ignore an *ekrarnamah* entered into by him as trustee with the defendants, by which he recognised the right of certain others to intervene in the appointment and removal of the Adhikari or trustee of the endowment. No question of estoppel like the one before us was raised in the case at all. The learned Judges were of opinion that the *ekrarnamah* would be binding on the plaintiff trustee if it really bore the character of a deed executed for the settlement of a dispute, even though his successor and the beneficiaries might not be bound thereby. The case has clearly no bearing on the case before us.

The next case cited, *Mahamaya Debi v. Haridas Haldar* (3), seems at first sight to have some bearing on the question before us, for Mr. Justice Mookerjee says in his judgment that the plea of estoppel against the mortgagor disputing the title he has himself granted is a good plea, even though the property mortgaged was trust property which he had no right to mortgage. This opinion must, however, I think, be taken with the facts of the case before the learned Judge. The property mortgaged there was the right of the mortgagor to perform certain turns of worship or "Palas" in a certain temple and to take the emoluments attached and the offerings made. The property was thus property belonging to the *sebait* or trustee personally, and the beneficial enjoyment of it was in him and the mortgage was by him as *sebait*. In these particulars the case differs materially from the case before us and could, I think, therefore, be distinguished from it. It was also found in that case that the mortgage objected to was really a valid one according to custom, as it was made to a member of the family of *sebait*s and Mr. Justice Beachcroft based his judgment entirely on that ground. The question of estoppel, therefore, really did not arise in the case and as Mr. Justice Mookerjee's opinion on that question does not affect the present case, it is unnecessary to examine it fully or to consider whether it should be followed. The real question in such cases as those in Calcutta is whether the rule that a man should not be allowed to plead against his own deed and to deny the truth of a declaration, act or omission of his which another man has believed and

acted upon to his disadvantage, should prevail against the rule that a trustee cannot transfer his office of trusteeship or vary the terms of it. There is a conflict of opinion in that High Court as to the answer to that question. See *Srimati Mallika Dasi v. Ratanmani Ohakervarti* (7) and the two cases quoted above. I reserve my opinion on it in the circumstances.

The authorities quoted for the appellants, therefore, do not affect the view I have already expressed. The plea of estoppel must thus be disallowed in the circumstances of this case and as that is the only plea raised before us, the second appeal must be dismissed with costs.

BY THE COURT.—The memorandum of objections is not pressed and is dismissed with costs.

M. C. P.

*Appeal dismissed;
Memo. of objections dismissed.*

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 115 OF 1919.

August 7, 1919.

Present: — Mr. Pratt, J. C.

MA E KO—APPLICANT

versus

MA PWA HMI AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115, scope of—Revision, interference in, when permissible—Jurisdiction, question of.

The application of section 115 of the Civil Procedure Code is very limited and its provisions must be construed strictly. [p. 503, col. 1.]

A material irregularity or illegality is not in itself a sufficient ground for revision under clause (c) of section 115 of the Civil Procedure Code. There must have been at the same time a wrong or irregular exercise of jurisdiction. [p. 503, col. 2.]

Mr. Maung Su, for the Applicant.

JUDGMENT.—This is an application for revision of the decree of the District Court, Shwebo, under section 115 of the Code of Civil Procedure.

The two main grounds on which the application is based are, first, that there was an illegality or material irregularity in not

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duly considering the point as to whether under Buddhist Law, husband and wife should be regarded as partners in business; and, secondly, that the lower Court was wrong in law in holding that the husband was not responsible for his wife's debts.

As a matter of fact the Judge considered the law on the point and came to the conclusion that there was no partnership between the husband and wife in the case in question.

This Court is, therefore, simply asked to revise the finding of the District Court on the ground that it was wrong in law.

It seems clear that this is a quite insufficient ground for interference on revision.

The law as to the scope of section 115, Civil Procedure Code, is explicitly laid down by the Lords of the Privy Council in *Balakrishna Udayar v. Vasudeva Aiyar* (1).

In the course of the judgment in that case it is remarked: "The 115th section of the Civil Procedure Code enables the High Court, in a case in which no appeal lies, to call for the record of any case, if the Court by which the case was decided appears to have acted in the exercise of a jurisdiction not vested in it by law, or to have failed to have exercised a jurisdiction vested in it, or to have exercised its jurisdiction illegally or with material irregularity, and further enables it to pass such an order in the case as the Court may think fit.

"It will be observed that the section applies to jurisdiction alone, the irregular exercise, or non exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved."

In the present instance the ground on which the Court is asked to interfere is solely that certain conclusions of law on the part of the District Court are wrong.

There is no question of jurisdiction involved.

Counsel for applicant relies upon a recent ruling of the Chief Court of Lower

Burma in *Goridut Bagla v. Rookman* (2).

In that case Ormond, J., referring to the judgment of the Privy Council cited above, remarked: "The judgment does not deal with clause (c) of section 115 beyond paraphrasing it as the irregular exercise of jurisdiction." I can find nothing in this judgment which is inconsistent with the decision in *Zeya v. Mi On Kra Zan* (3).

The ruling in *Zeya's case* (3), it should be noted, was to the effect that if the lower Court has failed to take into account some proposition of law or some material fact in evidence, it has acted illegally and its decision may be revised.

Towards the end of the judgment in *Goridut Bagla v. Rookman* (2) Ormond, J., sums up his view of the meaning of the third clause of section 115 as follows:—"The question, I think, resolves itself into this: *was the method irregular by which the conclusion of fact or of law was arrived at?* If the Judge arrives at a conclusion of law or of fact without having considered the law or a material part of the evidence or by misunderstanding or erroneously recording the statements of Pleaders or witnesses, the method of arriving at such conclusion is illegal and irregular, and is a good ground for revision, provided that the irregularity is material and the petitioner has suffered an injustice thereby."

The language used is very guarded, but with all due deference to the authority of the learned Judge, it seems to me he has travelled beyond the limits of interference under section 115 as interpreted by the Privy Council. He practically holds that, if the method by which a conclusion of law or fact is arrived at is irregular, this is in itself a sufficient ground for revision, provided that the irregularity is material and the petitioner has suffered an injustice. This view seems in effect to ignore the question of jurisdiction altogether and treats clause (c) of section 115 as if the words "in the exercise of its jurisdiction" were not present.

In the Privy Council judgment referred to it was definitely laid down that section 115 refers to jurisdiction alone, and is not

(1) 40 Ind. Cas. 650; 11 Bur. L. T. 48; 15 A. L. J. 645; 2 P. L. W. 101; 33 M. L. J. 69; 26 C. L. J. 143; 19 Bom. L. R. 75; (1917) M. W. N. 626; 40 M. 793; 6 L. v. 501; 22 C. W. N. 50; 44 I. A. 261 (P. C.).

(2) 47 Ind. Cas. 781; 12 Bur. L. T. 5; 9 L. B. R. 263.
(3) 2 L. B. R. 333.

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directed against conclusions of law or fact in which the question of jurisdiction is not involved.

There is no suggestion that this exposition of its meaning is confined to the first two clauses of the section.

Clause (c) of the section is paraphrased "to have exercised its jurisdiction illegally or with material irregularity." (The actual wording of the clause is to have acted in the exercise of its jurisdiction illegally or with material irregularity.)

It appears to my mind perfectly clear, therefore, that clause (c) must be held to refer to jurisdiction equally with clauses (a) and (b) of section 115.

It is not permissible to construe the words "in the exercise of its jurisdiction" as though they meant no more than "in its capacity as a Court." If that is all they mean, the words are superfluous and could be dispensed with, since in one sense a Court always passes orders in the exercise of its jurisdiction.

Clause (c) cannot be divorced from the other two clauses of the section, but must be read in its relation to them.

It is impossible to escape from the conclusion that acting illegally or with material irregularity in the exercise of its jurisdiction connotes an illegality or irregularity in a matter touching jurisdiction. In other words, there must be a question of jurisdiction involved. A mere illegality or material irregularity, in which no question of jurisdiction is involved, does not justify interference.

There must have been a misuse or abuse of its jurisdiction by the Court to warrant interference on revision.

This is in accordance with the view taken by a Bench of the Calcutta High Court in the case of *Chandra Kishore Roy v. Basat Ali* (4), where the facts were much stronger than in the present instance, since the decree, which it was sought to revise, was admittedly based on a wrong assumption of fact.

The application of section 115 is very limited and its provisions must be construed strictly.

It is not intended that it should take the place of a second appeal, which would

be the practical effect, if it were held that a mistake of law or a wrong view of the law justified the interference of the High Court on revision, even though the question of jurisdiction was not involved.

It may be desirable, especially in Upper Burma, that the power of revision should be extensive, but that does not make it permissible to construe the section in a manner which I hold to be clearly opposed to the interpretation of its meaning given in *Balakrishna's case* (1).

To summarise my view of the position, a material irregularity or illegality is not in itself a sufficient ground for revision under clause (c) of section 115. There must have been at the same time a wrong or irregular exercise of jurisdiction.

The application is dismissed.

Application dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 470 OF 1918.

January 16, 1919.

Present:—Mr. Justice Phillips and
Mr. Justice Krishnan.

RANGANAYAKI AMMAL AND ANOTHER—
DEFENDANTS NOS. 1 AND 2—APPELLANTS

versus

PARTHASARATHY AYYANGAR AND
ANOTHER—PLAINTIFF AND DEFENDANT NO. 3—
—RESPONDENTS.

*Transfer of Property Act (IV of 1882), s. 55 (4)—
Vendor and purchaser—Mortgage bond, unregistered,
executed to secure unpaid purchase-money, effect of—
Vendor's lien, whether extinguished—"Contract to the
contrary," what is—Suit on mortgage bond as simple
money bond, whether maintainable.*

Where an unpaid vendor takes an unregistered mortgage bond from the vendee to secure the payment of the purchase-money, the bond, being inadmissible in evidence as affecting the property sold, is not a contract to the contrary within the meaning of section 55 (4) of the Transfer of Property Act and does not operate to extinguish the vendor's lien [p 504, col. .]

Such a bond may be treated as a simple money bond and a suit would be maintainable on its basis as such bond. [p. 504, col. 1.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Vellore, in Appeal Suit No. 51 of 1917,

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preferred against the decree of the Court of the District Munsif, Arni, in Original Suit No. 1218 of 1914.

FACTS appear from the judgment.

Mr. V. C. Seshachariar, for the Appellants.—The suit is not maintainable. The plaintiff, having chosen to take a mortgage for the balance of the purchase-money, can only sue on the mortgage. As the mortgage has not been registered, he cannot sue on it. The vendor's lien cannot also be enforced, as it became extinguished by the execution of the mortgage.

Mr. R. N. Aiyangar, for the Respondents.—In the plaint the bond is treated as a simple money bond, and the plaintiff has also prayed for enforcement of the vendor's lien. The suit is, therefore, having regard to these specific prayers, maintainable.

There is no legal objection to treating the mortgage as a simple money bond when there is a technical defect in the mortgage. It does not form a contract to the contrary within the meaning of section 55 (4) of the Transfer of Property Act.

As the mortgage cannot legally be enforced, no inference can be deduced of the intention of the parties to extinguish the vendor's lien.

JUDGMENT.—It is contended for appellants that plaintiff's suit is not maintainable, as it is based on a mortgage deed Exhibit A which has not been registered and it is inadmissible in evidence. Plaintiff, however, recognised his difficulty and has treated Exhibit A in his plaint as a simple bond and has further asked for the enforcement of his vendor's lien for unpaid purchase money which formed the consideration for Exhibit A. There being these specific prayers in the plaint, the suit is certainly maintainable.

It is further urged that plaintiff gave up his vendor's lien by taking the bond Exhibit A. It must, however, be treated merely as a simple money bond not affecting immoveable property and as such does not in itself form a contract to the contrary within the meaning of section 55 (4), Transfer of Property Act. If Exhibit A could take effect as a mortgage as intended by the parties to it, it might well be that it constitutes a contract to the contrary; but inasmuch as it cannot take effect as such,

there arises no inference that the parties extinguished the vendor's lien.

Exhibit A was executed only to 1st defendant, but the Subordinate Judge has made both her and her husband 2nd defendant liable, and it is sought to support his order by reason of section 233 of the Contract Act. That section would only be applicable if 1st defendant were the agent of 2nd defendant, but she is not. The Subordinate Judge appears to find that Exhibit A was executed *benami* in 1st defendant's name for 2nd defendant but there was no issue on this point, and Mr. Sesha Charriar, who appeared for both 1st and 2nd defendants, objects to the finding and states that the plaint property belongs to 1st defendant and not to 2nd defendant, and we accept this statement and find the 1st defendant alone liable to plaintiff for the purchase-money. The lower Court's decree is, therefore, confirmed except that 2nd defendant must be exonerated. First defendant will pay plaintiff's costs in this second appeal and 2nd defendant will bear his own costs.

M. C. P.

Decree modified.

ALLAHABAD HIGH COURT.

PRIVY COUNCIL APPEAL NO. 8 OF 1918.

November 22, 1919.

Present :—Sir Grimwood Mears, Kt.,
Chief Justice, and Justice Sir P. C.
Banerji, Kt.

Nawab MUHAMMAD SAJJAD ALI KHAN
AND OTHERS—DEFENDANTS—APPLICANTS

versus

Nawab MUHAMMAD ISHAQ KHAN AND
OTHERS—PLAINTIFFS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), s. 109—Appeal
to His Majesty in Council on interlocutory matter,
whether permissible.

Appeals on matters interlocutory in their nature
should be allowed to be preferred to His Majesty in
Council only when their decision will practically
put an end to the litigation and finally decide the
rights of the parties. [p. 505, col. 2.]

Application for leave to appeal to His
Majesty in Council.

MUHAMMAD SAJJAD ALI KHAN v. MUHAMMAD ISHAQ KHAN.

Mr. S. O. Mukerjee, for the Applicants.

Mr. K. N. Katju, for the Opposite Party.

JUDGMENT.—This is an application by the parties who were defendants in the Court of the Subordinate Judge for leave to appeal to His Majesty in Council against a decision of this Court, dated January 9th, 1918. It appears that an action was commenced on July 3rd, 1915, for the recovery of mesne profits and when that action came on, the defendants took as their first point that this action was barred by reason of there having been a previous action between the same parties, and they relied upon section 11, Explanation V, of the Code of Civil Procedure. They succeeded in persuading the learned Subordinate Judge that he ought to regard the claim as falling within the principle of *res judicata*. In that way the plaintiffs' action came to a sudden termination. Thereupon the plaintiffs moved the High Court, and on the appeal it was held that the claim was not barred by reason of the previous action and the case was remanded for the decision of the Subordinate Judge. The result of the High Court decision was, of course, to place the parties exactly as they were when first the case was opened before the lower Court, with the exception that the issue of *res judicata* was settled in the plaintiffs' favour. The defendants now apply for leave to take this point on appeal to the Privy Council. Now, a reference to the pleadings shows that *res judicata* was only one of several issues put forward by the defendants. They contend, for instance, that the claim for mesne profits for the years 1912 and 1913 is barred by lapse of time, that the suit is not cognizable by the learned Subordinate Judge but is a matter within the province of the Revenue Court. There are other matters of substance which must be dealt with, involving much more than mere arithmetical calculations or perfunctory apportionment of liability amongst the defendants. In these circumstances it remains to be seen what are the principles which should govern an application of this kind. The application is based upon section 109 of the Code of Civil Procedure and turns upon the meaning to be given to a "final decree" in that section. Now this question, under varying circumstances, has been fre-

quently litigated and, if ever a point of law can fairly be said to be crystallised, it would seem that the time has arrived when it can be said that this matter is demonstrated clearly and definitely in a consistent series of decisions.

The defendants' Counsel quite naturally drew our attention to *Saiyid Muzhar Rossein v. Musammatt Bodha Ribi* (1) and if he could have shown us that a decision on the *res judicata* point would in any event have settled the rights of the parties except as to mere mechanical workings out of the decree, we should have granted the defendants a certificate and allowed the appeal to go to the Privy Council. A decision of the Privy Council affirming that of the High Court would, however, leave the various issues, above referred to, still in contention between the parties. The plaintiffs' Counsel, who opposed the application, referred us to several cases beginning with that of *Kaus-lla v. Ram Sarup* (2), *Ahmad Husain v. Gobind Krishna Narain* (3), *Nuri Mian v. Ganges Sugar Works Limited, Cawnpore* (4) and finally the case of *Danby v. Tafazul Hussain* (5). Now in each of those authorities there was a decision on some one point, just as in the case now under consideration there was a decision that the claim was barred but there were also outstanding points of considerable importance and of such a character that it could not be said that in whichever way the decision of the Privy Council went, the matter would be concluded. All of these cases are conveniently grouped up in the Patna decision [*Danby v. Tafazul Hussain* (5)] and there is thus a uniform consensus of opinion that appeals on matters interlocutory in their nature should be allowed to be preferred to His Majesty in Council only when their decision will practically put an end to the litigation and finally decide the rights of the parties. In this view it follows that the appeal must be rejected. We accordingly dismiss the application with costs, including fees on the higher scale.

Application dismissed.

(1) 17 A. 112; 22 I. A. 1; 5 M. L. J. 20; 6 Sar. P. C. J. 580 (P. C.).

(2) 5 A. L. J. 57; A. W. N. (1907) 291.

(3) 9 Ind. Cas. 932; 33 A. 391; 8 A. L. J. 192.

(4) 32 Ind. Cas. 380; 38 A. 150; 14 A. L. J. 50.

(5) 45 Ind. Cas. 290; (1918) Pat. 1; 4 P. L. W. 342.

VENKATA PERUMALLA PILLAI v. MARAPUDI VENKATASWAMI NAIDU.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1905 of 1918.

September 3, 1919.

Present:—Mr. Justice Bakewell and
Mr. Justice Moore.

VENKATA PERUMALLA PILLAI
AND OTHERS—DEFENDANTS NOS. 3, 4 AND 5—
APPELLANTS

versus

MARAPUDI VENKATASWAMI NAIDU
—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 22—Appellant, admission of, that appeal does not lie, effect of—Cross-objections, whether can be heard.

An admission by an appellant at the hearing of the appeal that the appeal does not lie amounts in effect to a withdrawal of the appeal under Order XLI, rule 22, Civil Procedure Code, and the respondent is in such a case entitled to be heard on his cross-objections.

Alagappa Chettiar v. Chockalingam Chetty, 48 Ind. Cas. 203; 35 M. L. J. 236; 41 M. 904; 8 L. W. 240; 24 M. L. T. 137; (1918) M. W. N. 688, distinguished.

Second appeal against the decree of the District Court, North Arcot, in Appeal Suit No. 160 of 1917, preferred against the decree of the Court of the District Munsif, Tirupati, in Original Suit No. 120 of 1916.

FACTS appear from the judgment.

Mr. P. M. Srinivasa Aiyar (with him Mr. A. Venkatachalam), for the Appellants.—I admit the appeal does not lie but the respondent should not be heard on his memorandum of objections, as the appeal has not been withdrawn or dismissed for default. Order XLI, rule 22 (4), Civil Procedure Code. The appeal is not for hearing before the Court.

Mr. T. Narasimha Iyengar, for the Respondent.—Virtually the intimation by the appellant's Vakil amounts to a withdrawal of the appeal. The case is for hearing before the Court and I am entitled to urge my cross-objections. As conceded by the appellant's Vakil the lower Appellate Court has based its decision on a matter not covered by the issues.

JUDGMENT.—Vakil for appellants admits that the appeal is incompetent since it is based on a matter not before the lower Appellate Court. The second appeal is dismissed with costs.

MEMORANDUM OF OBJECTIONS.

Upon the appeal being called on for hearing, the appellants' Vakil stated that

the appeal did not lie because the matter to which it relates was not the subject of appeal to the lower Appellate Court, and he has argued that the respondent cannot proceed with his memorandum of objections because the appeal has not been withdrawn or dismissed for default within the meaning of Order XLI, rule 22 (4), Civil Procedure Code. Rule 22 is contained in the rules grouped under the sub-heading "procedure on hearing," and sub-rule (1) applies to the hearing before the Court, as is shown by the expressions "any respondent may not only support the decree but take any cross-objections to the decree." The latter privilege depends upon his having adopted a certain procedure before the case comes on for hearing.

Sub-rule (4) applies to cases in which through some action or negligence of the appellant, the case does not come before the Court for hearing and the respondent might, therefore, without some express provision be deprived of his right to take cross-objections.

The decision in *Alagappa Chettiar v. Chockalingam Chetty* (1) deals with the case of an appeal barred by limitation, which, therefore, never comes before the Court for hearing. In the present case the appellants' Vakil in effect wishes to withdraw from the appeal because it is incompetent.

We think that since the case is before us for hearing, the respondent has the right to take his cross-objections under rule 22 (1).

The District Judge has based his decision on a case which was not raised by the issues or included in the grounds of appeal. The decree of the lower Appellate Court is set aside and the decree of the District Munsif is restored with costs throughout.

M. C. P.

*Appeal dismissed;
Memo. of objections allowed.*

(1) 48 Ind. Cas. 203; 35 M. L. J. 236; 41 M. 904; 8 L. W. 240; 24 M. L. T. 137; (1918) M. W. N. 688.

MAUNG TUN MAUNG v. MA YWE.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 104 of 1919.

July 18, 1919.

Present: — Mr. Pratt, J. C.

MAUNG TUN MAUNG AND ANOTHER—
DEFENDANTS—APPELLANTS

versus

MA YWE AND OTHERS—PLAINTIFFS—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 7, 8—Mortgage—Redemption, decree for—Preliminary decree, whether can be executed—Payment after expiry of period fixed but before final decree, effect of—Final decree, whether must be passed—Procedure.

The preliminary decree in a suit for redemption is provisional and until it is made final, redemption cannot be permitted. [p. 507, col. 2.]

Order XXXIV, rule 8, of the Civil Procedure Code provides for an extension of time for good cause shown, and ordinarily where a mortgagor decree-holder wishes to pay in the redemption money after the time specified but before the final decree, the correct course for him is to apply for an extension of time. The Court may, however, treat an application to pay in the money as tantamount to an application for extension of time. But the Court is not absolved from the necessity for passing a final decree and there is no provision for the execution of the preliminary decree before it has been made final. [p. 508, col. 1.]

Mr. O. G. S. Pillay, for the Appellants.

Mr. Maung Su, for the Respondents.

JUDGMENT.—Appellants were defendants in Civil Regular Case No. 88 of 1917 of the Township Court of Sale.

Plaintiffs sued for redemption under a usufructuary mortgage and were granted a decree in Civil Appeal No. 10 of 1918 of the District Court of Magwe.

In accordance with the provisions of Order XXXIV, rule 7 (d), the decree ought to have contained a direction that if the money was not paid on or before the date fixed, the mortgaged property be sold.

In the appeal decree a date was rightly fixed for the payment of the money into Court under Order XXXIV, rule 7, sub rule (c), and I do not understand the remark of the learned Additional Judge of this Court on second appeal that it is unnecessary to fix a date for redemption in usufructuary mortgages.

Rule 7 is quite clear and applies to usufructuary mortgages. The first Appellate Court fixed the 9th of September 1918 as the date on or before which the money was to be paid into Court.

On the 4th of October 1918, the decree-holders paid the money into Court and applied for the land to be attached and made over to them. Although the time specified in the decree for the payment of the money into Court had elapsed, the Court ordered the land to be attached and made over to the decree-holders, and this was done.

The judgment-debtors were given no notice of the application nor were they given any opportunity to show cause against the order being made.

The judgment-debtors appealed against the order in execution without success, the Court holding that respondent could redeem at any time he was in a position to pay the money into Court.

The Judge appears to have been led to state the case in such unqualified terms by the remark as to the absence of necessity to fix a date already referred to.

He saw that under the circumstances it was inequitable that the decree-holders should reap a crop, which they had not sown, without paying compensation, but could think of no remedy.

An appeal has now been preferred to this Court against the order in execution, on the ground that as the time specified for redemption had elapsed and no extension had been applied for or granted, the Court was in error in holding that the decree-holders could pay the money into Court at any time they could afford to do so.

It was also contended that appellants ought to be allowed to reap their crop or an order made to that effect before redemption was allowed.

There are numerous authorities for holding that the first decree in a mortgage suit is provisional and that until it is made final, redemption cannot be permitted.

The subject was discussed exhaustively in *Maung Lu Tha v. Maung Hman* (1) and it was held that until an order has been made under section 93 of the Transfer of Property Act, the decree-holder may redeem at any time subject to the law of limitation. It was further pointed out that a decree under section 92 of the Transfer of Property Act is of the nature of a decree *nisi* and that it does not foreclose the decree holder until an order to that effect has been passed under section 93.

(1) U. B. R. (1897-1901) II, 582.

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The latest Calcutta ruling cited is in 1908, *Bepin Behary Shaha v. Mokunda Lal Ghosh* (2), in which it was held that a person, who does not deposit the redemption money within the time allowed, can redeem afterwards before a final order is made under section 93 of the Transfer of Property Act.

The foreclosure adopted in that case was different to the present, as the plaintiff applied to have the decree made absolute, whereas in the present case there was no application for a final decree but an application was made for execution of the decree by attachment and delivery of possession.

Rules 7 and 8 of Order XXXIV have replaced sections 92 and 93 of the Transfer of Property Act and provision is made for preliminary and final decrees in redemption suits. The principles involved remain the same.

Both section 93 of the Transfer of Property Act and rule 8 of Order XXXIV provide for an extension of time on good cause shown.

Ordinarily, therefore, where the decree-holder wishes to pay in the redemption money after the time specified but before the final decree, the correct course would seem to be for him to apply for an extension.

Apparently, however, in view of the array of authorities on the subject, the Court would be justified in treating an application to pay in the money as tantamount to an application for extension of the time.

The Court, however, is not absolved from the necessity for passing a final decree and there is no provision for the execution of the preliminary decree before it has been made final.

The position, therefore, is that the decree-holders were entitled to redeem, but that the Court was bound to pass a final decree before allowing redemption and must pass a final decree in the terms specified in rule 8.

This has not been done and the procedure adopted by the Court was wholly irregular, in consequence of which it seems certain an injustice has been done to the mortgagees, who have been deprived of their crop.

As the money was not paid into Court until after the date fixed in the preliminary decree, I consider the Court ought to have issued a notice to the judgment-debtors to

(2) 1 Ind. Cas. 780, 36 C. L. J. 2; 8 C. L. J. 547.

show cause why a final decree should not be passed.

It would then have been able to put the decree-holders on terms as to the disposal of the crop before passing the final decree, having regard to the provisions of section 51 of the Transfer of Property Act.

I accordingly set aside the decree of the District Court on appeal and the order of the Township Court in execution.

There is as yet no final decree but the money has been paid into Court.

Payment must be entered in the original mortgage proceedings and the Township Court will call upon the judgment-debtors to show cause why a final decree should not be passed under Order XXXIV, rule 8. Orders must then be passed according to law, after hearing both parties, in the light of the remarks made in this judgment.

Appellants will be granted costs throughout.

Decree set aside.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1975 OF 1918.
October 8, 1919.

Present:—Mr. Justice Spencer and Mr. Justice Krishnan.

AGNIHOTRAM JAGANNADHA
CHARYULU—PLAINTIFF—
APPELLANT

versus

Sri Raja BOMMADEVARA SATYANA-
RAYANA VARAPRASADA RAO
BAHADUR AND ANOTHER—
DEFENDANTS—RESPONDENTS.

Madras Estates Land Act (1 of 1908), ss 101, 118, 124, 131, 132—Civil Procedure Code (Act V of 1908), O. XXI, rr. 90, 92, applicability of—Summary proceedings—Sale of ryot's holding for arrears of rent—Order cancelling sale for fraud or irregularity, validity of—Suit by purchaser to declare order invalid, maintainability of.

Where a ryot's holding is sold for arrears of rent under the summary procedure prescribed in section 111 and the succeeding sections of the Madras Estates Land Act and not in pursuance of a decree, the sale cannot be set aside by the Collector on the ground of irregularity or fraud, Order XXI, rules 90

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and 92, Civil Procedure Code, being inapplicable to such sales. [p. 510, col. 1; p. 511, col. 1.]

If an order cancelling such a sale is passed, it is open to the auction-purchaser to sue to have it declared that his purchase is valid and that the order setting it aside and directing a re-sale is without jurisdiction and null and void and not binding on him [p. 511, col. 2.]

Order XXI, rule 90, of the Civil Procedure Code applies only to cases where immovable property has been sold in execution of a decree, and it cannot be applied except to such sales inasmuch as its language precludes its application to sales in general, even though made through Court officers. [p. 511, col. 1.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Masulipatam, Kistna District, in Appeal Suit No. 29 of 1918, preferred against the decree of the Court of the District Munsif of Avanigadda at Masulipatam, in Original Suit No. 54 of 1916.

FACTS appear from the judgment.

Mr. P. Nagabushanam, for the Appellant.

—The Courts below erred in dismissing the plaintiff's suit as not maintainable. The order of the Collector cancelling the sale is *ultra vires*. The sale was not held in execution of a decree to attract the provisions of Order XXI, rule 90, Civil Procedure Code. It is only when the sale follows on a decree that it can be set aside for irregularity or fraud. Here there was no decree. The proceedings were summary and a sale held under section 111 of the Madras Estates Land Act is altogether independent of the provisions of the Civil Procedure Code. So unless the sale is set aside under section 131 of that Act, the Collector is bound to grant to the purchaser a certificate under section 124. The purchaser is entitled to have it declared that the order cancelling the sale was *ultra vires* and void. Sections 111 to 134 of the Madras Estates Land Act are summary and do not require an adjudication by the Collector of the rights of the parties. The sale of a holding cannot be said to be in execution of a decree. The Madras Estates Land Act, which is a self-contained enactment, does not itself provide for the setting aside of such sales for irregularity.

Mr. V. Ramesam, for the Respondents.—Section 192 of the Madras Estates Land Act makes Order XXI, rules 90 and 92, Civil Procedure Code, applicable to proceedings under the Madras Estates Land Act. Though there is no express provision in the Madras Estates

Land Act for the setting aside of sales under the summary procedure, resort must be had to rules 90 and 92, Civil Procedure Code, otherwise there will be hardship to the aggrieved party who will be left without a remedy. Any other view would nullify the effect of the application of rule 90 to proceedings under the Madras Estates Land Act. The order cancelling the sale being valid, plaintiff has no *locus standi* to maintain this suit.

In any event plaintiff cannot sue for a declaration of his title before getting a certificate under section 124 of the Estates Land Act.

JUDGMENT.

SPENCER, J.—The appellant, who purchased the holding of a ryot at a sale held under the provisions of Chapter VI of the Madras Estates Land Act (Mad. Act I of 1908), brought this suit to have it declared that the order of the Deputy Collector setting aside the sale for irregularities in the issues of notice, on a motion made by the land-holder who brought the holding to sale, was *ultra vires* and void. The suit was instituted in an ordinary Civil Court. The District Munsif who tried the suit held that as a Judge of a Civil Court he had jurisdiction to entertain it, but that no suit lay in consequence of the provisions of Order XXI, rule 92 (3), Civil Procedure Code. The Sub-Judge, who heard the appeal, agreed with him on the point that the suit was not maintainable, and held that it was also barred by the rule of *res judicata*. I have no doubt that they were both wrong on this point.

If the Deputy Collector had held a sale of the ryot's property in execution of a decree for rent passed by himself or by some other Collector in a suit instituted under Article 8 of Part A of the Schedule to the Act, the provisions of the Civil Procedure Code relating to the execution of decrees, including rules 90 and 92 of Order XXI, would by the force of section 192 of Act I of 1908 have become applicable to this case, so far as section 132 allowed it. But when summary proceedings are taken for the recovery of rent by the sale of the ryot's interest in the land under the provisions of section 141 and the following sections, the Collector has only to follow strictly the specific procedure laid

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down in the Act for the recovery of arrears without having recourse to a suit. Under that procedure it is not provided that a Collector may set aside a sale on account of irregularities. A sale may be postponed under section 131 or stopped by offering the amount due for arrears under section 122; but when once it is knocked down, the sale becomes final, and unless the defaulting ryot or some one else interested deposits the amount of the arrears and the costs of the sale together with 5 per cent. of the price within 30 days and so gets the sale set aside under section 131, it is imperative for the Collector to grant the purchaser a certificate of sale under section 124. The same was the case under the former Rent Act (see section 35 of Act VIII of 1865). There is no provision in either Act for sales being confirmed. Under the former Rent Act it was expressly declared in section 36 that no irregularity in publishing or conducting a sale of moveable property would vitiate such a sale, but this was not the case with sales of defaulters' holdings although the same rules for conducting such sales were made applicable by section 40, as it was held in *Nattu Achalai Ayyangar v. Parthasaradi Pillai* (1) that a suit would lie in the Civil Courts to question the propriety of a sale of immoveable property under the Act and to have it set aside for irregularities. *Doraisamy Pillai v. Muthusamy Mooppan* (2) was an instance of such a suit brought in a Civil Court.

Since the passing of the present Act it has been held that a defaulter can sue in the Civil Courts to have it declared that the sale of his holding was void for fraud or irregularity in the conduct of the sale. See *Ohidambaram Pillai v. Muthammal* (3) and *Gouse Moideen Sahib v. Muthialu Ohettiar* (4).

When the prevailing law was that enacted by Act VIII of 1865, a purchaser could have brought a suit such as the present to declare that the Deputy Collector had no power to set aside a sale once completed

[see *Velli Periya Mira v. Moidin Padsha* (5)] and in this respect too the enactment of Act I of 1908 has not effected any alteration in the law.

There being no other substantial objection to the plaintiff succeeding in this suit, the decrees of the lower Courts are reversed and the plaintiff will be given a declaratory decree as prayed for with costs throughout from 1st defendant.

KRISHNAN, J.—The lower Courts have dismissed the plaintiff's suit as barred by Order XXI, rule 92, clause (3), Civil Procedure Code (Act V of 1908), and hence this second appeal by him.

He purchased the 2nd defendant's father's holding at a rent sale held under section 118 of the Estates Land Act, when sold in public auction for arrears of rent due by the latter as a ryot to his land-holder, the 1st defendant, who is the proprietor of the Southvallur Estate. The Revenue Inspector, who was appointed as the selling officer under section 116 of that Act, accepted the plaintiff's bid and knocked down the property to him and received payment of the sale price as provided for in section 123. No application was made for setting aside the sale under section 131. Nevertheless the Deputy Collector, acting on a petition put in by the 1st defendant's manager which alleged certain irregularities in the conduct of the sale and consequent loss by the holding being sold for a grossly inadequate price, set aside the sale and directed a re-sale. A review petition by the plaintiff was rejected after hearing the parties and the original order was confirmed.

Plaintiff has brought the present suit to have it declared that his purchase was a valid one and that the order setting it aside and directing a re-sale was without jurisdiction and null and void and not binding on him.

In making his order the Deputy Collector purported to act under Order XXI, rule 90, Civil Procedure Code, read with section 192 of the Estates Land Act. The lower Courts have supported this view, and it is thus necessary to examine these provisions to see if that view is correct.

Section 192, Estates Land Act, no doubt

(1) 3 M. 114.

(2) 27 M. 94; 13 M. L. J. 479.

(3) 23 Ind. Cas. 524; 38 M. 1042; 15 M. L. T. 340; 1 L. W. 414.

(4) 21 Ind. Cas. 762; (1914) M. W. N. 55; 14 M. L. 523; 26 M. L. J. 36.

(5) 9 M. 332.

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makes rules 90 and 92 applicable to proceedings under the Act, for the corresponding sections 311, 312 and 314 of the old Code are not excepted sections in section 192, clause (a). To decide the question as to what proceedings in particular they apply to and whether they apply to the rent sale proceedings before us, we must examine the language of those rules themselves. Now if we turn to rule 90, we find that it applies only to cases where immovable property has been sold in execution of a decree; the rule, therefore, cannot be applied except to such sales, as its language precludes its application to sales in general even though made through Court officers. The difficulty in applying this rule to the rent sale before us is that it was not made in execution of any decree at all. An examination of sections 111 to 134 of the Estates Land Act, which deal with such rent sales, does not disclose anything in the nature of a decree being passed; there is no adjudication by the Collector of any rights of the parties. Neither the sale of a holding nor that of property distrained under section 93, Estates Land Act, can with any justification be held to be a sale in execution of a decree. It seems, therefore, to be clear that rule 90 cannot be applied to such sales.

It was suggested that this view would nullify the effect of the application of rule 90 to proceedings under the Estates Land Act. That is not so, because the rule would apply to sales in execution, for example, of rent decrees passed by the Revenue Courts.

If rule 90 does apply, rule 92 also cannot apply and the bar pleaded to the present suit under clause (3) of the latter section fails.

It is conceded that no section of the Estates Land Act taken by itself gives the Deputy Collector power to set aside the sale of a holding for any irregularity. In the case of sale of distrained property sections 103 and 104 make some provision for ordering a resale for certain irregularities mentioned in the latter section. But no such provision exists in the case of sales of holdings. In fact the language of section 124 seems to preclude the idea of the sale of a holding being set aside for irregularity, for under clause (2) thereof the Collector is bound to grant a certificate of sale to the

purchaser when the purchase-money is paid under section 123 save in the sole instance of an application under section 131 having been made and granted. Section 131 deals only with an application to set aside the sale of a holding on payment of the amount specified in the proclamation of sale and costs to the land-holder less any amount paid to him subsequently, and 5 per cent. of the purchase-money to the purchaser; it is similar in character to rule 89 of Order XXI, Civil Procedure Code. That section has nothing to do with cases of irregularity in publishing and conducting sales. If we turn to Schedule B to the Estates Land Act which mentions the various applications that can be made under the Act, we find that it makes no mention of any application to set aside the sale of a holding for any irregularity, the only applications referred to therein in this connection being applications under sections 114, 131 and 133; see Nos. 18, 19 and 20 of that Schedule. It seems, therefore, that the Legislature did not contemplate applications based on irregularities to set aside rent sales of holdings.

It cannot be argued that the sale remained incomplete till the Deputy Collector decided whether the bid of the highest bidder should be accepted or not, for under sections 118 to 123 of the Estates Land Act that duty seems to be cast on the selling officer.

It seems, therefore, impossible to avoid the conclusion that the Deputy Collector had no power to set aside the sale to the plaintiff as he did, and his action in doing so was *ultra vires*. In these circumstances it is conceded that the Civil Court has jurisdiction to give a declaration declaring the invalidity of the order and the validity of the plaintiff's purchase. See *Chidambaram Pillai v. Muthammal* (3), where also the order was found to be without jurisdiction. The suggestion that on the above view a person who has suffered loss on account of irregularity or fraud in the conduct of a rent sale of a holding will be left without a suitable remedy is, even if it is correct about which I express no opinion, not one we can take into consideration in deciding the question before us as our decision must depend entirely on the provisions of the law as we find it.

RALIA RAM V. MULK RAJ.

It was finally argued that, without getting a sale certificate under section 124 of the Estates Land Act, plaintiff is not entitled to a declaration of his title to the land. But that is not the declaration he is claiming. His prayer is to declare that his purchase is valid and that the order setting it aside is invalid. Such a declaration cannot be treated as a futile one, as the Revenue Authorities will no doubt act according to it, when produced to them, and give plaintiff a sale certificate and possession of the land as required by section 124.

No objection having been raised in this suit to the validity of the plaintiff's purchase on the merits and it not being explained how plaintiff's suit is barred by limitation, though an issue was raised on the point as additional issue No. 5, and the Deputy Collector's order setting aside his purchase being found to be *ultra vires*, we must give him the declaration he has asked for in the plaint.

The decrees of the lower Courts must, therefore, be reversed and plaintiff's suit decreed as prayed for with costs throughout against the 1st defendant.

M.C.P.

Appeal allowed.

LAHORE HIGH COURT.
MISCELLANEOUS SECOND APPEAL NO. 863
OF 1919.

December 1, 1919.

Present:—Mr. Justice Shadi Lal
and Mr. Justice Wilberforce.

RALIA RAM—DEFENDANT—
APPELLANT

versus

MULK RAJ AND GIAN CHAND, MINORS,
THROUGH WADHAWA, THEIR MATERNAL UNCLE
—PLAINTIFFS AND OTHERS—DEFENDANTS—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 99, O. I, r. 3—Declaratory suit by reversioners in respect of several alienations, whether maintainable—Appeal—Misjoinder of parties and causes of action, whether can be made ground of appeal—Decree, whether can be set aside on ground of misjoinder.

Plaintiffs sued for a declaration that alienations made by their father and uncles were without consideration and legal necessity and did not affect their reversionary rights. The land had been mortgaged on various occasions and eventually sold and all the mortgagees as well as the vendee were impleaded as defendants. A preliminary objection that the suit was bad for misjoinder of parties having been taken and upheld, the plaintiffs proceeded in their case against the vendee only. Their suit was dismissed. On appeal the District Judge held that there was no misjoinder of parties or causes of action and reversed the decree of the first Court. Defendants preferred a second appeal to the High Court:

Held (1) that the suit was not bad for misjoinder of parties and the plaintiffs were competent to bring one suit against the vendee and the prior mortgagees; [p 513, col. 1.]

Rup Narain v. Musammatt Gopal Devi, 3 Ind. Cas. 382; 93 P. R. 1909; 6 A. L. J. 567 (P. C.); 10 C. L. J. 58; 13 C. W. N. 920; 5 M. L. T. 423; 11 Bom. L. R. 533; 36 C. 780; 68 P. L. R. 1910; 146 P. W. R. 1907; 19 M. L. J. 548; 36 I. A. 103, followed

(2) that the order of the first Court on the point of misjoinder of parties vitally affected the merits of the case and the District Judge was justified in reversing the decree and remanding the suit for the trial of the original plaint. [p. 513, cols. 1 & 2.]

Miscellaneous second appeal from the order of the District Judge, Gurdaspur, dated the 14th March 1919, reversing that of the Subordinate Judge, 1st Class, Gurdaspur, dated the 24th December 1918, and remanding the case for a fresh decision.

Lala Mehr Chand Mahajan, for the Appellant.

Lala Fakir Chand, for the Respondents.

JUDGMENT.—The plaintiffs in this case sued for a declaration that alienations made by their father and uncles were without consideration or legal necessity and did not affect their reversionary rights. The land had been mortgaged on various occasions and was eventually sold, the consideration consisting mainly of these previous mortgages. A preliminary objection was taken that the suit was bad for misjoinder of parties. This objection was upheld by the first Court on the authority of *Musammatt Gopal Devi v. Jai Narain* (1). The plaintiffs, therefore, proceeded in their case against the vendee only. Their suit was dismissed, and in their appeal to the District Judge they attacked the decision of the first Court on the question of misjoinder. The District Judge accepted the appeal, on the ground that the Privy Council judgment in *Rup Narain v. Musammatt Gopal*

(1) 1 P. R. 1905; 83 P. L. R. 1905; 11 P. W. R. 1905,

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Devi (2) had overruled the decision of this Court in *Musammatt Gopal Devi v. Jai Narain* (1) and the learned Judge held that there was, therefore, no misjoinder of parties or causes of action. Against this decision an appeal has been preferred to this Court, and the same contentions which were raised before the District Judge have been repeated before us. It is also urged that under section 99, Civil Procedure Code, the lower Appellate Court should not have reversed the decree of the first Court on account of misjoinder of parties or of causes of action. We consider that there is no doubt that their Lordships of the Privy Council disagreed with the view of this Court expressed in *Musammatt Gopal Devi v. Jai Narain* (1) and laid down the law applicable to such cases. There does not appear to have been any subsequent judgment of this Court upon the subject, but the Calcutta High Court in two cases reported as *Provabati Debi v. Rameswar Mandal* (3) and *Rameswar Mandal v. Provabati Debi* (4) has followed the Privy Council judgment in question. The position is also now clearer than it was in 1905 owing to the amendments introduced into the Civil Procedure Code. Rule 3 of Order I is now on much broader lines than the old section and gives the plaintiff the right to join as defendants all persons against whom there exists any right to relief in respect of a series of acts or transactions. We may also note that the words "Where if separate suits were brought against such persons any common question of law or fact would arise" were not contained in the old Code. In this case common questions both of law and fact did arise. We, therefore, hold that in such a case one suit can be brought against the vendee and the prior mortgagees.

As for the objection that the District Judge acted against the provisions of section 99 in accepting the appeal and remanding the suit for the trial of the original plaint, we have no doubt that

the order of the first Court on the subject vitally affected the merits of the case; this is clear, as it was most improbable that the plaintiff could succeed against the vendee alone, who could shelter himself behind the prior mortgagees.

We, therefore, dismiss the appeal with costs.

Appeal dismissed.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 113 OF 1918.

March 23, 1919.

Present:—Mr. Saunders, J. C.

MAUNG TAW—DEFENDANT—APPLICANT
versus

MOOSAJI AHMED & Co.—PLAINTIFFS—
RESPONDENTS.

Buddhist Law, Burmese—Partnership—Husband and wife borrowing money—Presumption.

Under Burmese Buddhist Law there is no presumption that whenever a husband and wife borrow money there is a partnership between the two and that the money is borrowed for the purposes of that partnership. [p. 514, col. 2.]

Mr. J. C. Chatterjee, for the Applicant.

Mr. L. K. Mitter, for the Respondents.

JUDGMENT—This was one of three suits brought by the plaintiffs-respondents upon three separate promissory notes executed by one Ma Zon. The plaintiffs made Ma Zon and her husband, Maung Taw, defendants, claiming against Maung Taw on the ground that he was a partner with his wife Ma Zon, and, therefore, liable, although he had not executed the note.

The Judge of the Small Cause Court held that the husband and wife were partners and gave the plaintiffs a decree. The husband now comes to this Court in revision under section 25 of the Provincial Small Cause Courts Act.

The question whether a member of a partnership firm who has not signed a promissory note is liable in a suit upon that note signed by one of the partners for money lent upon the security of the note for the purposes of the partnership business has been decided by authority see the case of *Karmali Abdulla v. Bora Karimji* (1), a (1) 26 Ind. Cas. 915; 39 B. 261; 17 M. L. T. 35; 2 L. W. 133; 17 Bom. L. R. 103; 19 C. W. N. 337; 13 A. L. J. 121; 12 O. L. J. 122; 28 M. L. J. 515; (1915) M. W. N. 606; 42 I. A. 48 (P. C.).

(2) 3 Ind. Cas. 382; 93 P. R. 1909; 6 A. L. J. 567; (P. C.); 10 C. L. J. 58; 13 C. W. N. 920; 15 M. L. T. 423; 11 Bom. L. R. 833; 36 C. 780; 68 P. L. R. 1910; 146 P. W. R. 1909; 19 M. L. J. 543; 36 I. A. 103.

(3) 6 Ind. Cas. 248.

(4) 25 Ind. Cas. 84; 20 C. L. J. 23; 19 C. W. N. 318.

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decision which was referred to and commented on in *Shanmuganatha Ohettiar v. Srinivasa Aiyar* (2). There can now be no doubt that under these circumstances each of the partners is liable, although he did not sign the note for money borrowed for the purposes of the partnership business.

The learned Judge of the Small Cause Court decided that the defendants were partners, upon the ground that Burmese Buddhists who are husband and wife are ordinarily to be presumed to be partners in the absence of evidence to the contrary, and that the evidence in this case did not show that they were not partners. As the Judge puts it, the union as husband and wife constitutes under the Buddhist Law a partnership, unless it is shown that the wife lives and has a separate establishment of her own and takes no share in the management of her husband's house. As authority for this view a quotation from the notes by Sir John Jardine given in a Selection of Leading Cases, Part I, Matrimonial Law, page 50, by U Me Aung, is referred to. Under the head "Incidents of Marriage" the learned author says: "With respect to the management and acquisition of property the Buddhist Law, in distinctly recognising the status, treats the husband and wife as if they were partners in the profits, unless perhaps the woman lives and has an establishment separate from her husband and takes no share either in the management of his business or in his household affairs." In the case of *U Guna v. U Kyaw Gaung* (3) the Judicial Commisicner (Mr. Burgess) said: "It might have far-reaching and inconvenient consequences to hold that such a union, that is to say, the union of a husband and wife, invariably constitutes a partnership, but there is no doubt that it very commonly does so in effect to many intents and purposes," and in that case it was pointed out that the husband and wife had been carrying on a business very much after the character of a partnership.

But to say that the union of a husband and wife very commonly constitutes a partnership to many intents and purposes is by no means the same as laying down

the principle that it generally does so, and should be presumed to do so unless the contrary is proved, and it is clear that Mr. Burgess was not willing to lay down the broader proposition. Nor do I think that the note by Sir John Jardine can be interpreted as meaning more than this, that where a husband and wife live together and carry on business they ordinarily share the profits as partners. Here it appears that the wife kept a shop in the bazaar for the sale of dried prawns and the like. The husband was a clerk in Whiteaway Laidlaw's. The husband gave the wife Rs. 500 to start business, but she already had a stall, when he married her, with her mother, and it was only a year after her marriage because she wanted to have a separate shop of her own, according to the husband, that he provided her with this sum as capital.

The plaintiff in his evidence said that the defendants lived together and carried on business jointly, but he did not explain what he meant by this. He said he had made a demand for settlement of accounts from both the defendants and both the defendants asked him to give them time. He admitted that the wife had alone come and bought goods.

Ismail, an employee of the plaintiff, said that he collected outstandings and the wife paid money; sometimes she did not pay and said that she would pay on receipt of her husband's salary. He saw Maung Taw about the money due but Maung Taw said that he had anything (nothing) to do with the money.

I am of opinion that it would be introducing an entirely new principle, for which there is no justification either in the Buddhist Law or in the published rulings, to hold that in every case in which a husband and wife borrow money it must be presumed, until the contrary is proved, that there is a partnership between the two and that the money is borrowed for the purposes of that partnership. Every case must be decided on its merits. In the present case there is nothing to show that the husband took any part whatever in the wife's business beyond the supply of the capital of Rs. 500 with which to set her up in a stall. He has been shown to have a separate

(2) 35 Ind. Cas. 219; 40 M. 227; (1916) 2 M. W. N. 14; 31 M. L. J. 138; 4 L. W. 27; 20 M. L. T. 172.

(3) U. B. R. (1892-96), II, 204.

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and entirely distinct source of income in a shop in which apparently his services are fully employed. The mere fact, if it is a fact, that profits from one or other business are used for the maintenance of both husband and wife certainly cannot constitute the business a partnership. It would be as reasonable in the present case to hold that the wife was a partner in the husband's business as a clerk in the firm of Whiteaway Laidlaw as to hold that the husband was a partner in the wife's business of selling dried comestibles in the bazaar.

The application must be allowed and the decree, as far as the applicant is concerned, must be set aside with costs.

Application allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 467 OF 1918.

August 14, 1919.

Present :—Mr. Justice Seshagiri Aiyar and Mr. Justice Moore.

SABAPATHI PILLAY—DEFENDANT No. 1
—APPELLANT

versus

THANDAVAROYA ODAYAR—PLAINTIFF
—RESPONDENT.

Hindu Law—Joint family—Purchase of co-parcener's share in specific items of family property in Court auction—Partition—Allocation of other properties to co-parcener—Purchaser, right of, against substituted properties.

Plaintiff's vendor purchased certain properties in execution of a money decree against first defendant and obtained a certificate of sale. At the time of attachment a partition suit was pending between the first defendant and his co-parceners. The decree in the partition suit allotted certain properties to first defendant which included some only of the items included in the sale certificate. Plaintiff now sued for the allotment of the full extent of the area purchased by him out of the items allotted to the first defendant under the partition decree:

Held, that the plaintiff had no right or equity to compel the first defendant to give properties in substitution of those which had been sold at the Court auction. [p. 517, col. 2.]

The principle of *Byjnath Lall v. Ramooddeen*, 1 I. A. 106; 21 W. R. 233; 3 Sar. P. C. J. 333; 2 Suth. P. C. J. 942 (P. C.), does not apply to Court sales. [p. 516 col. 2; p. 517, col. 1.]

(Authorities reviewed).

Second appeal against the decree of the Court of the District Judge of Tanjore, in

Appeal Suit No. 400 of 1917, preferred against the decree of the District Munsif of Tiruvadi, in Original Suit No. 192 of 1916.

FACTS.—In pursuance of a money decree against A, an undivided member of a Hindu joint family, certain joint family properties were attached and A's share in them was purchased by B. A partition suit which was pending before the attachment ended after the sale, with the result that some of the attached properties were allotted to members other than the judgment-debtor. The present suit was brought for substitution in respect of A's share in these latter items from the other items which had been allotted to A. The lower Appellate Court decreed the suit.

Mr. A. V. Viswanatha Sastri, for Mr. S. Muthiah Mudaliar, for the Appellant.—The doctrine of substitution of security can be availed of only where there is a warranty of title. It is clear law that in a Court sale there is no warranty of title. A Court sale differs from a private alienation in that in the former there is no privity of contract between the parties; the purchaser can recover back the money when he finds that the judgment-debtor has no saleable interest. The implied warranty of title in respect of sales by private contract cannot, therefore, be extended to Court sales. See *Vitla Butten v. Yamenamma* (1), *Sundara Gopalan v. Venkatavarada Ayyangar* (2), *Byjnath Lall v. Ramooddeen* (3), *Aiyyagari Venkataramayya v. Aiyyagari Ramayya* (4), *Parvathi Ammal v. Govindasami Pillai* (5) and *Rangaya Reddy v. Subraymanya Aiyar* (6). A suit to recover the purchase-money is maintainable in spite of the provisions of Order XXI, rules 91 and 93. See *Tirumalaisami Naidu v. Subramaniam Chettiar* (7).

Messrs. T. M. Krishnaswamy Aiyar and N. P. Narasimha Iyer (for Mr. T. S. Narayana Aiyar), for the Respondent.—The present is not a question of

(1) 8 M. H. C. R. 6.

(2) 17 M. 228; 3 M. L. J. 293.

(3) 1 I. A. 106; 21 W. R. 233; 3 Sar. P. C. J. 333; 2 Suth. P. C. J. 942 (P. C.).

(4) 25 M. 690 at pp. 715, 716 (F. B.)

(5) 30 Ind. Cas. 82; 34 M. 803 at p. 806; 29 M. L. J. 467; (1915) M. W. N. 797; 2 L. W. 861.

(6) 40 Ind. Cas. 429; 40 M. 365 at p. 397; 32 M. L. J. 575; 5 L. W. 797; 21 M. L. T. 385.

(7) 45 Ind. Cas. 109; 40 M. 1009.

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warranty of title. It is a question of equity based on "fundamental principles of jurisprudence" as laid down in *Byjnath Lall v. Ramoodeen* (3). The law is clearly stated in *Manjaya Mudali v. Shanmuga Mudali* (8), which has been adopted with approval in *Rangaya Beddy v. Subramanya Aiyar* (6). See also *Venumeta Subbaraju v. Veejesena Seetharamaraju* (9) (Court sale). There is no distinction in this respect between a private alienation and a Court sale on principle.

Mr. A. V. Viswanatha Sastri, in reply.—*Manjaya Mudali v. Shanmuga Mudali* (8) lays down that what the purchaser gets is a mere right *in personam* and not a right *in rem*. The observation at page 689 is purely *obiter*.

JUDGMENT.—The plaintiff's vendor purchased certain properties in execution of a money decree against the first defendant and obtained a certificate of sale, Exhibit A. At the time of attachment, a partition suit between the first defendant and his co-parceners was pending. The decree in the partition suit allotted certain properties to the first defendant. On comparing the sale certificate, Exhibit A, with the list of the properties which the first defendant obtained under the partition decree, it is found that the sale certificate included items which did not all of them correspond to the items in the partition decree. Plaintiff obtained 283 cents under the sale certificate. His suit was for the allotment of this extent from the items given under the partition decree.

Some of the items being common to both, there will be no difficulty in decreeing them to the plaintiff. As regards those which do not correspond to the partition decree, the question is whether the plaintiff is entitled to have their equivalent from out of the properties which fell to the 1st defendant's share in the partition.

It was first argued that whatever may be the plaintiff's rights, he is not entitled to claim that the exact extent *minus* the extent of the items which are common should be carved out of the other items. There is much to be said for this argument,

because the properties that were allotted on the partition might be more valuable than the properties purchased at the auction. The latter might be unproductive *punja* lands. But the point was not put in issue in the Courts below or even here specifically. The consideration of the question would necessitate the taking of evidence; we have, therefore, refused to hear the question argued.

The more important question is, has the plaintiff any right or equity against the first defendant to compel him to give properties in substitution of those which were purchased at the Court auction. It was contended by Mr. A. V. Viswanatha Sastri that as there is no warranty in a Court sale, as the principle of *caveat emptor* applies to it, and as the plaintiff has chosen to bid for and purchase specific properties, he is not entitled to claim their equivalent from other properties of his judgment-debtor. There is no direct authority on the question, *Raja Thakur Barmha v. Jiban Ram Marwari* (10) only lays down that there is no warranty in a judicial sale.

Mr. T. M. Krishnaswami Aiyar drew our attention to the decision of the Judicial Committee in *Byjnath Lall v. Ramoodeen* (3). That was a case of a mortgage of specific properties belonging to an undivided family. The case arose before the Transfer of Property Act came into force. Their Lordships say: "It is, therefore, clear that the mortgagor had power to pledge his own undivided share in these villages, but it is also clear that he could not, by so doing, affect the interest of the other sharers in them, and that the persons who took the security took it subject to the right of those sharers to enforce a partition, and thereby to convert what was an undivided share of the whole into a defined portion held in severalty." This principle was apparently enunciated as arising from first principles of jurisprudence and was not based upon any statutory recognition of warranty. No doubt by the Transfer of Property Act, the Legislature has provided for a warranty in favour of the mortgagor: *vide* section 65; but the decision above quoted was wholly independent

(8) 22 Ind. Cas. 555; 38 M. 684 at p. 689; 15 M. L. T. 186; (1914) M. W. N. 356; 26 M. L. J. 576.

(9) 28 Ind. Cas. 232; 17 M. L. T. 57; (1915) M. W. N. 174; 39 M. 283.

(10) 21 Ind. Cas. 936; 41 C. 590; 19 C. L. J. 16; 18 C. W. N. 31; 1914) M. W. N. 118; 15 M. L. T. 187; 16 Bom. L. R. 156; 12 A. L. J. 156; 41 I. A. 38; 26 M. L. J. 89 (P. O.).

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of legislative warranties. In *Manjaya Mudali v. Shanmuga Mudali* (8) Sankaran Nair, J., applied this principle to cases of private sales by a co-parcener of specific properties. Mr. A. V. Viswanatha Sastri contended that that decision is opposed to principle and to the judgment of Bashyam Aiyangar, J., in *Aiyyagari Venkataramayya v. Aiyyagari Ramayya* (4). In this latter case what the learned Judge decided was that where a sale is made of specific items before partition, the proper remedy of the purchaser is to sue for partition and to claim the allotment to his vendor of the specific items sold to him. It was also held that if this cannot conveniently be done, the right to compensation for selling properties without title can be enforced against the vendor. This does not affect either Sankaran Nair, J.'s *dictum* in *Manjaya Mudali v. Shanmuga Mudali* (8) or the present case. Further Sankaran Nair, J.'s *dictum* has been accepted as correct by Oldfield and Sadasiva Aiyar, J.J., in the order of reference in *Rangayya Reddy v. Subramanya Aiyar* (6).

The further question is whether these rulings are applicable to adjustment of rights dependent upon Court sales. The point was thrice argued, as we had doubts on the question and as it is *res integra*. The learned Vakils on both sides have placed all the available authorities before us, but none of them really touches the question we have to decide. There are some general principles on which alone we can rest our decision. (1) There is no warranty in a Court sale: see *Raja Thakur Barmha v. Jiban Ram Marwari* (10). (2) There is no privity of contract between an auction purchaser and a judgment-debtor. Under the old Code of Civil Procedure if the purchaser had reason to believe that there was no saleable interest at all in the property sold, he had a right of action against the decree-holder for refund of money. The new Code has taken away that remedy and limits the purchaser's right to an application for refund. There is no indication in the Code that the purchaser has any remedy against the judgment-debtor. (3) It must be remembered that it is the decree holder that brings the property to sale; he prepares the proclamation and to the best of his knowledge places before the public all the available information in

respect of the property to be sold. Although the judgment-debtor is expected to assist the Court in settling the proclamation and although his failure to do so may entail some consequences, there is no provision of law which brings him into contact with the bidders at a sale. These persons are bound by the principle of *caveat emptor*. They take the risk of the property corresponding to the description given. If that fails, they can have no remedy against the judgment-debtor, because there was no act or representation by him which has contributed to the result.

Having regard to the principles above indicated, it seems to us that there is no justification for extending the theory of substitution, which has been enunciated in respect of persons standing in the relation of promisor and promisee, to persons who are strangers to each other. In this view, we must hold that the plaintiff is not entitled to any property against the defendant other than those which his vendor purchased in the Court sale. As the parties cannot agree in this Court regarding the identity of properties, we must reverse the decree of both the Courts below and remand the suit to the Court of first instance for ascertaining what the properties are in the possession of the defendant which are identifiable with the items purchased at the Court auction.

Plaintiff is entitled to a decree to the share of the judgment-debtor which his vendor purchased at the Court auction. There will be a preliminary decree as above indicated and the Court of first instance will pass the final decree in the usual course. Each party must bear his own costs hitherto incurred. Further costs will be provided for in the revised decree.

M. C. P.

Appeal allowed; Suit remanded.

SASI BHUSAN BHADOR v. BASANTA LAL BHAR.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2041
OF 1916.

July 22, 1919.

Present:—Mr. Justice Chatterjea and
Mr. Justice Cuming.

SASI BHUSAN BHADOR—DEFENDANT
No. 1—APPELLANT

versus

BASANTA LAL BHAR AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Hindu Law—Religious endowment—Absolute dedication, whether can be revoked.

Where there is an absolute dedication of property to a deity, a subsequent deed cannot affect the right of the Thakur to the property, nor can the donor, as owner of the property, revoke the dedication. [p. 519, cols. 1 & 2.]

Appeal against the decree of the Subordinate Judge, 1st Court, Burdwan, dated the 27th of July 1916, reversing the decree of the Munsif, Additional Court, Asansol, dated the 29th of June 1915.

FACTS appear from the judgment.

Babu Baranashibashi Mookherjee, for the Appellant.—The defendant No. 1 is the appellant. This appeal arises out of a suit for recovery of possession of certain properties alleged to belong to the plaintiffs as *shebait*s of certain deity. The property admittedly belonged to a lady named Dhan Kumari, who executed on 12th Falgun 1315 a document called *arpannama* but which is really a charge for the maintenance of the deity. The lady said there that she would maintain the *sheba* at present and after her death her relatives would do so. After six months she executed another deed in favour of the relatives, subject to a charge for the maintenance of the *sheba*, on 7th Assin 1316. She revoked the first deed on the 12th Falgun. Plaintiffs are the persons who were appointed to maintain the *sheba* after her death.

[Babu Bankim Chandra Mookherjee, for the Respondents, pointed out that the suit went on a different footing assuming that the *arpannama* was not valid as it was not properly executed.]

My first submission is that the deed of 12th Falgun created only a charge upon the property and did not make full dedication and on that footing the lady made the bequest.

Secondly, even supposing there was a complete dedication, the donor would have

a right to change the course of management by a subsequent deed.

[CHATTERJEA, J.—With regard to the first point the other side raises an objection that it was not pressed in the Courts below.]

I submit it was argued in the lower Court.

The lady simply created a charge upon the property by her first document and the second document creates the right subject to the charge.

A distinction between a private and public endowment under Hindu Law must be taken into consideration. The character of the property may be changed by the consensus of the family. There is no case directly to the point. Refers to *Govinda Kumar Roy Chowdhury v. Debendra Kumar Chowdhury* (1) and *Khetter Ohunder Ghose v. Hari Das Bundopadhyaya* (2).

Ganapat Iyer's book and *Govinda Kumar Roy Chowdhury v. Debendra Kumar Chowdhury* (1) referred to.

Babu Bankim Chandra Mookherjee, for the Respondents—My first point is that if it is established that by a deed of the 12th Falgun there was an absolute dedication out and out in favour of the deity of which there is no doubt, the subsequent dedication by which, he revoked the deed is inoperative.

The ownership vested in the deity and she could deal with the property as a *shebait* and by no other process.

In the subsequent deed she makes a bequest in my clients' favour subject to the charge. She does not make any substitution of *shebait*.

If the trustee does anything prejudicial to the interest of the property she must institute a suit unless she has reserved any power of revocation.

Here she has reserved no power of revocation in the deed. My friend's clients are also insolvents.

Krishna Pillai v. Arunachala Ohettiar (3) referred to.

Babu Baranashibashi Mookherjee, in reply.—I would ask your Lordships to give effect to that part of the deed which is valid, *viz.*, the power of nomination.

Dedication remains and if the revocation stands, the plaintiff is out of Court.

(1) 12 C. W. N. 98.

(2) 17 C. 557.

(3) 18 M. L. J. 304.

SASI BHUSAN BHADOR V. BASANTA LAL BHAR.

The case referred to does not apply because it is a case of a public endowment.

JUDGMENT.—This appeal arises out of a suit for recovery of possession of $7\frac{1}{2}$ *bighas* of land, on the allegation that the land was dedicated to the deity "Ganesh Janani", and that the plaintiffs were appointed *shebait*s under an *arpannama* dated 12th Falgun 1315 B. S. executed by one Dhan-kumari. It is further alleged that they had been in possession thereof until they were dispossessed in 1319.

The defence was that by a subsequent deed dated the 26th Bhadra 1316, Dhan-kumari Dasi made a gift of the property in favour of the defendant subject to a charge in favour of the Thakur, and that by a still later deed dated 7th Assin 1316, she revoked the first deed of dedication dated 12th Falgun 1315 altogether.

The Court of first instance dismissed the suit. On appeal the decree of the Court of first instance was reversed and the plaintiffs' suit decreed.

Two questions have been raised in appeal before us. The first is whether there was an absolute dedication of the property under the *arpannama* dated the 13th Falgun 1315 or whether there was merely a charge in favour of the Thakur on the property.

The *arpannama* has been placed before us and we agree with the Court below in holding that there was an absolute dedication in favour of the Thakur.

Our attention has been drawn to a passage towards the end of the document which might indicate that she had some beneficial interest in the property so long as she was alive. But reading the document as a whole, we think that there was an absolute dedication of the property. By that document she appointed the plaintiffs and their heirs as the *shebait*s of the Thakur after her death. Now, there being an absolute dedication of the property, the subsequent deed dated 26th Bhadra 1316 could not affect the right of the Thakur to the property nor of the plaintiffs as *shebait*s under that deed.

It is contended on behalf of the appellant that the founder has the right of substituting one *shebait* in the place of another and it is pointed out that by the deed of 20th Bhadra 1316, the lady purported to sub-

stitute the defendant as *shebait* in the place of the plaintiffs. It appears, however, that by this deed the lady purported to make a gift of the property to the defendant as if it was secular property and there was merely a charge in favour of the Thakur. That being so, it cannot be said that the defendant was substituted as *shebait* in the place of the plaintiffs.

The second contention is that even if there was a complete dedication, the donor had a right to change the course of management by a subsequent deed and reliance is placed upon the third deed dated 7th Assin 1316. But under the last deed there was a revocation of the dedication altogether, and we think, therefore, that the statement in the document to the effect that the plaintiffs would not be the *shebait*s cannot affect their right.

In the first place, the lady purported to revoke the gift and *shebaitship* in her right as owner of the property and not in her right as founder and first *shebait* of the Thakur. In the next place, the right of the plaintiff as *shebait* depended upon the dedication made in the deed dated 12th Falgun 1315. There having been an absolute dedication, as stated above, it could not be revoked. We cannot divide the terms of the deed and hold that one part of it, namely, that relating to the dedication was invalid, but that the statement contained in the document with regard to the *shebaitship* of the plaintiff was valid. The question might have been different, had she purported to act in her capacity as a trustee or as founder of the trust. As it is, we do not think that she had any power as owner of the property to set aside the deed dated the 12th Falgun 1315 in any respect.

In this view it is unnecessary to consider whether a founder of a trust can in his lifetime alter the course of succession of *shebait*s even if he does not reserve any power to do so in the deed of trust.

We may mention that the appellant before us is an insolvent and has prosecuted this appeal with the permission of the Insolvency Court.

The result is that this appeal is dismissed with costs.

Appeal dismissed.

MOHAMED ASKARI v. NISAR HUSAIN.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 61 OF 1919.

November 29, 1919.

Present:—Mr. Justice Tudball and
Mr. Justice Ryves.

Syed MOHAMED ASKARI—DEFENDANT
—APPELLANT

versus

Qazi NISAR HUSAIN AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O XL, r. 1,
O XLIII, r. 1 (s)—Order allowing application for
appointment of Receiver—Appeal, whether lies.

An order allowing an application for the appointment of a Receiver, without actually appointing any one to that office, is not appealable. Rule 1 of Order XL of the Civil Procedure Code contemplates an order appointing a Receiver.

Appeal from an order of the Subordinate Judge, Basti, dated the 15th March 1919.

Mr. S. A. Haidar, for the Appellant.

Dr. S. M. Sulaiman, for the Respondents.

JUDGMENT.—A preliminary objection is taken that no appeal lies from the order of the Court below. In the suit in question an application was made by the plaintiffs for the appointment of a Receiver. The defendants objected and after hearing arguments the Court passed an order to the following effect:—"I would, therefore, allow the application for appointment of a Receiver. Plaintiffs to suggest names for selection with particulars regarding security, remuneration and property to be taken possession of within a month." The present appeal has been preferred from that order. It is an admitted fact that no Receiver has, up to the present time, been appointed. So there is no order by the Court below actually appointing a Receiver but merely an expression by the Court of its intention to appoint. Order XLIII, rule 1, clause (s), grants a right of appeal against an order under rule 1 of Order XL. Order XL, rule 1, says where it appears to the Court to be just and convenient, the Court may by order appoint a Receiver; and it is, therefore, clear that the law gives a right of appeal only against an order appointing a Receiver, and not against an expression by the Court below of its intention to appoint. The matter is covered by many decisions. It was decided by the Calcutta High Court in *Upendra Nath Nag Chowdhry v. Bhupendra Nath Nag Chowdhry* (1) and also (1) 9 Ind. Cas. 582; 13 C. L. J. 157,

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by the Bombay High Court in the case of *Narbadashankar Mugatram Vyas v. Kevaldas Raghunathdas* (2) and also by our own Court in the case of *Ramji v. Koman Das* (3). The only decision in favour of the present appellant is one of the Madras High Court in the case of *Palaniappa Chetty v. Paluniappa Chetty* (4). That was a decision of three Judges in which two held that an appeal would lie from an order such as the one now before us, but the third Judge disagreed. Moreover, an examination of the report shows that the third Judge fully agreed with the two Judges of the same Court who had referred the matter for the decision of a Full Bench, with a view to the upsetting of a previous decision of the Madras High Court with which they did not agree. The decision in the case of *Ramji v. Koman Das* (3) is one which to our own knowledge has been followed more than once in this Court. We see no reason whatsoever to differ from the mass of opinion which is all against the appellant. We must, therefore, accept the preliminary objection. We hold that no appeal lies. The appeal will, therefore, be dismissed. We make no order as to costs as no certificate has been filed.

Appeal dismissed.

(2) 29 Ind. Cas. 504; 17 Bom. L. R. 510;

(3) 27 Ind. Cas. 646; 13 A. L. J. 79.

(4) 40 Ind. Cas. 185; 40 M. L. J. 304; (1917) M. W. N. 393; 5 L. W. 776.

ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 100 OF 1918.

July 16, 1919.

Present:—Mr. Lyle, A. J. C., and
Mr. Ashworth, A. J. C.

HANUMAN SINGH AND ANOTHER
DEFENDANTS NOS. 1 AND 2—APPELLANTS

versus

ADIYA PRASAD—PLAINTIFF AND GOBIND
PRASAD—DEFENDANT No. 3—

RESPONDENTS.

Pre-emption suit—Estoppel by acquiescence, proof of
—Formal offer to pre-emptor, whether necessary—Good
faith of pre-emptor, whether can be enquired into—
Oudh Laws Act (XVIII of 1876), Ch. II.

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Where in a pre-emption suit estoppel by acquiescence, as distinct from estoppel by the prescribed notice, is pleaded, it is necessary to show that the pre-emptor had full knowledge of what was going on and not merely the knowledge that there was a proposal to sell the property to some one or another for a certain price [p. 523, col. 2.]

A formal offer to the pre-emptor, however, is not necessary where it is obvious from the attendant circumstances that the pre-emptor is neither willing nor able to pay the purchase-money. [p. 523, col. 2.]

Chapter II of the Oudh Laws Act does not allow any discretion to a Court in a pre-emption suit to go into the question of the good faith of the plaintiff in asking for pre-emption [p. 524, col. 2.]

Appeal against the decree of the Subordinate Judge, Sitapur, Tahsil Biswan, dated the 17th June 1918.

Mr. A. P. Sen, for Appellant No. 1.

The Hon'ble Mr. Wazir Hasan, for Appellant No. 2.

Mr. H. K. Ghosh, for Respondent No. 1.

Mr. Nabi ullah, for Respondent No. 2.

JUDGMENT.—This appeal arises out of a suit for pre-emption brought by the plaintiff-respondent against the three defendants. One Ladli Prasad had died in 1910 leaving behind him three sons, Adiya Prasad (plaintiff) by his first wife (deceased) and Ajudhia Prasad and Narba'a Prasad (vendors) by his second wife Musammatt Chhatardei. To pay off an ancestral debt a mortgage was executed by one Sankata Prasad, who was guardian of all three minors, on the 20th of December 1910 in favour of a Bank in Gorakhpur, the entire family property being included in the mortgage. On 11th November 1914 the Bank at Gorakhpur transferred their rights as mortgagees to one Bhagwati Prasad. These facts are all set forth in the sale deed (Exhibit A 5) which has given rise to this suit and which is printed at page 9 of the appellants' book. When Adiya Prasad came to the age of majority, the guardianship of Sankata Prasad ceased and Musammatt Chhatardei was appointed guardian of her two children by the District Judge of Gorakhpur. The District Judge of Gorakhpur, being anxious to pay off the debt, at first asked Adiya Prasad to arrange for the payment. He made some attempts to do so but was unsuccessful, as is shown by an application of his dated the 23rd March 1917, which appears as Exhibit No. A1 on page 5 of the appellants' book. This application runs as follows:—

'The applicant begs to state as follows:—

"1. That the applicant and Musammatt Chhatardei Kunwar (opposite party) were ordered by the Court to provide for payment of the debt, by sale of the property.

"2. That the applicant made repeated endeavours and negotiations are going on with Bindeshri Prasad, resident of Mohalla Hanspur, Gorakhpur city, with respect to purchase of the villages situate in Gorakhpur, but as he has, as yet, given no clear reply and further delay is calculated to injure the other side, the applicant has no objections to the arrangements of Musammatt Chhatardei Kunwar.

"Although the debt is not paid off by that money, yet the applicant has no objections to comply with such orders as might be passed by the Court."

Musammatt Chhatardei then managed to get an offer for the property, which was submitted to the District Judge and sanctioned by his order of the 20th of June 1917. This sanction, which is Exhibit A 3, printed at page 6 of the appellants' book, runs as follows:—

"Mr. Mohammad Ismail and M. Abdul Rahman for Musammatt Chhatardei. Notice issued to Adiya Prasad who refused it. It was served by affixation. Applicants suggest that Musammatt Chhatardei and the minors should sell 9 annas out of their two-third share and should then sue for contribution. The creditor, B. Bhagwati Prasad, remits two hundred rupees of the debt. I sanction the sale of 9 annas share for Rs. 90,124. Out of this Rs. 87,145 will be paid to B. Bhagwati Prasad. The balance Rs. 2,979 should be retained for bringing the suit, if necessary, otherwise it will be invested in postal cash certificates or some good security. A draft deed should be filed for approval. Evidence should be given within a month of the payment of the debt."

The next proceedings took place on the 8th September 1917, which is the important date in this case. Between the 2nd of June 1917 and the 8th September 1917 Musammatt Chhatardei had received a higher offer for the property and in Exhibit A2, printed on pages 7 and 8 of the appellants' book, she asked permission to accept it. The person who had made the first offer named Gobind Prasad, defendant No. 3, was also

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present in Court and put in an application, Exhibit A4, printed on pages 6 and 7 of the appellants' book, asking that he should at least be offered the property for the higher price. The District Judge passed the following order, which is Exhibit No. 2 and is printed at page 8 of the appellants' book:—

"Musammât Chhatardei..... Applicant.

"M. Abdul Rahman has now obtained an offer for ninety-three thousand rupees. Babu Adiya Prasad has no objection. The Court has already sanctioned the sale for a smaller sum. It is not concerned with the question who is the purchaser. That is a matter for the vendors. A draft deed is put in and is approved. Evidence should be given on November 2nd of payment of the debts."

It will be seen from this order that the plaintiff Adiya Prasad was present in Court and it can be inferred beyond all doubt that he was aware of the previous offer by Gobind Prasad inasmuch as Gobind Prasad was himself in Court. It will also be noted that a draft deed was put in and approved by the District Judge. This draft deed was in favour of defendants Nos. 1 and 2. On the 19th September Gobind Prasad prevailed on Musammât Chhatardei and the two vendees to allow him one-third share of the property. Consequently the deed before registration (which took place on the 20th September) was altered by the addition of the following endorsement printed at page 12 of the appellants' book:—

"N. B. —This deed was prepared on 16th September 1917, but this 19th day, Lala Gobind Prasad purchaser has been, with consent of parties, added. Now Thakur Hanuman Singh, Babu Chhote Lal named in the sale-deed, and Lala Gobind Prasad, son of Lachhman Das, Banker, resident of Thomsonganj Market, Pargana Khairabad, Tahsil and District Sitapur, have become purchasers of annas 3 and this note-writing to be taken as part of the sale-deed and the sale-deed to be read subject to this amendment."

The case of the plaintiff originally was that, although present in Court on the 8th September and aware of Musammât Chhatardei putting in her application to be allowed to sell to Hanuman Singh and B. Chhote Lal, defendants Nos. 1 and 2, he had on that date expressed a desire

to himself purchase the property but that the Judge had remarked that he was not concerned with the question as to who would be the purchaser. This case, however, was given up by the plaintiff during the hearing of the suit, as is clearly stated in the following passage from the judgment:—

"Issues Nos. 1 and 2.—It has since been conceded by Babu Ram Prasad, Pleader for the plaintiff, that his client was aware of the contents of the application, dated 8th September 1917, and that he did not inform the District Judge, on the 8th September 1917, that he was willing to purchase the property (*vide* pleadings, dated 17th May 1918).

"The main fact is, therefore, admitted, i.e., the plaintiff consented on the 8th of September 1917 to the sale being effected in favour of defendants Nos. 1 and 2 for Rs. 93,000."

Notwithstanding this the lower Court has held that the plaintiff was not estopped from bringing the suit on the following grounds:—It was held that, although the plaintiff must be considered to have assented to the sale for Rs. 93,000 in favour of defendants Nos. 1 and 2, he never consented to defendant No. 3 being joined as a vendee. The learned Subordinate Judge has also held that there is no evidence that the vendees were induced to purchase the property by any acquiescence or conduct on the part of the plaintiff. This finding is based on the failure of the defendants themselves to come into the witness-box and also on the fact that on the 17th September 1917 the plaintiff sent to B. Chhote Lal, defendant No. 2, a telegram as follows:—

"Do not purchase share Kosila. I shall purchase. If you shall purchase, I will pre-empt. Inform Hanuman also."

To which he never received an answer. The lower Court has also relied on the ruling in 5 Oudh Cases, to which we shall subsequently refer, as authority for holding that before estoppel can be pleaded the pre-emptor must have expressly consented to the purchase of the property by the ultimate vendees.

There is no question of any written notice having been given in this case. It will clear the ground if we state that

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we cannot concur with the learned Subordinate Judge in finding that the defendants were bound to prove, by direct evidence, that the conduct of the plaintiff induced them to conclude the purchase. If it can be proved that the plaintiff had assented to the sale to the three defendants, then it may be presumed that the defendants were relying on his acquiescence and were induced by it to complete the purchase. We cannot presume that they would, apart from any acquiescence by the plaintiff, have purchased the property and incurred the risk of a pre-emption suit. The fact that the plaintiff sent a telegram on the 17th forbidding the defendants Nos. 1 and 2 to purchase does not indicate that the defendants were willing to purchase without his consent. Knowing that they had already received his consent—a fact which is noted in the District Judge's order of the 8th September—their failure to pay attention to the telegram cannot bear any such construction. The Subordinate Judge relied on *Bhagwat Singh v. Saiyad Nazir Husain* (1) and *Bank of Upper India v. M. Alopī Prasad* (2). These rulings are quoted as authority for the proposition that, in order that a pre-emptor be held to be estopped by his conduct, it is necessary that the plaintiff must establish that the property was offered to the pre-emptor at a certain price, that he refused to purchase it at that price, and that he expressly consented to the purchase of the property by the defendants-vendees. It is urged that, even if we admit that the plaintiff was present in Court on the 8th September and consented to the sale of the property either to defendant No. 3 at a lesser price or to defendants Nos. 1 and 2 at a higher price, these conditions are not fulfilled. In our opinion these rulings, in so far as they lay down these three conditions, are not applicable to the facts of the present case. The general principle of these rulings appears to us correct, namely, that if acquiescence is pleaded, it must be an intelligent acquiescence by a person who is cognizant of all the material facts, which of course will include the person to

whom the vendor proposes to sell. We are not prepared to dissent from the view that, where estoppel by acquiescence, as distinct from estoppel by the prescribed notice, is pleaded, it will be necessary to show that the pre-emptor had full knowledge of what was going on and not merely the knowledge that there was a proposal to sell the property to some one or another for a certain price. We do not, however, think that a formal offer to the pre-emptor is necessary when it is obvious from the attendant circumstances, as in this case, that the pre-emptor is neither willing nor able to pay the purchase price. Nor do we consider that it is necessary for the pre-emptor to have been aware of the precise persons in whose favour the sale deed was ultimately executed, when he had already shown that he did not mind if the sale-deed was executed in their favour. The respondent had agreed to a sale in favour of the defendant No. 1 alone or in favour of defendants Nos. 1 and 2. All three defendants were in these circumstances entitled to assume that he would assent to the purchase by themselves in conjunction. It is to be noted that the plaintiff had, as early as the 23rd March 1917, by the application of that date (already quoted) signified that he left the matter of getting a purchaser for the family property entirely in the hands of *Musammāt Chhatardei*. The last sentence of the application shows that he felt quite safe as she was a guardian under the Court. We cannot concur with the plaintiff's Counsel that this application can be construed to mean that he only agreed to the payment of debt by *Musammāt Chhatardei* and not to the sale of any property. Nor again can it be construed to mean that he only assented to the sale of property in Gorakhpur and not to the sale of property in Sitapur. It should also be remembered that the mortgage debt for which the property was being sold was binding on the plaintiff as well as on the minors. The whole case of the plaintiff, as set up for him by the Subordinate Judge, rested on his being able to prove that he would not have consented to Gobind Prasad being a purchaser. As we have pointed out, he had already shown that he would assent to

(1) 5 O. C. 395.

(2) 10 O. C. 257.

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any purchaser. Moreover, the order of the District Judge of the 8th September 1917, quoted above, coupled with the fact that Gobind Prasad and the plaintiff were both present in Court on the 8th (Gobind Prasad's presence being proved beyond all doubt by his application of that date and plaintiff's presence proved by the District Judge's order), goes to show that the plaintiff had consented to the sale to defendant No. 3, and also that he was willing to consent to the sale to defendants Nos. 1 and 2. His plea, therefore, that he was not willing to assent to the sale to the three defendants appears to us baseless.

Another argument taken up by the plaintiff's Counsel is that a pre-emptor must, if offered the property when the proposal is to sell to one person, be again offered it if the first proposal falls through and is replaced by a proposal to sell to another person. Every case must be judged on its merits. We quite agree that, where the transactions are separate in time, the property should be again offered to the pre-emptor as the circumstances of the pre-emptor, may have changed in the interval. The argument will not apply to a case like this, where the proceedings as to the sale of property form a single transaction and the pre-emptor must be deemed to have assented to the sale to any or all of certain persons proposed.

The respondents' Counsel urges that, even if we allow the appeal of the appellants (who are defendants Nos. 1 and 2), the judgment of the lower Court will hold good as regards the third share of the defendant No. 3 who has not appealed. The defendant No. 3 has, however, been made a respondent and his Counsel appears to urge that, in the event of the plaintiff being found estopped, he should have the benefit of that finding as well as the appellants. He relies on Order XLI, rule 33. In our opinion that Order gives us full powers in a case like this, and we consider that the judgment of the lower Court should be upset as a whole. There being no force in the plaintiff's case, we do not think that he should be allowed to take advantage merely of the fact that defendant No. 3 has not appealed.

We do not consider it necessary to go into the question raised by ground No. 3 of the appeal, namely, that this is not a *bona fide* suit for pre-emption. Chapter II of the Oudh Laws Act does not allow any discretion to a Court in a pre-emption suit to go into the question of the good faith of the plaintiff in asking for pre-emption.

For the above reasons we allow this appeal with costs in both Courts to the appellants. The plaintiff respondent and the defendant-respondent will bear their own costs.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1796, 1797 AND 1798 OF 1918.

August 27, 1919.

Present:—Mr. Justice Spencer and Mr. Justice Krishnan.

IN S. A. NOS. 1796 AND 1797 OF 1918
CHIDAMBARANATHA GOUNDAN—
DEFENDANT NO. 3—APPELLANT

IN S. A. NO. 1798 OF 1918
THEVAROYA REDDI—DEFENDANT NO. 3—
APPELLANT

versus

IN S. A. NO. 1796 OF 1918
SELLAPPA REDDI AND ANOTHER—
PLAINTIFF AND DEFENDANT NO. 1—
RESPONDENTS

IN S. A. NOS. 1797 AND 1798 OF 1918.
SELLAPPA AND OTHERS—PLAINTIFF
AND DEFENDANTS—RESPONDENTS.

Hindu Law—Will, construction of—Female legatees, estate taken by—Devise to mother and sister with direction that properties should go to dayathis of testator after his sister's death without issue—Estate taken by devisees, nature of.

In construing bequests to Hindu women the general rule that a transfer of property conveys all the rights of the transferor, unless a contrary intention appears, applies. [p. 526, col. 2.]

A Hindu left a Will bequeathing his property to his mother and sister *sarva swathanthrathudan* and in the event of the sister dying without issue the property was to go to his *dayathis*:

Held, that the mother and sister took an absolute estate, the provision for the *dayathis* being a

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contingent bequest which did not cut down the absolute estate given to the female devisees. [p 526, col. 1; p. 528, col. 1.]

Muthuvenkatanarayanan Chetti v. Athipandurenga Naidu, 51 Ind. Cas. 217; (1919) M. W. N. 103, followed.

Second appeals against the decree, of the District Court, Trichinopoly, in Appeal Suits Nos. 286, 287 and 288 of 1917, preferred against the decrees of the Court of the Principal District Munsif, Kulitalai, in Original Suits Nos. 1098, 1100 and 1099 of 1916 respectively.

FACTS appear from the judgment.

Mr. K. Srinivasa Aiyangar, for the Appellants.—On a proper reading of the Will it must be held that the legatees, i. e., the mother and sister of the testator took an absolute and not merely a life-estate. There is, first, the usual expression that the legatees are to enjoy *Sarva Swathanthrathudan*, which means with full proprietary rights. In *Muthuvenkatanarayanan Chetti v. Athipandurenga Naidu* (1) Sadasiva Aiyar, J., held that that expression was the strongest that could be used to confer an absolute estate. No doubt Ayling, J., took the opposite view in *Manika Mudali v. Muthachi Kavandan* (2), but that has not been followed in later cases. If only a life-interest was intended, the testator would have said so and provided for the vesting of the remainder in his Dayathis.

Recent decisions have laid down that, so far, at any rate, as this Presidency is concerned, there is no general presumption that legacies to women confer only a life-estate. On the other hand, the rule is that, unless a contrary intention is clear, a transfer of property confers all the rights of the transferor. *Ramachandra Rao v. Ramachandra Rao* (3). It is distinctly mentioned in the Will that only the testator's mother and sister are entitled to all that is comprised in the Will, and *none else*. That indicates very clearly that the testator intended to give them all his rights in the properties.

The bequest to Dayathis does not have the effect of cutting down the absolute estate. It is only a contingent estate which is not inconsistent with the absolute nature of the earlier estate. It could take effect only after

the death of the testator's sister without issue. The sister's children are not expressly made the direct objects of the gift.

The provision for the discharge of debts with the consent of the testator's Dayathis does not militate against the absolute nature of the gift. The debts have any way to be discharged and their advice was to enable the legatees to discharge the real debts of the testator.

Mr. S. T. Srinivasagopala Chariar, for the Respondents.—The bequests in this case are to Hindu females. They must be held to take a life estate unless a contrary intention is patent in the Will.

The provision for the Dayathis taking the property on the death of Sundarammal without issue shows that the prior estate was a life estate and that there was a gift over to the Dayathis. At any rate what was intended, was only a life estate to the sister, a full estate to her children and a contingent interest to the Dayathis.

The condition that the debts were to be paid with the consent of the Dayathis shows that their interest as reversioners was reserved.

The legatees are, under the terms of the Will only 'to enjoy,' i. e., to take the income from the properties.

JUDGMENT.

SPENCER, J.—The only thing we have to concern ourselves with in deciding this second appeal is to ascertain as far as possible what were the intentions of the testator, and that is not an easy matter because there are some expressions in the Will which are not easy to be reconciled with others. In the first part of the Will there is a provision that the testator's mother and sister are both to enjoy his properties with full proprietary rights after his death, and this is followed by an expression of intention to exclude all others. Then at the end it is provided that if the sister should die without issue, the Dayathis of the testator are to get the property and that their consent should be obtained in the matter of discharging debts. There is no distinct provision that the two women are to have powers to alienate the property beyond the use of the words *Sarva Swathanthrathudan*, which may be translated "with full proprietary rights" and have been regarded by Sadasiva Aiyar, J., as the "strongest expression that an alienor

(1) 51 Ind. Cas. 217; (1919) M. W. N. 103.

(2) 30 Ind. Cas. 685; 18 M. L. T. 346; 2 L. W. 827.

(3) 52 Ind. Cas. 94; 42 M. 283; 36 M. L. J. 306.

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can employ to confer an absolute estate on the alienee" in *Muthuvenkatanarayanan Ohetti v. Athipandurenga Naidu* (1), and by Ayling, J., as not conferring a full title on the donee in *Manika Mudali v. Muthachi Kavandan* (2). Again in *Sambasiva Ayyar v. Visam Ayyar* (4) Wallis, J., (now C. J.) observed that the words: "You shall enjoy the suit lands with the rights of gift, sale, etc.," where words of common form borrowed from Regulation No. XXV of 1802 denoting the act of the donor in divesting himself of ownership rather than the nature of the interest taken by the donee. As pointed out by the learned District Judge, there is no provision in this Will as to what is to happen with the mother's interest. Probably the reason for this is that the testator did not contemplate his mother outliving her daughter. I am of opinion, after careful consideration, that the bequest in favour of the testator's Dayathis was contingent on the sister dying without issue (not without heirs, as has been translated, the word used being *santhathi*) and that they did not take a vested interest. The testator evidently wished to exclude his sister's husband, but not her children if any should be born. As a matter of fact, the sister Sundarammal died between the appeal to the District Court and the second appeal to this Court and left no issue. The estate vested in her heirs on the testator's death. The contingency upon the happening of which the Dayathis would have succeeded to the property, namely, the death of Sundarammal without issue during the testator's lifetime, never happened. That is the only construction to be put on the words "if there be no issue to the above Sundarammal, my sister, the property should go to my Dayathis after her death" no time being specified for the occurrence of the event of her death—*vide* 2 Jarman (6th Edition) 2144. The event (Sundarammal's death) no doubt was certain to happen but it was uncertain whether she would die childless. If the testator had intended his mother and sister to take life-estates, he would have declared his wish that they should enjoy his property after his death and that after they died, the remainder, should go to the sister's issue, or failing such issue, to the testator's Dayathis. But there are no words to that effect. The provision that

the debts should be paid off upon the consent of the testator's Dayathis may have been inserted as a measure of precaution and in any case no inference can be drawn from these words so as to override the words of the bequest in the preceding parts of the Will. These words of bequest are sufficient to authorise the alienations at the time that they were made. I agree that the appeals must be allowed and the District Munsif's decree restored with costs here and in the lower Appellate Court.

KRISHNAN, J.—The main question that arises for decision in this case is whether the mother and the sister of the testator took an absolute estate or only a life-estate under his Will, Exhibit A. If they took an absolute estate, plaintiff's suit as reversioner to have it declared that an alienation by them is not binding beyond their lifetime fails. The question depends on the intention of the testator as expressed in his Will and to be gathered from its language taken as a whole.

Before considering the language of Exhibit A, it may be observed that the rule enunciated by the Privy Council in the case of *Moulvi Mohamed Shamsul Hooda v. Shewukram* (5) and again referred to and followed in *Radha Prasad Mullick v. Rane Mani Dassee* (6), that when a Hindu gives property to a Hindu woman and more particularly to a Hindu widow there is a presumption that the estate meant to be given is only a life-estate, has been held in recent cases not to apply now in this Presidency. See *Ramachandra Rao v. Ramachandra Rao* (3) and the judgment of Sadasiva Aiyar, J., in *Muthuvenkatanarayanan Ohetti v. Athipandurenga Naidu* (1). On the other hand, the general rule that a transfer of property should be taken to convey all the rights of the transferor unless a contrary intention appears clear, is applied. In construing the present Will we are not, therefore, trammelled in any way by the fact that the legatees are two Hindu women.

I shall now turn to the language of the Will. The words of bequest are "my mother Periammal and my own sister Sundarammal shall both enjoy with all proprietary rights

(5) 2 I. A. 7; 14 B. L. R. 226; 22 W. R. 409; 3 Sar. P. C. J. 405; 3 Suth. P. C. J. 43.

(6) 35 C. 896; 12 O. W. N. 729 (P. C.); 35 I. A. 118; 4 M. L. T. 23; 18 M. L. J. 287; 5 A. L. J. 460; 10 Bom. L. R. 604; 8 C. L. J. 48.

(4) 30 M. 356; 17 M. L. J. 243; 2 M. L. T. 316.

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(Sarvaswathantharathudan in Tamil) after my death the immoveable properties belonging to my family, cattle and all the debts I have incurred by means of document." The testator then directs them to pay Rs. 1,000 to his wife for her maintenance and Rs. 300 to a temple for a religious festival. He then reiterates that it is only his mother and sister that shall be entitled to the whole of the "matters" mentioned in the Will and none else shall be entitled to them. If the Will ended there, there can be no doubt, as the learned District Judge observes, that the testator intended to give the ladies all the rights he had in the properties or, in other words, an absolute estate. The import of the words ("Sarvaswathantharathudan") was considered by Salasiva Aiyar, J., in *Muthurenkattanarayanan Chetti v. Athipandurenga Naidu* (1) above referred to. On page 106* the learned Judge lays down as his view that that expression is the strongest that an alienor can employ to confer an absolute estate and that the addition of other expressions is superfluous. Without going so far, I consider that the expression is wide enough to convey an absolute estate with powers of alienation, and effect must be given to it unless we can gather from other words in the Will that the testator meant to use it in a restricted sense. That is the principle recognized in section 70 of the Indian Succession Act. In *Manika Mudali v. Muthachi Kavandan* (2) Ayling, J., took a somewhat narrower view of the import of the expression. His view was not fully adopted by Tyatji, J., who was sitting with him and has been dissented from by Sadasiva Aiyar, J., in *Muthurenkattanarayanan Chetti v. Athipandurenga Naidu* (1). It seems to me that Ayling, J., failed to give full effect to the words as he considered the presumption that an estate given to a Hindu female is a life-estate outweighed their effect. That presumption, as I have already observed is now hardly recognised in this Presidency and, therefore, the ruling in question loses its authority. It may also be observed, that here we have a further indication that the testator meant to give a full estate, as he says again that the ladies alone and none else shall be entitled to the properties. In this respect the present case is similar to the unreported case, Appeal No. 26 of 1896 referred to in *Manika Mudali*

v. *Muthachi Kavandan* (2), and is thus distinguishable from that case on the very point on which the unreported case was distinguished in it.

In this connection one argument for the respondent has to be considered, viz., that the use of the word "enjoy" indicates that the properties were not to be alienated and thus restricts the scope of the words "Swathantharathudan," for it is said that after alienation the alienees and not the legatees will "enjoy" the properties. I think this argument puts too restricted a construction on that word. We often find it used in conjunction with words giving express powers of sale, gift, etc., in Tamil documents. If the meaning suggested for the respondent is accepted, there will be a contradiction in terms in such cases. It would thus appear that the word does not necessarily imply that the legatees should keep possession of the properties and should take only the income from them; it is used in a general way to mean "to take the benefit of the ownership of the property." The facts that the sum of Rs. 1,300, which the testator directed the ladies to pay, could not be raised without alienating some of the immoveable properties and that he also directed them to pay his debts are clearly in favour of the view that he meant to give them powers of alienation.

So far the words of the Will are distinctly in favour of the contention that an absolute estate was given. We have now to consider the effect of two further provisions in the Will, for the testator goes on to say that "if there be no issue to the above Sundarammal, my sister, that property should go to my Dayathis after her death" and that "the debts should be discharged with the consent of my Dayathis." To take the 2nd clause first, I do not think it has any bearing on the question as to the nature of the estate given. It is suggested that it was put in for the benefit of the Dayathis and that it indicates that their interest as reversioners was reserved and that only life-estates were given to the ladies. It seems to me that this is all very far-fetched and untenable. It might equally well be suggested that the clause was put in because the testator considered that without the concurrence of the Dayathis the ladies might be misled into paying fictitious debts. I think that is the more natural suggestion. The direction is not really binding on the

*Page of (1919) M. W. N.—Ed.

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ladies, as they will have to pay the just debts of the testator whether the Dayathis consent or not.

I shall now consider the effect of the first clause above quoted. In the first place, it will be noticed that it is confined to the sister's share and has no effect on the mother's share. It could not, therefore, be relied on to cut down the mother's estate in any way.

Now if we consider the clause carefully, it seems to me to strengthen the inference that an absolute estate was meant to be given to the sister rather than the contrary. It distinctly contemplates the sister's estate was to go to her issue if she were to get any. That indicates that she was to have an estate of inheritance and not merely a life-estate. It was suggested that we should construe the clause as giving a life-estate first to the sister and then a full estate to her children, if any, and then a contingent estate to the Dayathis. But there are no words in the Will to justify this. There are no words denoting the children as the direct objects of the distinct and independent bequest and in their absence, the bequest to the sister and her children must be taken as giving an estate of inheritance to the sister, as no contrary intention appears from any other part of the Will. That is a well-recognised rule and it is embodied in section 84 of the Indian Succession Act and though the Act does not apply in the present case, the principle is one of general application.

The bequest in favour of the Dayathis is purely a contingent one dependent on the uncertain event of the sister having no issue till her death. The fact that after the decree in appeal in this case that event has actually happened, is immaterial in this connection. Being a purely contingent bequest, it is difficult to see how it can be used to show that the earlier bequest was of a life estate only. Such a contingent bequest may clearly be added to a Will giving an absolute estate without any inconsistency and, therefore, its addition is really of no importance in considering the nature of the estate first given. If, as in the case in *Lallu v. Jagmohan* (7), there was a bequest of a vested remainder, it would necessarily follow that the prior estate was a limited one whatever be the

words used to describe the powers given to the prior legatee. But that is not the case here at all. The contingent bequest was entirely ineffective against the prior legacy to the sister and could take effect, if at all, only on her death without issue. It cannot, therefore, be relied on to cut down the absolute estate given to her by the words of the bequest in her favour in the Will. It is not necessary, besides, for the purposes of this case whether the contingent bequest failed entirely on the death of the testator leaving his sister alive, or whether it became effective in favour of the Dayathis against the sister's heirs when she died without issue. I express no opinion on that point.

I have, for the above reasons, come to the conclusion that the mother and the sister of the testator took an absolute estate in the testator's properties under his Will. Plaintiff's suit, therefore, fails. The second appeal must be allowed and the decree of the District Judge reversed and that of the District Munsif restored with costs here and in the Court below.

The other Second Appeals Nos. 1797 and 1798 of 1918 follow.

M.C.P.

Appeals allowed.

ALLAHABAD HIGH COURT.

PRIVY COUNCIL APPEAL No 13 OF 1918.

November 24, 1919.

Present:—Sir Grimwood Mears, Kt., Chief Justice, and Justice Sir P. C. Banerjee, Kt.
DIRGPAL SINGH—PETITIONER

versus

PAHLADI LAL AND OTHERS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), s. 109, O. XLV, r. 3—Appeal to His Majesty in Council—Remand, order of, whether appealable—Mortgage—Registration, fraud effected in procuring, effect of, whether question of general importance.

An appeal does not lie to the Privy Council as of right against an order of remand by the High Court, unless it is a final order within the meaning of section 109 of the Civil Procedure Code and the case is otherwise a fit one for appeal to His Majesty in Council involving a substantial question of law of general interest. [p. 529, col. 2.]

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The question whether the fraud of a mortgagor alone in procuring the registration of the mortgage-deed in a particular registration office, by representing that some portion of the mortgaged property was within the jurisdiction of that office, would vitiate the mortgage and disentitle the mortgagee, who was ignorant of the fraud, to enforce it, is a substantial question of law of general importance to satisfy the requirements of rule 3, Order XLV, of the Civil Procedure Code. [p. 530, c 1. 1.]

Application for leave to appeal to His Majesty in Council.

Mr. *Gulzari Lal*, for the Petitioner.

Mr. *B. E. O'Connor*, for the Opposite Parties.

JUDGMENT.—This is an application for leave to appeal to His Majesty in Council. The suit was one to enforce two simple mortgages. The present applicant, who is the purchaser of a part of the mortgaged property, contested the suit on the ground that the registration of the mortgages was invalid inasmuch as a part of the property comprised in the mortgage, which lay within the jurisdiction of the Sub-Registrar in whose office the mortgage-deeds were registered, did not belong to the mortgagor and was never intended to be included in the mortgage. The Court below held that the registration of the document was invalid by reason of the fraud perpetrated on the registering officer. It relied for its decision upon the ruling of their Lordships of the Privy Council in the case of *Harendra Lal Roy Chowdhuri v. Hari Dasi Debi* (1). Upon appeal to this Court the learned Judges of this Court found that the mortgagor obtained registration of the document in the office of the Sub-Registrar of Budaun by perpetrating this fraud, that he got the Sub-Registrar to register the document whereas he had no interest in the property and he had not intended to mortgage it but had included it in the mortgage simply with the object of obtaining registration of it in the office of the Sub-Registrar of Budaun. They, however, found that in this fraud the mortgagee did not participate, inasmuch as the property was recorded in the revenue papers in the name of the mortgagor although under an arbitration award it had been allotted to the share of other members of the family to which the mortgagor belonged. The learned

Judges held that as the mortgagee did not join in the fraud, the registration was not vitiated by reason of the fraud of the mortgagor. They accordingly remanded the case to the Court below for trial of the other issues which arose in the case. From this order of remand the present application for leave to appeal to His Majesty has been preferred on two grounds. The first is that the order of remand was incorrect and the decision of the learned Judges of this Court was erroneous upon the question of fraud. The second ground is that even if no appeal lies from the order of remand, the case is otherwise a fit one for appeal to His Majesty in Council within the meaning of rule 3, Order XLV, of the Code of Civil Procedure. We have recently held in the case of *Muhammad Sajjad Ali Khan v. Muhammad Ishaq Khan* (2) that an order of remand made under circumstances similar to those of the present case is not a final order within the meaning of section 109 of the Code of Civil Procedure and that an appeal does not lie as of right from that decision. We may mention that the value of the subject-matter of the suit and of the proposed appeal exceeds Rs. 10,000. The decision to which we have just now referred follows a long series of rulings of this Court and, therefore, we must hold that an appeal does not lie to His Majesty in Council in the present case from the order of remand to the Court below. We have next to consider whether the case is "otherwise a fit one" for appeal to His Majesty in Council. In order to justify us in certifying the case to be a fit one for appeal, we have to see whether the case involves a substantial question of law and whether that question of law is one of general importance. In the Privy Council case to which the learned Judges of this Court have referred, it was held that if the property of which registration was obtained did not exist, or if it existed, and the mortgagor and the mortgagee joined together for the purpose of committing a fraud in the registration department and getting the property registered by a Sub-Registrar who should not have registered it, the registration would not be valid and

(1) 23 Ind. Cas. 637; 41 C. 972; 27 M. L. J. 80; 12 A. L. J. 774; 15 M. L. T. 6; (1914) M. W. N. 432; 1 L. W. 1050; 13 C. W. N. 317; 19 C. L. J. 434; 13 Bom. L. R. 400; 41 L. A. 910 (P.C.).

(2) 54 Ind. Cas. 504; 1 U. P. L. R. (H. C.) 162.

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the mortgagee would not be entitled to take the benefit of the document so registered as a valid document. That is not the case here. The question in the present case, as already pointed out, is whether the fraud of the mortgagor alone would vitiate registration and disentitle the mortgagee (who was ignorant of the mortgagor's fraud) to enforce the mortgage. This is clearly a substantial question of law. It does not appear to have been decided in any other case so far as we are aware and so far as cases have been cited to us. The question is one of first impression and, being a substantial question of law, we should be justified in granting the application for leave to appeal if it is one of general importance. We are of opinion that the question is also one of general importance, as it frequently arises in cases similar to the present. We are, therefore, of opinion that this case is "otherwise a fit one" for appeal to His Majesty in Council and we so certify.

Order accordingly.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1333 OF 1918.

July 25, 1919.

Present:—Mr. Justice Seshagiri Aiyar and
Mr. Justice Bakewell.

VEDALINGAM PILLAI, MINOR AND OTHERS
— DEFENDANTS NOS. 3 TO 5—APPELLANTS

versus

VEERATHAL *alias* SORNATHACHI

AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O XXI, rr. 58, 59, 60, 61, 63, scope of—Claim proceedings—Order regarding possession only and not adjudicating on title, effect of—Order on claim petition, when and how far binds judgment-debtor—Payment of decretal amount after one year from date of order, effect of—"Possession", "conclusive", meanings of.

A judgment-debtor will not be bound by an order on a claim petition unless he has been a party to it and also unless the order in terms adjudicates on his title. Where the only matter adjudicated on by the claim order is as to who is in possession and the conclusive effect predicated by Order XXI, rule 63, Civil Procedure Code, only affects possession and not the title, the order does not bind the judgment-debtor even though he is a party and

actively contests the claimant's right, and the judgment-debtor or his heirs are not bound to sue to establish their title within a year of the date of the order. [p. 534, col. 1.]

Per Seshagiri Aiyar, J.—The scope of Order XXI, rules 58 to 61, Civil Procedure Code, should be restricted to concluding the parties regarding the right to attach the property in execution, and not to finally determine the rights of the parties to the property itself [p. 533, col. 1.]

The term "possession" in Order XXI, rule 60, of the Civil Procedure Code signifies bare possession and not possession indicative of title. [p. 534, col. 1.]

Quære.—Whether a payment of the decree amount after a year from the date of the adverse order has the same effect as payment within a year and makes the order spend itself out.

Per Bakewell, J.—The meaning of the word 'conclusive' in Order XXI, rule 63, Civil Procedure Code, is that the realization of the attached property shall proceed or be stayed as directed by the order of Court and that there shall be no appeal therefrom except as prescribed by the rule. If the attached property be sold in pursuance of the order, then the purchaser will take it free from or subject to the rights asserted by the claimant or objector as determined by the Court. [p. 535, col. 1.]

Quære.—Whether if the attachment be raised the execution proceedings simply come to an end or there is an adjudication as to the title of the judgment-debtor.

Second appeal against the decree of the District Court, Tanjore, in Appeal Suit No. 683 of 1917, against the decree of the Court of the District Munsif, Tiruthurai-pundi, in Original Suit No. 109 of 1915.

Messrs. A. Krishnaswami Aiyar and N. S. Srinivasa Aiyar, for the Appellants.—The judgment-debtor, having been a party to the claim proceedings, is bound by the order thereon to the same extent as the decree-holders. All that is required is that notice should go out to him. See Second Appeal No. 975 of 1918. So that if he does not bring a suit to set aside the order within a year under Order XXI, rule 63, he is barred from agitating the matter by a fresh suit. See also *Muthusami Mudaly v. Ayyalu Bathadu* (1), *Kurriyil Parkum v. Varanakat Illath Ganapathi* (2), *Sabella Appanna v. Mallidi Appanna* (3).

[SESHAGIRI AIYAR, J. referred to *Sadaya Pillai v. Amurthachari* (4).]

Sadaya Pillai v. Amurthachari (4) gives a

(1) 13 M. L. J. 367.

(2) 10 Ind. Cas. 424; 35 M. 168 at p. 172; 9 M. L. T. 423; 21 M. L. J. 550; (1911) 2 M. W. N. 315.

(3) 25 Ind. Cas. 700; (1914) M. W. N. 833; 1 L. W. 772; 16 M. L. T. 300.

(4) 8 Ind. Cas. 157; 34 M. 533; 8 M. L. T. 417; (1910) M. W. N. 741.

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special right to a defeated claimant. In *Sardhari Lal v. Ambika Pershad* (5) referred to in *Sadaya Pillay v. Amurthachari* (4) and in other cases, the effect of an order like the present on a judgment-debtor was never considered. It cannot be said that a judgment-debtor is not a person interested in defending against the claim. The property is attached as the judgment-debtor's property. The judgment-debtor is, therefore a person against whom an order is made and who is to bring a suit within a year of the date of the order to establish his right to the property within the meaning of Order XXI, rule 63. Secondly, the contention is that the order adjudicates only as to possession and not as to title. The words "attachment is raised" clearly refer to an act done on recognition of the claimant's objection that the judgment-debtor has no saleable interest at all. See *Machi Raju Venkataratnam v. Vadrevu Ranganayakamma* (6), *Nagendra Lal Ohawdhury v. Fani Bhusan Das* (7), *Ramu Aiyar v. Palaniappu Chetty* (8), *Badri Prasad v. Muhammad Yusuf* (9), *Amrata v. Pandharinath* (10). Possession by itself may be heritable, or attachable in which case there may be an adjudication as to possession alone. But a possession available against a person who subsequently comes forward as owner is possession based on title.

Lastly, plaintiff's case is one of possession and dispossession. So Article 142 and not Article 144 will apply.

Mr. K. Srinivasa Aiyangar and with him Mr. S. Varadachariar, for the Respondents.—The order in question is a step in the execution of the decree and so is an adjudication, if at all, only for the purpose of executing the decree. The order is "attachment is raised." Those words import no adjudication as to the title of any party. The one year rule was intended solely to obtain a finality in execution proceedings and the executing Court has no power to pass orders which will continue to have effect for all time to come. It

(5) 15 O. 521; 15 I. A. 123 (P. C.); 5 Sar. P. C. J. 172.

(6) 48 Ind. Cas. 270; 41 M. 985; 24 M. L. T. 197; (1918) M. W. N. 599; 8 L. W. 292; 35 M. L. J. 335.

(7) 44 Ind. Cas. 265; 45 O. 785; 23 C. W. N. 375.

(8) 8 Ind. Cas. 117; 35 M. 35; (1910) M. W. N. 589; 8 M. L. T. 381; 21 M. L. J. 756.

(9) 1 A. 381.

(10) 2 Bom. L. R. 134.

has been repeatedly held that such orders cannot operate as *res judicata*. They continue to be in force until the work of executing the decree is completed or until the decree is paid off when, *eo instanti*, the order ceases to have any force.

Rule 5 of Order XXI contains the words "had some interest in or was possessed of, the property attached." It is plain, therefore, that the order need not be an adjudication on title and that it may be only as to base physical possession.

Even though the Court may have jurisdiction to execute the decree, it may often happen that the property attached is of a value exceeding its jurisdiction. So it cannot be said to adjudicate on title finally.

See also *Koyyana Ohittemma v. Dossy Gavaramma* (11).

The judgment debtor is not a necessary party. He may have no interest in the fight between the claimant and the decree-holder. None of the rules refer to the judgment-debtor as a party to these proceedings. Rule 47 regulates the rights as between parties to a suit and a defeated claimant has always a right of suit against the judgment-debtor.

Farther no order could be made against the judgment-debtor. For it is the decree-holder who attaches whatsoever properties in which he thinks a judgment debtor has a saleable interest, and the order is that such attachment be raised.

Mr. S. Varadachariar, continuing the argument for the Respondents, cited *Gurur v. Subbarayudu* (12), *Moidin Kutti v. Kunhi Kutti* (13) and other cases in support of the argument that an order in claim proceedings is not an order 'against' a judgment debtor.

Mr. A. Krishnaswami Aiyar, in reply.—The contention for the respondents, if allowed, would bring about many anomalies in the law. The whole series of decisions in the High Courts which proceed on the basis that the adjudication is final for all time to come, must fall to the ground. It will also be a direct travesty of the policy underlying section 47, Civil Procedure Code, which bars a separate suit.

The only question that can be decided

(11) 29 M. 225; 16 M. L. J. 136.

(12) 13 M. 366.

(13) 25 M. 721; 12 M. L. J. 411.

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by an order on a claim petition is whether the judgment-debtor has a saleable interest in the disputed property or not. It could never have been contemplated by the Legislature that the owners of properties wrongly attached were liable for all time to be harassed by regular suits brought by persons who were parties to the proceedings whereby the wrong attachment was got raised. The Courts also have from 4 Madras High Court Reports [*Netietom Perengaryprom v. Tayan-larry Parameshwaren Nambudry* (14)] downwards taken a consistent view in my favour.

The raising of the attachment is only the necessary corollary to a finding as to title.

JUDGMENT.

SESHAGIRI AIYAR, J.—One Amirthammal had two sons, Vythilinga, the 1st defendant, Dakshinamoorthy, the father of defendants Nos. 3 to 5, and at least one daughter. There was some dispute about the property belonging to the daughter's husband and a suit was pending in respect of it. A compromise was come to and by Exhibits A and B the property in suit was given to Amirtham in 1882. Subsequent to this arrangement, disputes arose between the mother and the sons regarding the right to this property, which is of considerable value. The mother gave leases to enable the lessee to eject the sons. There was some litigation based on these leases. Ultimately in Suit No. 228 of 1908, a decree was obtained for money by a creditor against Amirtham and Vythilinga. In execution, the property in suit was attached, as belonging to the judgment-debtors. Dakshinamoorthy intervened with a claim petition. Exhibit XVIII (c) is the order thereon, dated the 4th February 1910. The exact interpretation of this order will be dealt with later on. In June 1910, the share of Vythilingam in certain items of the property was sold. It is alleged for the respondents that the sale-proceeds were utilised to pay off the decree and that the decree has been fully satisfied. Mr. Krishnaswami Aiyar for the appellants does not admit this and contends that as this point was not argued in the Court below, it is not open for the respondents to rely on it and to base a legal argument on it. The suit was brought by the daughters of Amirthammal claiming the property as their mother's Stridhanam (14) 4 M. H. C. R. 472.

and praying for an injunction restraining the defendants from interfering with their enjoyment. The Court of first instance held that the property was taken by Amirthammal under Exhibits A and B *benami* for her sons and dismissed the suit. In appeal the District Judge has reversed the decree. He has held that the *benami* character of Exhibits A and B has not been established and that it has not been proved that the sons were holding adversely to their mother. On the question whether the failure to sue within a year of the order on the claim petition barred the plaintiff, he held that the title of Amirthammal was not adjudicated upon in the claim petition and that neither she nor her heirs were bound to sue within a year (Article 11 of the Limitation Act) to establish their title.

The second appeal is against that decree. The second appeal has been very fully and ably argued before us, as was to be expected from the learned Vakils engaged in the case, and as the matter may not rest here and as the decision affects considerable property, I think it desirable to deal with the questions at some length.

As regards the findings that Exhibits A and B were not executed *benami* for the sons, Mr. A. Krishnaswami Aiyar rightly stated that the finding was not open to attack in second appeal. Whatever may be the powers of the Judicial Committee to examine the evidence where two Indian Courts differ, it has been held that the Civil Procedure Code does not give the second Appellate Court that power. The same observations apply to the finding as to the adverse possession.

I shall now proceed to consider the question very elaborately argued at the Bar. Mr. K. Srinivasa Aiyangar for the respondents addressed us on the scope and effect of Order XXI, rules 58 to 61. The question may be considered from two standpoints; (1) Is the order an adjudication which affects title to the property for all purposes; and (2) Is the order effective against all the parties interested in it, namely, the judgment debtor, the defendant and the claimant? For the limited scope which the learned Vakil suggested for the rules there are some weighty considerations: (a) It is now well recognised that,

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notwithstanding an adverse order, if the money due under the decree is paid off within a year, the order spends itself out and the party affected by the order need not seek to have it set aside. See *Koyyana Ohittemma v. Doosy Gavaramma* (11). Whether a payment after the year should have the same effect is open to argument. But it is unnecessary to consider the point now. Speaking for myself, I am unable to see why the payment after the period fixed in Article 11 of the Limitation Act should have a different effect. (b) It is equally well established that the result of the litigation started in consequence of an order on a claim petition is to place the parties in *status quo ante*, that is, to the position they occupied at the time of the attachment objected to. If that is the result, it is suggested that the adjudication in the claim petition should be restricted in its scope to the matter arising in execution under the decree and not to concluding the rights of parties which are not within the purview of the execution order. There is much force in this contention. (c) Again, if the decree holder is unable to establish the title of the judgment debtor in answer to a claim, it would not preclude him, in execution of another decree, from proving that the property did really belong to the judgment-debtor. This would go to show that the adjudication has not the force of *res judicata*, but it is only operative to conclude rights in execution. (d) The nature of the inquiry is a summary one. Rights relating to property far beyond the pecuniary jurisdiction of a tribunal in regard to suits cannot be disposed of on the claim petition. Can the Legislature have contemplated such far-reaching consequences to an order made under such circumstances as to conclude the right and title of the parties for all time to come? I must say that I have been very much impressed by these considerations and I am inclined to think that the scope of the rules should be restricted to concluding the parties regarding the right to attach the property in execution, and not to finally determine the rights of the parties to the property itself.

However, I do not want to rest my judgment on this point alone, because there are decisions and observations in the judgments of this Court which clothe such an order with wider attributes than I am prepared to invest them with.

In my opinion, the order in question was not intended to and did not adjudicate upon the right of Amirtham. I shall shortly review the history of the question as to how far and to what extent a judgment debtor is bound by an adverse order in a claim petition. There are three possible views: (a) He is not a necessary party and is not bound by the order, although it was passed in his presence and after hearing him; (b) he is bound by the order, whether he appeared and contested the claim or not; and (c) the extent to which he is affected will depend upon what was considered and decided in the enquiry. The first view has been taken by some of the Judges in the other High Courts. Mr. K. Srinivasa Aiyangar argued in support of that view. Mr. S. Varadachariar elaborated it by pointing to the language of rule 60 and to the final effect the order has. Mr. A. Krishnaswami Aiyar, on the other hand, referred to the concluding portion of rule 61 and to the language of Article 11 of the Limitation Act as pointing to the opposite conclusion. Having regard to the course of decisions in this Presidency, I do not feel myself at liberty to hold that the order would under no circumstances be binding on the judgment debtor. Nor am I prepared to agree with Mr. A. Krishnaswami Aiyar that the order would bind the judgment-debtor whatever may be the nature of the adjudication on the claim petition. The intermediate view is what has consistently been acted on in this Court. The view in *Netietom Perengaryprom v. Tayanbary Parameshwaren Nambudry* (14) was very soon after limited in its operation by stating that the nature of the relief should be considered in appraising the effect of the order. See *Arakel Kunhi Kuttiyali v. Imbichi Amnah* (15). In *Guruvu v. Subbarayudu* (12), to which Mr. S. Varadachariar drew our attention, it was distinctly stated that even if the judgment-debtor had notice, the order will not bind him. The order must be against him in effect. In *Muthusami Mulaly v. Ayyulu Bathadu* (1) evidence was given against the claimant by the judgment-debtor. The learned Judges held that his having notice of the claim and of the adjudication will not bind him, if his rights were not adjudicated upon. The same view was taken in *Moidin Kutti*

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v. Kunhi Kutti (13). To all these judgments Sir Arnold White was a party; and I think I am justified in deducing the rule from them, that a judgment debtor will not be bound by the order on a claim petition, unless he has been a party to it and also unless the order in terms adjudicates upon his title. That was the very view pointedly enunciated in *Sadaya Pillay v. Amurthachari* (4), after referring to the narrow view held in Calcutta. *Sabella Appanna v. Mallidi Appanna* (3), to which I was a party, only held that if there is an adverse order against the judgment-debtor, he can sue within a year. It negated the contention that the decree-holder alone can sue and not the judgment-debtor. Second Appeal No. 975 of 1918 was a suit by the claimant and there is nothing in that judgment which is opposed to the authorities I have reviewed. Now comes the question regarding the nature and effect of the order in the summary enquiry in the present case. In considering this point, the observations in *Ramu Aiyar v. Palaniappa Chetty* (8) should be borne in mind. It was there pointed out that if the order in terms leaves the question of title open, it cannot be contended that observations as to possession conclude title as well. Mr. Krishnaswami Aiyar rather insistently argued that possession spoken of in rule 60 is possession indicative of title and not bare possession, *e. g.*, that of a trespasser. I find nothing in the rule to warrant this interpretation. Bearing these considerations in mind, I proceed to examine the order passed on the claim petition. It starts by saying that only the question of possession will be considered. The discussion is all about possession. The conclusion relates to possession. I am unable to read in such an order an intention on the part of the Court to deal with the title of the parties. It is true that Amirtham put in a statement and claimed the property. But the Court wisely did not embark upon the enquiry claimed by her.

My conclusion is that notwithstanding that Amirtham was a party, notwithstanding that she actively contested the claimant's right, the only matter adjudicated upon was as to who was in possession; and that, therefore, the conclusive effect predicated by the section only affects possession and not the title being litigated in this suit.

In this view, I am of opinion, the District Judge is right and I would dismiss the second appeal with costs.

BAKEWELL, J.—I do not propose to deal with the cases which have been cited and discussed by my learned brother, but intend only to examine the scope of rules 58 to 63 of Order XXI of the Code and the effect of the order made upon the claim petition in this case. The ground of an application under these rules is that property attached in execution of a decree is not liable to that attachment. Section 60 of the Code declares that certain things "belonging to the judgment-debtor, or over which, or the profits of which he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf," are liable to attachment and sale in execution of a decree, and that certain other things are not so liable. A judgment-debtor may, therefore, object to any attachment on the ground that the property attached is exempted from attachment and sale and an objection by him falls within rule 58. A third party may claim that he has some interest in or is possessed of the property attached (rule 59) and since the judgment-debtor is interested in the discharge of the decree by means of the attached property and in any surplus sale proceeds after such discharge, he should be made a party to the proceedings. The enquiry under rule 58 is termed an 'investigation,' not a trial of issues between the parties, and the Court is directed not to make it when the claim or objection has been designedly or unnecessarily delayed. The policy of the Legislature is to secure the speedy settlement of questions of title raised at execution sales: *Sardhari Lal v. Ambika Pershad* (5), and the finding of a Court is a summary decision from which the suit allowed by rule 63 is simply a form of appeal: *Phul Kumari v. Ghanshyam Misra* (16). The object of the Legislature in prescribing a suit by way of appeal appears to be to give the parties an opportunity of placing their respective cases fully before a Court, because a summary investigation might not have furnished sufficient material for a decision

(16) 35 C. 202 (P.O.); 7 C. L. J. 36; 12 C. W. N. 169; 10 Bom. L. R. 1; 5 A. L. J. 10; 17 M. L. J. 618; 2 M. L. T. 506; 14 Bur. L. R. 41; 35 I. A. 22.

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by an Appellate Court. From these considerations, I am of opinion that the meaning of the word 'conclusive' in rule 63 is that the realisation of the attached property shall proceed or be stayed as directed by the order of the Court and that there shall be no appeal therefrom except as prescribed by the rule. If the attached property be sold in pursuance of the order, then the purchaser will take it free from or subject to the rights asserted by the claimant or objector as determined by the Court; but if the attachment be raised, the question arises whether the execution proceedings simply come to an end or there is an adjudication as to the title of the judgment-debtor. This question does not arise in the present case and I express no opinion upon it.

I agree that the order in this case is not made against the judgment-debtor Amir-thammal, because the Court did not decide the title to the property as between her and her co-defendant and the claimant. I think that the Court only decided that the sale should not include any possessory right to a moiety of the property to which the claimant might be entitled. I agree with the order proposed by my learned brother.

M. C. P.

Appeal dismissed.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 130 OF 1919.

August 26, 1919.

Present:—Mr. Stuart, J. C.

LADLI PRASAD—PLAINTIFF—APPELLANT

versus

NIZAM-UD-DIN KHAN—DEFENDANT—RESPONDENT.

Mortgage—Redemption—Mortgaged property acquired under Land Acquisition Act, effect of—Limitation Act (IX of 1908), s. 15 (2), Sch. I, Art. 120—Suit by mortgagor against mortgagee, to recover share of compensation awarded under Land Acquisition Act—Limitation applicable—Secretary of State wrongly impleaded as party to suit—Notice, period of, whether can be excluded.

Where mortgaged property is acquired under the Land Acquisition Act, the mortgage cannot be redeemed as the mortgaged property has ceased to exist. [p. 535, col. 2.]

A suit by a mortgagor against his mortgagee to recover his share of the compensation awarded to the latter in respect of the mortgaged land under the Land Acquisition Act is governed by Article 120 of Schedule I to the Limitation Act. [p. 536, col. 1.]

Where the Secretary of State is wrongly impleaded as a defendant in a suit, the period of notice given to the Secretary of State cannot be excluded under section 15 (2) of the Limitation Act in computing the period of limitation applicable to the suit. [p. 536, col. 1.]

Appeal against the decree of the District Judge, Lucknow, dated the 3rd February 1919, upholding the decree of the Munsif, North Lucknow, dated the 11th May 1918.

Messrs. *Makund Behari Lal* and *Rajeshwari Prasad*, for the Appellant.

The Hon'ble Mr. *Wazir Hasan*, for the Respondent.

JUDGMENT.—The plaintiff-appellant is the successor-in-interest of *Piara Lal Risaldar*, the proprietor of two groves in Lucknow City. *Piara Lal Risaldar* mortgaged the two groves by deeds of usufructuary mortgage. The defendant-respondent *Nizam-ud-Din Khan* is the successor-in-interest of the mortgagee. The groves were acquired under the Land Acquisition Act. Compensation was paid to *Nizam-ud-Din Khan*. The plaintiff then sued for redemption of the mortgage. The Courts held that the mortgage could not be redeemed because the mortgaged property had been destroyed. Their view was that the mortgage had ceased to exist and that there was nothing to redeem. The District Judge held that the plaintiff would ordinarily have been entitled to a share of the amount paid by Government by way of compensation for the acquisition of the groves, but that such relief was time barred. The present second appeal is preferred by the plaintiff.

In support of the view that the mortgaged property was destroyed and that no redemption can take place, the Courts below relied on the decision in *Sajjadi Begam v. Musammatt Janki Bibi* (1). That was my decision. I see no reason to differ from the view I took in it. I, therefore, hold that there can be no question of redemption because there is nothing to redeem.

The next point for determination is whether the plaintiff should obtain a decree against *Nizam-ud-Din Khan* for a portion of the money that *Nizam-ud-Din Khan* received in compensation. That money was paid to *Nizam-ud-Din Khan* on the 1st March 1911. The plaintiff could have instituted a

(1) 42 Ind. Cas. 793; 20 O. C. 255.

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suit against him at once. There was no necessity for him to have delayed one moment after Nizam-ud-Din Khan received the money. I agree with the learned Counsel for the appellant that limitation is not governed by Article 62, First Schedule, Act IX of 1908, but that limitation is governed by Article 120. The money was paid to Nizam-ud-Din Khan on 1st March 1911. The suit was not instituted till the 20th March 1917. So the claim was not within six years. The learned Counsel for the appellant meets the point in the following way:—He says that he sued the Secretary of State and the Lucknow Municipality in the plaint and that he had to give them two months' notice under the provisions of the law. He invokes the assistance of section 15 (2), Act IX of 1908. But looking into the facts, I find that he had no good cause to sue the Secretary of State or the Municipality. He had no cause of action against them. Section 15 (2) reads: "In computing the period of limitation prescribed for any suit of which notice has been given in accordance with the requirements of any enactment for the time being in force, the period of such notice shall be excluded." It has application only to instances in which notice has been given in accordance with the requirements of any enactment for the time being in force. No enactment required the plaintiff to give notice to the Secretary of State or the Municipality in this particular matter, for he had no cause of action against them. The learned Counsel is really arguing for the proposition that where a plaintiff under a mistake of law or fact conceives that he has a cause of action against the Secretary of State or a public body in addition to his cause of action against a private person and joins without reason the Secretary of State or the public body, he shall be entitled to extend the period of limitation ordinarily allowed by law against the private person by two months. The proposition cannot be accepted. The section has only application in cases in which the plaintiff has a good cause of action against such a body. The law forbids him to institute a case against such a body until he has given them notice. So the law says very reasonably as you are not allowed to bring a case until two months have elapsed from the date of the notice, that period of two months shall not count against you in the way of limitation. But

the law nowhere says to a plaintiff that when he is under no disability but erroneously imagines himself to be under a disability, he will obtain any relaxation of the ordinary law of limitation. I hold that Article 120 applies and I hold that the suit is barred under the provisions of Article 120. I, therefore, dismiss this appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1529 OF 1913.

August 21, 1919.

Present:—Mr. Justice Bakewell and
Mr. Justice Odgers.

VENKATACHELLA REDDY—PLAINTIFF
—APPELLANT

versus

MUTHIALU REDDY AND OTHERS—

DEFENDANTS NOS. 1 TO 5—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, rr. 58, 59, 60, 61, 63, scope of—Claim petition by party exonerated, dismissal of—Order, finality of—Claimant, whether can plead title in defence to suit by auction-purchaser.

The meaning of Order XXI, rule 63, Civil Procedure Code, is that the parties to the proceedings shall be concluded by the order made thereon, and that the purchaser at a Court sale shall take the property purchased by him free from any claims negatived by that order, subject to any right of appeal or of suit to which the claimant may be entitled. [p. 538, col 2.]

Order XXI, rule 63, Civil Procedure Code, may possibly be construed, where the aggrieved claimant or objector is a party to the suit, as substituting a right of suit for the right of appeal. [p. 538, col 2.]

As section 47, Civil Procedure Code, does not prescribe the procedure to be followed in claim proceedings, regard must be had to the provisions of Order XXI, which deals with "execution of decrees and orders," and rules 58 to 63 of that Order, which are grouped under the sub-heading "investigation of claims and objections," regulate applications made on the ground that any property attached in execution is not liable to such attachment. [p. 537, col 2; p. 538, col 1.]

The concluding words of the first paragraph of rule 58 (1) of Order XXI of the Civil Procedure Code must be held to apply only to the case where the claimant or objector is not a party. [p. 538, col 1.]

Where a party exonerated from a suit preferred a claim to property attached in execution of the decree against the other defendants, alleging that it was his self-acquisition, and the property was subsequently sold and the auction-purchaser sued for partition as against all the defendants who were members of a joint family:

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Held, that the exonerated defendant was precluded from raising the plea of self-acquisition as a defence, inasmuch as he had neither appealed against the order on his petition nor filed a separate suit to establish his title. [p. 538, col. 2.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Vellore, in Appeal Suit No. 691 of 1917 (Appeal Suit No. 380 of 1916 on the file of the District Court, North Arcot), preferred against the decree of the Court of the Principal District Munsif, Vellore, in Original Suit No. 759 of 1914.

FACTS appear from the judgment.

Mr. A. Krishnaswamy Aiyar (with him Messrs. P. S. Narasami Aiyar and S. Rangachari), for the Appellant.—The lower Court should not have allowed the 2nd defendant to plead in the partition suit that any item of the property was his self-acquisition. That plea was negatived by the order on his claim petition. He has not appealed, nor filed a separate suit as contemplated in Order XXI, rules 58 to 63. Parties to suits are as much bound by these rules as strangers. Section 47, Civil Procedure Code, does not prescribe the procedure to be followed. The procedure must, therefore, be taken from rules 58 to 63, where the question is whether property attached is not liable to attachment. The body of the Code deal with substantive law. The procedure portion is relegated to the First Schedule, which must be adopted wherever possible.

Mr. L. A. Govindaraghava Aiyar (with him Mr. A. Viswanatha Aiyar), for the Respondents.—Order XXI, rules 58 to 63, Civil Procedure Code, do not apply to parties to suits. They are governed by section 47. Applications under that section are independent of the rules. A party exonerated who is defeated in his claim petition is not bound to sue within a year of the order. He may urge the same ground in resistance of an action brought against him.

JUDGMENT—The 5th defendant obtained a money decree against the 1st and 4th defendants in a suit in which the 2nd and 3rd defendants were parties but were exonerated from liability. The decree holder attached the undivided half share of the judgment-debtors in certain property, alleged to belong to the undivided family of which the four defendants were members, and thereupon the 2nd defendant applied by a

petition under Order XXI, rule 58, of the Code of Civil Procedure that the attachment of portion of the property might be raised on the ground that it had been assigned to him upon a partition and was his separate property. The petition was dismissed on the ground that it was too late. The appellant bought the attached property at the Court sale and then sued the defendants for partition, and an issue was raised whether the portion of the property previously claimed by the 2nd defendant belonged to him.

The appellant was not a party to the previous suit and is not a representative of any party [*Nadamuni Narayana Iyengar v. Veerabhadra Pillai* (1)] and the provisions of section 47 of the Code of Civil Procedure do not apply to his suit. The question, therefore, is whether under Order XXI, rule 63 the order made upon the 2nd defendant's petition in the proceedings in execution precludes him from raising this defence.

The argument on behalf of the 2nd defendant appears to be that rules 58 to 63, of that Order do not apply to parties to suits, who are governed by section 47, and that applications under that section are in some manner independent of the rules.

Section 47 (1) contains two provisions, of which the first is positive and prescribes the Court which shall determine certain questions, and, therefore, relates to jurisdiction; the second is negative and declares that the application to the Court shall not be initiated by a plaint. If a plaint raising any of these questions be presented to the Court executing the decree it may be treated as a proceeding in execution but if it be presented to another Court it should be rejected. In the former case the Court may treat a statement of defence as an application for relief under the section, *Thatu Naick v. Kondu Reddi* (2).

Since the section does not prescribe the procedure to be followed, regard must be had to the provisions of Order XXI, which deals with "execution of decrees and orders" and rules 58 to 63 of that Order which are grouped under the sub-heading "Investigation of claims and objections," regulate

(1) 8 Ind. Cas. 429; 34 M. 417; (1910) M. W. N. 662; 9 M. L. T. 152; 21 M. L. J. 928.

(2) 1 Ind. Cas. 221; 32 M. 242 at p. 252; 5 M. L. T. 248.

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applications made on the ground that any property attached in execution is not liable to such attachment. Section 60 of the Code declares what things are liable to and what exempt from attachment and a party to a suit may raise a claim or objection in the executing Court under that section, and in the absence of any specific provisions those headed "Investigation of claims and objections" will apply.

It has been decided by the Calcutta High Court in *Punchanun Bundopadhyaya v. Rabia Bibi* (3), upon the words of section 278 of the Code of Civil Procedure of 1882 "and in all other respects, as if he was a party to the suit," that that and the following sections, which correspond to rules 58 to 63, do not apply to parties to suits.

No doubt if the claimant be a party these words do not apply, but they do not expressly exclude him from the operation of the rule or limit the very general words with which the rule begins "where any claim is preferred to, or any objection is made"; moreover these words occur in a sentence defining the powers of the Court, which has already been given jurisdiction over any claim or objection by the preceding words "the Court shall proceed to investigate." We are of opinion that the concluding words of the first paragraph of rule 58 (1) may be taken as applying only to the case where the claimant or objector is not a party. We may also point out that the general arrangement of the present Code differs from the Code of 1882, in that the body of the Code deals with matters of substantive law and jurisdiction and the rules of procedure are relegated to the First Schedule and we must, therefore, consult the latter to discover the manner in which the principle laid down in section 47 is to be carried out.

The question as to the remedy of a party to a suit who is aggrieved by an order made upon a claim or objection does not arise in the present case, but we may point out that section 96 of the Code, which gives a right of appeal from a decree, commences with the words "save where otherwise expressly provided in the body of this Code", and that section 121 enacts that "the

rules in the First Schedule shall have effect as if enacted in the body of this Code" and that rule 63 may possibly be construed as substituting a right of suit for a right of appeal.

Their Lordships of the Privy Council have described a suit under section 283 of the Code of 1882, which corresponds to rule 63, as "simply a form of appeal [*Phul Kumari v. Ghanshyam Misra* (4)].

The policy of the Legislature is to secure the speedy settlement of questions of title raised at execution sales [*Sardhari Lal v. Ambika Pershad* (5)] and the principle applies whether the claimant be a party or a stranger to the suit. We are of opinion that the meaning of rule 63 is that the parties to the proceedings shall be concluded by the order made thereon, and that the purchaser at a Court sale shall take the property purchased by him free from any claims negatived by that order, subject to any right of appeal or of suit to which the claimant may be entitled.

In the present case the 2nd defendant did not appeal or bring a suit and is, therefore, precluded from asserting his title under a partition.

The decree of the lower Appellate Court is set aside and that of the District Munsif is restored with plaintiff's costs in this and the lower Courts.

Appeal allowed.

M. C. P.

(4) 35 C. 202 (P. C.); 7 C. L. J. 36; 12 C. W. N. 169; 10 Bom. L. R. 1; 5 A. L. J. 10; 17 M. L. J. 618; 2 M. L. T. 506; 14 Bur. L. R. 41; 35 I. A. 22.

(5) 15 C. 521; 15 I. A. 123 (P. C.); 5 Sar. P. C. J. 172.

CALCUTTA HIGH COURT.
APPEAL FROM APPELLATE DECREE No 690
OF 1917.

August 13, 1919.

Present:—Sir Lancelot Sanderson, Kt.,
Chief Justice, and Mr. Justice Duval.

JACHMI MONDAL AND ANOTHER—
DEFENDANTS—APPELLANTS

versus

CHENINISSA BIBI AND OTHERS—
PLAINT FF—RESPONDENTS.

Registration Act (XVI of 1908), s. 17 (2) (vi)—Com.

(3) 17 C. 711 (F. B.),

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promise amounting to conveyance, whether requires registration—Civil Procedure Code (Act V of 1908), O. XXIII, r. 1.

A compromise which contains matter relating to a suit or covered by its subject-matter, and which is embodied in a decree, does not need registration, even though the transaction amounts to a conveyance the consideration for which is Rs. 100. [p. 540, col. 2.]

Appeal against the decree of the Additional District Judge, Jessore, dated the 18th of January 1917, affirming that of the Munsif, 2nd Court at Jhenidah, dated the 27th of February 1915.

FACTS appear from the judgment.

Babu Porosh Nath Mookerjee, for the Appellants.—This appeal arises out of a suit for declaration of title and recovery of possession. The predecessors of the plaintiff and the defendant were brothers. In a previous money suit one of the brothers entered into a compromise, which was not registered, and gave up his right to the immoveable property in favour of the other brother suing. The money suit was valued at Rs. 44. It is also alleged in the plaint that the defendant took a *kabuliyat* from the plaintiff. My points are that the compromise, which was not registered, cannot be enforced and that the decree for Khas possession is bad in law. The plaint itself states that the defendants gave a registered *kabuliyat* in respect of some lands in their possession. The compromise was effected in a money suit and being extraneous to the subject-matter of the suit, cannot be relied upon: *Birbhadra Rath v. Kalpotaru Panda* (1), *Kali Charan Ghosal v. Ram Ohandra Mandal* (2). The suit was for money due on account of rent paid by one brother to the landlord. The compromise ought to have been registered, as the consideration for what was given up according to the compromise was more than Rs. 100. The case in *Gobinda Ohandra Paul v. Dwarka Nath Paul* (3) relied on by the learned Munsif is distinguishable. Refers to *Natesan Ohetty v. Vengunachiar* (4).

Babu Upendra Nath Bagchi, for the Respondents, was not called upon to reply.

(1) 1 C. L. J. 388.

(2) 30 C. 783.

(3) 7 C. L. J. 492; 35 C. 837; 12 C. W. N. 849.

(4) 3 Ind. Cas. 701; 33 M. 10²; 20 M. L. J. 20; 6 M. L. T. 313.]

JUDGMENT.

SANDERSON, C. J.—This is an appeal by the defendants from the appellate judgment of the Additional District Judge, and the matter depended upon the question whether the document to which reference is made required registration.

Taking the statement of facts in the learned Judge's judgment, it appears that the plaintiffs and the defendants are respectively the representatives of Telam and Kinn, who admittedly were previously the sole proprietors of the suit Jama. The plaintiffs' case was that in 1838 Telam sued Kinn for contribution, he having defaulted in payment of rent. I understand from what the learned Vakil has said that Telam had paid rent to the landlord and Kinn had failed to pay his half share. Consequently Telam sued Kinn for contribution. A compromise in this suit was effected and was incorporated in a decree, under which Kinn gave up his rights in the land and Telam gave up his claim for rent. The learned Vakil has translated the material parts of the decree for us; and, it appears that the amount of rent which was claimed was Rs. 44 odd, as being the contribution which the defendant was liable to make to the plaintiff and it was alleged to be due in respect of certain properties which were mentioned in the decree; and it was then stated that the defendant gave up his right to the half share in the properties mentioned in the decree and that the plaintiff gave up his claim for the money and he, the plaintiff, agreed to pay rent to the landlord after he had taken possession. On the face of that decree, it would appear that the consideration for the defendant giving up his title to his half share was the Rs. 44 which the plaintiff was claiming in that suit. But the learned Judge in his judgment said: "Telam by this *solenamah* in effect paid Kinn some Rs. 100 as consideration." The learned Vakil who appeared for the appellant has submitted that this Court must take that as a finding of fact.

Now the learned Munsif said in his judgment: "In the present case the plaintiff got his claim for money dismissed on condition that he would get the lands in lieu of it." There again, it looks as if the

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consideration for the giving up of the title was Rs. 44. If the consideration was only Rs. 44 then there would have been no necessity for registration, because the amount would be less than Rs. 100 which is the amount specified in section 17 (b) of the Registration Act of 1908. But on the assumption that we must take the learned Judge's statement to be a finding of fact that the consideration was Rs. 100, the further question arises whether the document would require registration. I think the test which should be applied to this case may be stated in the words of Mr. Justice Mitter in *Gobinda Chandra Paul v. Dwarka Nath Paul* (3) as follows:—"The question whether any particular term of a petition of compromise incorporated in a decree made under the power given by section 375 of the Code of Civil Procedure" (which corresponds to rule 3, Order XXIII, of the present Code), "relates to the suit or is covered by its subject-matter must be decided from the frame of the suit, the relief claimed, and the relief allowed by the decree on adjustment by lawful agreement. The mutual connection of the different parts of the relief granted by a consent decree is an important element for consideration in each case in deciding whether any portion of the relief is within the scope of the suit. No hard and fast rule can be laid down, each case being governed by its own facts." As far as I can judge from the translation which the learned Vakil was good enough to give us of the decree, I am of opinion that it cannot be said that in the compromise which is under consideration, there were any matters which did not relate to the suit or which were not covered by its subject-matter. As I have already said, the claim was for a share of rent in respect of certain lands which were held by the then plaintiff and the then defendant in an equal interest and the plaintiff on the one hand agreed to give up his claim for the rent and the defendant agreed to give up his title to his share in the lands in respect of which the rent was claimed. Consequently, in my judgment, the terms of the compromise did relate to the suit, or at all events were covered by the subject-matter thereof. It is conceded by the learned Vakil that if that be so and inasmuch as the

compromise was embodied in the decree, the document would not require registration even though the transaction did amount to a conveyance and the consideration for it was Rs. 100. That point, therefore, fails.

The learned Vakil's further point is that the plaintiffs should not get a decree for Khas possession, on the ground that the defendants are in possession by reason of a *kabuliyat* as tenants of the plaintiffs. It appears that in their written statement the defendants denied that the *kabuliyat* related to any of the lands in suit, and, the learned Judge has said, "it appears to be the case of neither party that the plots in suit are covered by the *kabuliyat*. The plaint and the written statement do not allege any such identity." In my judgment, that being so, the defendants cannot now turn round and say that they are in possession as tenants under the *kabuliyat*. For these reasons I think that the decree must be upheld and this appeal dismissed with costs.

DCVAL, J.—I agree.

Appeal dismissed.

ODH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 486 of 1918.

October 27, 1919.

Present :—Mr. Stuart, J. C.

JAGDEO—DEFENDANT—APPELLANT

versus

MATHURA PRASAD AND OTHERS—

PLAINTIFFS—RESPONDENTS.

*Limitation Act (IX of 1908), Sch. I, Art. 131—
Suit to establish right to offerings of temple—Arrears,
claim for—Limitation applicable.*

A suit for a declaration that the plaintiff is entitled to a certain share in the offerings of a temple is a suit to establish a periodically recurring right and is governed by Article 131 of the First Schedule of the Limitation Act, and limitation begins to run from the date on which the plaintiff is first refused the enjoyment of the right. This Article, however, has no application to a suit for the recovery of arrears of the plaintiff's share in the offerings. [p. 541, col. 1; p. 542, col. 1.]

JAGDEO V. MATHURA PRASAD.

Appeal against the decree of the 2nd Additional District Judge, Lucknow, dated 27th August 1918, modifying that of the Subordinate Judge, Barabanki, dated 22nd January 1918.

Mr. Bisheshwar Nath Srivastava, for the Appellant.

Mr. A. P. Sen, for the Respondents.

JUDGMENT.—The point for decision in this appeal is whether the decree—which is in effect a decree for a declaration that 5/6ths out of a two-pies share in the offerings at the temple of Ludheswar Mahadeo are payable to the respondents and for the payment of the amount of such offerings calculated in that manner from the 12th February 1914—can be permitted to stand. The facts, in so far as they are necessary for the decision of this appeal, are as follows:—

A joint Hindu family, consisting of two brothers, Ganeshi and Ram Adhin Brahmans was entitled as Pandas to a two-pies share of the offerings at that temple. Ganeshi died in 1905. By the ordinary rule of survivorship his interest in the offerings would have descended to Ram Adhin. But before his death he executed a deed by which he assigned his interest in these offerings to Jagdeo, the son of a daughter of Ram Adhin. The collateral heirs of Ganeshi and Ram Adhin have now claimed these offerings. There can be no question as to the fact that a suit for a declaration that the successful respondents are entitled to 5/6ths of the two pies share of the offerings is maintainable. Such a suit is not barred by limitation, as it is a suit to establish a periodically recurring right and has been brought within twelve years of the date, when the successful respondents were first refused the enjoyment of the right. The case is covered by Article 131 of the First Schedule of Act IX of 1908. It is unnecessary to discuss the point at any length, for the point is clearly covered by a decision of a Bench of this Court in the case of *Sheikh Ohedi v. Deputy Commissioner, Bahraich* (1). The passage having bearing will be found at page 357. I am bound by that decision and need not discuss how far the view enunciated therein has found favour in other Courts. So, in

so far as that portion of the decree is concerned which deals with the declaration, the appeal must fail.

The appellant's case rests, however, on stronger ground with regard to the remaining points raised in the appeal. The decree, in so far as it awards payment of the share of the offerings, cannot stand as the relief is barred by time. The view that I take is the view taken in *Lachhmi Narain v. Turab-un-nissa* (2). The view taken by the learned Judges who decided that appeal is not the view taken in the Madras High Court. The last pronouncement of the Madras High Court upon the subject will be found in the report of the case *Manavikrama Zamorin Raja Avergal of Oalicut v. Achutha Menon* (3). But it is noticeable that in the last decision in which the Madras High Court took the view that a suit to recover sums due under a periodically recurring right was governed by Article 131, the Judges expressed grave doubts as to the legality of the view which they accepted. Ayling, J., stated that on a consideration of the various Articles in the Schedule he was disposed to hold the Article 131 to be inapplicable. Tyabji, J., who was the other referring Judge, said that he considered that Article 131 appeared to be meant to apply only to cases where the plaintiff wished to establish a right and was not appropriate to a suit for recovering sums that had become due under, or as a consequence of, such a right. These two learned Judges however, were of opinion that, as there was a mass of previous decisions of the Madras High Court which took the contrary view, they were debarred from adopting the interpretation of the Article which it would seem that they preferred, and when the question came before the Full Bench the Chief Justice stated that, if the matter had been *res integra*, he would have been disposed to hold that Article 131 should be construed as applying to a suit brought for the purpose of obtaining an adjudication as to the existence of an alleged periodically recurring right, and not to a suit in which it was sought to recover moneys alleged to be due by reason of the alleged right. Sankaran Nair, J., remarked that

(2) 14 Ind. Cas. 505; 34 A. 246; 9 A. L. J. 297.

(3) 23 Ind. Cas. 806; 38 M. 916; (1914) M. W. N. 228; 15 M. L. T. 226; 26 M. L. J. 377.

(1) 3 O. C. 351.

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the question was not free from doubt. This was also the view taken by the third Judge composing the Full Bench, but all agreed that they must follow the principle of *stare decisis* and not interfere with the view taken previously by the Court. Apart from the question of authority it appears to me that the wording of the Article itself precludes the view that its provisions can apply to a suit for recovery of money. The law, as I understand it, lays down that in such a case as this, where a man claims to share in the offerings made to a temple, he can invoke the provisions of Article 131 and bring a suit at any time within twelve years from the date when he first asserted his right, and did not have it recognised, even although his right originated on a previous date, but that the Article has nothing whatever to do with a suit to recover arrears. We have it that the successful respondents had never collected their share of the offerings since the death of Ganeshi. They are not entitled thus to collect any arrears. They will be permitted to collect their share in the future.

I, therefore, partly allow and partly dismiss this appeal. I direct that the decree stand simply as a decree for a declaration that the successful respondents are entitled to 5/6ths out of the two-pies share in the offerings to the temple in question, and that no other relief be given to them. As the appellant has partly succeeded and partly failed, I direct that the parties bear their own costs of this appeal.

Appeal partly allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 342 OF 1917.

June 20, 1919.

Present:—Justice Sir Ernest Fletcher, KT, and Mr. Justice Cuming.

ABIRJAN BEWA—PLAINTIFF
—APPELLANT

versus

SHEIKH KABIL—DEFENDANT—
RESPONDENT.

Muhammadan Law—Gift imposing obligation on

donee to maintain donor—Hiba-bil-ewaz—Resumption whether permissible.

A gift by a Muhammadan widow imposing an obligation, without making it a condition precedent, on the donee to nurse and maintain her for the rest of her life cannot, on the donee ceasing to maintain her, be avoided by her on the ground that the obligation was a condition precedent to the gift; nor can such gift be resumed under the Muhammadan Law, as the obligation placed on the donee deprives the gift of being one purely voluntary and makes it a *hiba-bil-ewaz*. [p. 543, cols. 1 & 2.]

Appeal against the decree of the Subordinate Judge, 3rd Court, Mymensingh, dated the 14th of July 1916, reversing that of the Munsif, Iswarganj, dated the 15th of June 1915.

FACTS appear from the judgment.

Babu Birendra Kumar Dey, for the Appellants.—Refers to *Mariam Bibee v. Muhammad Ibrahim* (1). The Court must satisfy that she had full knowledge of the deed. There is no finding that she had full understanding as to what she was going to do. There is no finding either if she had any independent advice. Moreover here the defendant occupies a position of trust—fiduciary relationship. She is entitled to avoid the transaction whenever the defendant ceases to maintain her.

Babu Kalinkar Chackerburtty (with him Babu Pasupati Nath Chackerburtty), for the Respondent.—Refers to section 39 of the Specific Relief Act under which the powers of the Court are discretionary. No manner of fraud has been found. The case cited by my learned friend has no application to the facts and circumstances of the present case as set out in the plaint.

Babu Birendra Kumar Dey, in reply.—In certain cases, under the Muhammadan Law, a *heba* can be revoked, and this case is eminently one of such cases. The gift can be revoked by the donor through proceedings in Court.

JUDGMENT.

FLETCHER, J.—This is an appeal preferred by the plaintiff against the decision of the learned Officiating Subordinate Judge of Mymensingh, dated the 14th July 1916, reversing the decision of the Munsif of Iswarganj. The plaintiff, a Muhammadan widow, brought the suit against the defendant, who is her deceased husband's nephew, first, for a declaration that the *bil ewaz* *hebanama* in respect of one *ara* of land

(1) 13 Ind. Cas. 561; 28 C. L. J. 306.

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mentioned in the plaint was without any consideration, null and void, ineffectual, fraudulent and spurious, and, secondly, for a declaration that the plaintiff having revoked the conditional gift in respect of the one *ara* comprised in the schedule to the plaint covered by the said *hebanama*, the defendant acquired no right thereto. The case as set out in the plaint is not open to doubt. The plaintiff's case is this, that she had executed and intended to execute a deed of gift in favour of the defendant—her deceased husband's nephew, but the gift was to be subject to the condition, and a condition precedent, that the nephew was to be bound to nurse and maintain her during her life. The case has got to be dealt with clearly on the allegation made by the plaintiff in her plaint, and no such case arises on the present plaint as is referred to by Mr. Justice Mookerjee in his judgment in the case of *Mariam Bibee v. Muhammad Ibrahim* (1). In the present instance the case of the plaintiff was that she made a gift and intended to make a gift, but the gift was subject to a condition precedent. The learned Judge of the lower Appellate Court has negatived any case of fraud. He has found that the lady was in full possession of her senses, that she dictated the terms on which the gift was to be made, that the scribe and witnesses witnessed her signature and that the document having been written on her own instructions the lady, the plaintiff, subsequently registered it. The document contained an obligation on the defendant to nurse and maintain the plaintiff during the rest of her life, but, according to the terms of the document, that obligation was not stated to be a condition precedent to the gift. The view put forward on behalf of the lady is this, that instead of relying on the terms of the deed and enforcing the obligation as against the defendant to maintain her she is entitled to avoid the transaction whenever the defendant ceases to maintain her, notwithstanding that it be twenty years after the execution and registration of the deed. The learned Judge declined to accept that story and he has found as a fact that there was no condition precedent in this case and that the document represented what was in fact the intention

of the lady when she gave instructions to her own people to register the document.

Another argument was urged at the close of the case that under the terms of the Muhammadan Law a gift might be resumed by the donor by proceedings in Court, but I am clearly of opinion that the document in the present case is not a *heba* pure and simple but a *heba bil-ewaz*, i. e., a gift made on consideration, and it is important to see that in the plaint the lady's own advisers called it a *bil-ewaz hebanama*, which quite clearly shows that the document is not a simple gift. Whether the story about the gift of the Koran to the lady, which she directed the defendant to deliver to a Fakir, is true or not, there was a clear obligation in this case placed on the defendant by the terms of the deed to maintain the lady, which deprived the gift from being one purely voluntary. In my opinion on the facts found by the learned Judge of the Court of Appeal below, we must dismiss the present appeal. The appellant must pay to the respondent his costs of this appeal.

CUMING, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 329 OF 1917.

September 14, 1918.

Present:—Mr. Justice Sir William Ayling, Kt., and Mr. Justice Krishnan.

MADUKURI ANKAMMA—PLAINTIFF No. 5
—APPELLANT

versus

MUVVALA SUBBAYYA AND OTHERS
—DEFENDANTS—RESPONDENTS.

Valuation of suit—Suit for declaration that attachment does not affect plaintiff's mortgage—Subsistence of mortgage not disputed—Valuation for purpose of jurisdiction.

In a suit for a declaration that an attachment in execution of a decree against the judgment-debtor does not affect a mortgage of the property in plaintiff's favour, where the subsistence of the mortgage is not in dispute, the proper valuation for the purpose of jurisdiction is not the value of the

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property but the amount for which execution is sought.

Phul Kumari v. Ghanshyam Misra, 35 C. 202 (P. C.); 7 C. L. J. 36; 12 C. W. N. 169; 10 Bom. L. R. 1; 5 A. L. J. 10; 17 M. L. J. 618; 2 M. L. T. 506; 14 Bur. L. R. 41; 35 I. A. 22, *Khetra Pal v. Mumtaz Begam*, 31 Ind. Cas. 879; 38 A. 72; 13 A. L. J. 1104 and *Krishnasami Naidu v. Somasundaram Chettiar*, 30 M. 335; 17 M. L. J. 95; 2 M. L. T. 116, followed.

Fisher v. Arunachallam Chettiar, 2 Ind. Cas. 522; 19 M. L. J. 236; 5 M. L. T. 70, distinguished.

Appeal against the order, dated the 28th November 1916, of the Court of the Subordinate Judge, Bezwađa, in Appeal Suit No. 47 of 1916, preferred against the order of the Court of the Additional District Munsif, Bezwađa, in Original Suit No. 478 of 1913.

FACTS appear from the judgment.

Mr. K. G. Sarangaraja Aiyangar, for the Appellant.—The Subordinate Judge's view of the principle of valuation is wrong. The question is, whether the plaintiff's mortgage right is affected by the attachment against the 1st defendant. The mortgage itself is not in dispute. The property need not be valued. The proper valuation is the amount for which execution was prayed.

Krishnasami Naidu v. Somasundaram Chettiar (1), *Phul Kumari v. Ghanshyam Misra* (2).

Mr. P. Narayanamurthi, for the Respondents.—The valuation must be made on the value of the property.

JUDGMENT.—This appeal relates solely to the question of the correct valuation of the suit for the purpose of jurisdiction. The general principle is laid down by the Privy Council in *Phul Kumari v. Ghanshyam Misra* (2) and is to the effect that the value of the action is its value to the plaintiff. If this principle be applied to the present case, the Subordinate Judge's order is clearly wrong. The validity and subsistence of plaintiff's mortgage are not disputed by the mortgagors (defendants Nos. 2 to 7), and what is in dispute is whether this mortgage right should be affected by the attachment in execution of 1st defendant's decree, *vide* the prayer in the plaint.

This is the view taken by the Full Bench in *Krishnasami Naidu v. Somasundaram Chettiar* (1) and with due respect to the learn-

ed Judges, who in their judgment in *Narayan Singh v. Aiyasami Reddi* (3) suggested some doubt on the point, we can see nothing in the judgment of the Privy Council above referred to which is incompatible with it. We may also refer to the judgment of a Bench of the Allahabad High Court in *Khetra Pal v. Mumtaz Begam* (4), which considers the Privy Council judgment and comes to the same conclusion to which we are inclined.

The case dealt with in *Fisher v. Arunachallam Chettiar* (5) is easily distinguishable, as there was in that case a dispute between a mortgagor and mortgagee as to whether the plaintiff's mortgage had been discharged.

We must, therefore, set aside the order of the Subordinate Judge and direct him to restore the appeal to file and dispose of it according to law.

We may point out that the decree of the District Munsif, in so far as it declares that plaintiff is entitled to enforce his mortgage on certain items of property, appears to go beyond the plaint prayer, and requires amendment.

The first respondent will bear appellant's costs in this Court.

M. C. P.

Order set aside.

(3) 31 Ind. Cas. 189; 39 M. 602; 19 M. L. J. 728.

(4) 31 Ind. Cas. 879; 38 A. 72; 13 A. L. J. 1104.

(5) 2 Ind. Cas. 522; 19 M. L. J. 236; 5 M. L. T. 70.

OUDE JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL No. 18 OF 1919.

November 6, 1919.

Present:—Mr. Stuart, J. C., and Pandit Kanhaiya Lal, A. J. C.

JAI KISHORI BIBI—DECREE-HOLDER—
versus

Musammât AFZAL KHANAM OBJECTOR AND
Nawab NURUDDAHAR MIRZA—
JUDGMENT DESTROYED.

Partition—Partition decree, effect of—Mortgage, whether affected—Mortgagee purchasing proprietary rights—Proprietary rights, loss of, effect of—Mortgage, whether revived.

(1) 30 M. 335; 17 M. L. J. 95; 2 M. L. T. 116.

(2) 35 C. 202 (P. C.); 7 C. L. J. 36; 12 C. W. N. 169; 10 Bom. L. R. 1; 5 A. L. J. 10; 17 M. L. J. 618; 2 M. L. T. 506; 14 Bur. L. R. 41; 35 I. A. 22.

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A decree for partition between proprietors purports to divide the proprietary rights of the persons seeking partition as against the other co-owners of the property, and does not affect the rights of mortgagees in the property partitioned, even when the mortgagees are parties to the partition, unless the rights of the mortgagees as such are attacked and a relief is granted in respect of the same by the decree allowing the partition. [p. 546, col. 1.]

Where the proprietary rights acquired by a mortgagee in the mortgaged property at an auction sale in execution of a decree obtained by a subsequent mortgagee are wiped out, the mortgage is revived. [p. 546, col. 1.]

Appeal against the order of the Subordinate Judge, Lucknow, dated the 27th January 1919.

Mr. A. P. Sen and Mr. P. O. Gupta, for the Appellant.

Messrs. Mumtaz Husain and Farzand Ali, for the Respondent No. 1.

JUDGMENT.—This is an appeal from an order disallowing an application for the execution of a decree. The decree in question was passed for the sale of the mortgaged property on the 31st May 1911. It was made absolute on the 6th July 1912. One of the properties mortgaged was a 1/20th share in what was known as the Chaulakhi buildings. From time to time the decree-holder took steps to proceed with the sale of the other property mortgaged.

Before the decree-holder could proceed with the sale of the said property, another decree-holder, Kashi Nath, applied for the sale of the same in execution of a decree obtained by him on foot of a subsequent encumbrance. The present decree-holder thereupon applied to the Court which was executing that decree, stating that she had already obtained a decree for sale of the said property on foot of a prior mortgage and that she might be allowed to have a first charge on the sale-proceeds of the said property in case it was sold.

The order passed on that application was that out of the sale-proceeds of that property the decree obtained by the present decree-holder should be first satisfied and that the amount due to her should be settled after the sale had taken place, that is, at the time of payment. The property in question was thereafter sold by auction and purchased by the decree-holder for Rs. 3,000, the said amount being insufficient to satisfy her prior charge,

which according to her then was over Rs. 12,932.

The judgment debtor had meanwhile sold what he described as two trees in the Chaulakhi buildings to Musammam Afzal Khanam. Musammam Afzal Khanam thought that she had purchased a 1/20th share in the Chaulakhi buildings belonging to the judgment debtor by virtue of that sale. She filed a suit for the partition of that share, making the present decree holder a party to that suit. She obtained an *ex parte* decree, the validity of which the present decree-holder challenged but without success. The present decree-holder sued for a partition of the 1/20th share she had purchased at auction, but that share was not allowed to her on the ground that she was a party to the decree for partition which Musammam Afzal Khanam had obtained and was bound by it. She then filed a suit, seeking to set aside the decree for partition obtained by Musammam Afzal Khanam on the ground of fraud committed by her in misdescribing the property which she had purchased. That suit was also dismissed. The present application was thereupon filed by her to execute her original decree for sale, which was opposed by Musammam Afzal Khanam, whose objection was allowed by the Court below.

There can be no question that so far as the proprietary rights acquired by the present decree-holder in the 1/20th share of the Chaulakhi buildings by purchase at auction in execution of a decree obtained by Kashi Nath go, they were lost by her by virtue of the decree for partition which, rightly or wrongly, was obtained by Musammam Afzal Khanam, to which the present decree-holder was a party. It is, however, open to the present decree-holder to fall back on her title as mortgagee and to execute her decree for sale, if it is otherwise within time, for a decree for partition between proprietors purports to divide the proprietary rights of the persons seeking partition as against the other co-owners of the said property and does not affect the right of persons holding simple mortgages over the same. In *Balwant Singh v. Sardar Singh* (1) it was held that a partition

(1) 29 Ind. Cas. 613; 20 O. C. 115.

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of proprietary rights leaves the rights of mortgagees in the property partitioned unaffected, even though the mortgagees may be parties to the partition, unless the rights of the mortgagees as such are attacked and a relief is granted in respect of the same by the decree allowing the partition. There was no such relief granted in the present instance, affecting the rights of the mortgagee.

The learned Counsel for *Musammatt Afzal Khanam* urges that the rights of the present decree-holder as mortgagee had merged in the proprietary rights, which she had acquired by the purchase at auction; but the purchase having failed, the present decree-holder is entitled to fall back on her mortgage. It is not open to *Musammatt Afzal Khanam* to plead that the present decree-holder had lost the proprietary right she had acquired by reason of her laches. Her purchase was subsequent to the mortgage held by the present decree-holder, and the mortgage revived as soon as the proprietary rights acquired by the mortgagee were wiped out. In *Ganga Sahai v. Tulshi Ram* (2) the acceptance by the mortgagee of the surplus sale-proceeds, under an erroneous belief that the purchaser was somebody other than the judgment-debtor, was held not to debar him from falling back on his mortgage and seeking to enforce it by the sale of the property mortgaged. In *Har Chandi Lal v. Sheoraj Singh* (3) the renewal of a mortgage which was subsequently described to be invalid was held to debar the mortgagee from enforcing his rights under the previous mortgage which was the subject of renewal.

The appeal is, therefore, allowed and the execution case sent back to the Court below, with a direction to re-admit it under its original number and to proceed with it in accordance with law. The costs incurred by the decree holder appellant here and hitherto will be paid by the objector-respondent.

Appeal allowed.

(2) 25 A. 371; A. W. N. (1903) 75.

(3) 39 Ind. Cas. 343; 44 I. A. 60; 32 M. L. J. 241; 15 A. L. J. 223; 1 P. L. W. 330; 5 L. W. 102; (1917) M. W. N. 290; 25 C. L. J. 316; 21 M. L. T. 292; 21 C. W. N. 765; 19 Bom. L. R. 444; 39 A. 178 (P. C.).

LAHORE HIGH COURT.

MISCELLANEOUS FIRST APPEAL No. 2012 OF 1919.

December 23, 1919.

Present:—Mr. Justice Abdul Raoof.

THE FIRM SOHAN LAL-CHIMAN LAL
OF DELHI—PLAINTIFFS—APPELLANTS

versus

THE FIRM JAI NARAIN BABU LAL OF
DELHI—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIX, r. 2—Temporary injunction, grant of, principles governing—Remedy, other, available, effect of—Contract, breach of—Arbitration, reference to—Injunction restraining arbitration proceedings, when should be granted.

A temporary injunction should not be granted unless the applicant satisfies the Court that its interference is necessary to protect him from irreparable or at least serious injury before the legal right can be established at the trial. [p. 547, col. 2.]

If there is any other remedy open to the applicant by which he can protect himself from the consequences of the injury apprehended, a temporary injunction will not be granted. [p. 547, col. 2.]

Where one party to a contract alleges a breach of the contract and refers the matter to arbitration and the other party brings a suit for a declaration that it is not liable upon the contract, then if the existence of the contract itself is denied, no temporary injunction should be granted restraining the arbitration proceedings, but if the contract is impeached on grounds of equity, such as fraud or misrepresentation, a temporary injunction should ordinarily be granted. [p. 548, col. 1.]

Miscellaneous first appeal from the order of the District Judge, Delhi, dated the 9th October 1919, granting a temporary injunction.

Lala Moti Sagar, R. S., for the Appellants.

The Hon'ble Pandit Sheo Narain, for the Respondents.

JUDGMENT.—This is an appeal against an order granting temporary injunction in favour of the appellant Firm Sohan Lal-Chiman Lal, on condition that the plaintiff-appellant should give security to the extent of the damages claimed by the defendant firm within ten days of the order. The facts which gave rise to the proceedings are briefly these.

The plaintiff firm entered into a commercial contract with the defendant firm to purchase piece goods of various kinds. The goods were to be imported from Europe and to be delivered at Delhi. The contract

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between the parties contained a clause providing for a reference to arbitration of two European merchants at Karachi in case of any dispute arising under the contract. It appears that the defendant firm offered to deliver goods to the plaintiff firm under the contract, but the latter refused to take delivery. Thereupon the defendant firm proceeded to sell the goods in the market at the plaintiff's risk, then appointed an arbitrator and called upon the plaintiff to appoint another arbitrator under the terms of the contract. This the plaintiff refused to do. In default of the nomination of a second arbitrator by the plaintiff the defendant firm nominated the second one also and chose an umpire to refer the matter for decision to them. The plaintiff firm has instituted a suit at Delhi where the parties carry on business. The case for the plaintiff, as stated before me by Rai Sahib Moti Sagar, briefly put, is as follows:—

The plaintiff made the proposal to the defendant and it was agreed that the acceptance of the offer would be communicated to the plaintiff by the defendant; the defendant communicated a qualified acceptance, making the acceptance subject to any terms that might be imposed by Messrs. Graham and Company. The acceptance, it is alleged, being qualified, no binding contract came into existence between the parties. It is further alleged that the qualified acceptance must be treated as a fresh offer by the defendant and as it was not accepted by the plaintiff firm, no contract was entered into between the parties so as to be binding upon them. It is also alleged that the defendant fraudulently represented to the plaintiff that the goods would be imported from outside and it is suggested that as a matter of fact they were not imported; fraud was imputed to the defendant in this respect also. On these allegations the plaintiff firm asked the Court to pass a decree declaring that no contract had taken place. A further relief was claimed asking the Court to grant a perpetual injunction against the defendants prohibiting them from proceeding with the arbitration. After instituting the suit the plaintiff made an application under Order XXXIX for the grant of a

temporary injunction. The application apparently was made under rule 2. The Court made an order granting temporary injunction. Thereupon the defendant firm made an application supported by an affidavit objecting to the temporary injunction and asking the Court to order the plaintiff to give security for the payment of damages which the defendant had incurred in consequence of the refusal by the plaintiff firm to take delivery of goods. The Court below by an order, dated the 9th of October 1919, granted the prayer of the defendant and made the grant of the temporary injunction to be conditional on the plaintiff firm furnishing security to the extent of the damages claimed by the defendant firm. The plaintiff firm has filed an appeal objecting to the condition requiring the plaintiff to give security, while the defendant firm has filed objections taking exception to the grant of a temporary injunction in the present case. On the above pleadings two questions arise for decision, namely,

(1) whether a temporary injunction should have been granted in this case?

(2) if so, whether an order for furnishing security should have been made?

On general principles a temporary injunction should not be granted unless the applicant satisfies the Court that its interference is necessary to protect him from irreparable or at least serious injury before the legal right can be established at the trial. Again, if there is any other remedy open to the applicant by which he can protect himself from the consequences of the injury apprehended, a temporary injunction will not be granted. If the arbitrators in this case give an award in favour of the defendant firm, it will simply entitle the firm to come to Court and ask it to pass a decree on the award. This will give to the plaintiff sufficient opportunity to contest the award on the various grounds which are now set up. Thus there is another remedy open to the plaintiff.

The following cases have been relied upon by the parties in the argument addressed to me:—

Kitts v. Moore (1) *Gajanand Maskara v.*
(1) (1895) 1 Q. B. 253; 64 L. J. Ch. 152; 12 R. 43;
71 L. T. 676; 43 W. R. 84.

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Taleb Jalal ud-din (2), *Baij Nath v. Mansukirai Panna Lal* (3) and *Sardarmull Jessraj v. Agar Ohand Mahata & Co.* (4).

The rule deducible from these cases is (1) that where in such a case as this the existence of the contract itself is denied and accordingly a suit is brought for a declaration, no temporary injunction should be granted and (2) where the contract is impeached on grounds of equity, such as fraud or misrepresentation, a temporary injunction should ordinarily be granted. The reason for the rule is apparent. Where there is no contract, the proceedings of the arbitration would be a nullity and futile and the plaintiff need not apprehend any injurious consequences. As observed by the learned Judge who decided the last mentioned case, there is no means of preventing parties bringing unfounded actions but the Court would not interfere with such an arbitration. Now in this case the main ground on which the plaintiff's suit is brought is that there was no contract between the parties. It is true that certain allegations of fraud and misrepresentation are also made, but having regard to the fact that the existence of the contract, as a matter of fact, is denied, those allegations cannot have any material bearing. It is only in the case where the existence of a contract is admitted and a suit is brought asking the Court to relieve the plaintiff from the consequences of the contract, that there may be any apprehension of injury and it may be necessary to stay the arbitration proceedings. Having regard to the above observations I must hold that a temporary injunction should not have been granted in this case. In this view it is not necessary to decide the second question whether an order for security should have been made or not. I, therefore, allow the objection of the respondent and set aside the order granting injunction with costs. The appeal necessarily fails and is dismissed with costs.

Appeal dismissed.

- (2) 46 Ind. Cas. 173; 22 C. W. N. 535.
 (3) 49 Ind. Cas. 938; 23 C. W. N. 258.
 (4) 52 Ind. Cas. 588; 23 C. W. N. 811.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1001
OF 1918.

July 17, 1919.

*Present:—Mr. Justice Chatterjea and
Mr. Justice Cuming.*

ASANULLA MOLLA AND OTHERS—
DEFENDANTS—APPELLANTS

versus

SANKAR DAS SANYAL AND OTHERS—
PLAINTIFF—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885) s. 87, provisions of, whether exhaustive—Landlord and tenant—Abandonment of holding, what constitutes.—Transfer of whole of non-transferable raiyati holding, effect of—Ejectment of transferee—Proof of abandonment—Presumption.

The provisions of section 87 of the Bengal Tenancy Act are not exhaustive and do not prescribe the only mode in which a holding can be abandoned. [p. 550, col. 1.]

In order to entitle a landlord to eject a transferee of the whole of a non-transferable *raiya* holding it is not necessary for him to prove as a fact that the *raiya* has left the holding and disclaims any interest in it. This is a direct inference from the fact that he has sold the entire holding and given possession of it to the purchaser and distinct repudiation or refusal to pay rent need not be proved. [p. 550, col. 1.]

Appeal against the decree of the District Judge, Rajshahye, dated the 14th of February 1918, reversing that of the Munsif, Nator, dated the 14th of December 1916.

FACTS appear from the judgment.

Babu Bepin Behari Ghose (Jr.) (with him Babu Satindranath Mukerjee), for the Appellants.—The defendants are appellants. The appeal arises out of a suit for ejectment on the ground that the defendants had purchased a non-transferable occupancy holding from *pro forma* defendant No. 10. The sale took place in Chait 1317 B. S. Our defence was that we paid *salami* to the landlord after purchase and he gave receipts to us. The first Court dismissed the suit on the ground that rent was received from us by the landlord. The lower Appellate Court did not believe the receipts as genuine and decreed the suit. I submit that when the landlord had been receiving rents, there could not have been any abandonment under section 87 of the Bengal Tenancy Act. When a landlord accepts rents from a purchaser as a *Marfatdar*, that amounts to recognition. See

ASANULLA MOLLA v. SANKAR DAS SANYAL.

Probbabati Dasi v. Taibatunnessa (1). If I simply go and say "landlord, here is your rent," I am only the bearer: that does not amount to recognition. But if the landlord knowing me as the actual purchaser accepts rent, pending the payment of Nazar, as Marfatdar, that I submit amounts to recognition. The learned Judge has not at all taken into account the fact that we have been possessing the holding, paying rents and Nazar. My next submission is that sale does not work forfeiture. The landlord is entitled to re-enter only in case of abandonment. Mere leaving the land would not amount to abandonment unless the tenant repudiates the liability to pay rent. My last point is that there is no proper finding regarding the Marfatdari payment. The case ought to go back.

Babu Krishna Kamal Moitra (with him Babu Bireswar Bagchi), for the Respondents.—It does not appear anywhere that the landlord had knowledge of the transfer. As regards the Marfatdari receipts, the learned Judge holds them to be not genuine. Nowhere in the written statement does the defendant rely upon the receipts as amounting to recognition by the landlord. The mere fact that the transferee paid rent to the landlord who knew of the transfer, would not amount to recognition. See *Samujan Roy v. Munshi Mahaton* (2), *Digbijoy Roy v. Ata Rahaman* (3) and *Sekh Ohand v. Romoni Mohan Roy* (4). The landlord by not re-entering for a certain period cannot be said to have waived his right to re-enter.

Babu Bepin Behari Ghosh replied in brief.

JUDGMENT.—The defendant purchased a non-transferable occupancy holding and the plaintiff as landlord brought the present suit for recovery of *khas* possession of the land. Defendant's case is that after his purchase he obtained possession, paid rent in the name of the old tenant and obtained Marfatdari receipts for four years and that subsequently the landlord on taking Nazar from him recognized him as tenant and granted a *Dakhila* in his own name as tenant. The Court of first

instance found in favour of the defendant, but, on appeal, the learned District Judge reversed that finding. The learned District Judge disbelieved the story of recognition on payment of Nazar and the granting of *Dakhila* in the name of the defendant. So far as that question goes, the finding cannot be interfered with.

It has been contended before us that the learned District Judge has not considered the effect of the Marfatdari receipts. In one portion of his judgment the learned Judge says: "Whether the defendant paid rent and got Marfatdari receipts is immaterial in the suit". It appears, however, that in a previous part of his judgment the learned Judge disbelieved these receipts and differed from the view taken by the Munsif with regard to these documents. He said: "The learned Munsif seems not to have had his attention directed to certain very significant features of the documents on which the respondents rely. The first of these features is that there are distinct differences between the printing of their receipts and that of the receipts in the appellants' counterfoils (amongst which are some unissued tenant's portions). In the respondents' Marfatdari receipts there is no bottom line such as appears in the tenants' portions in the counterfoil books, the spacing of the lines of print is different and in one word the impression of the letter J (on every page of the counterfoil book of one year at least) is blurred in a peculiar way which does not appear in the respondents' receipts for that year". Then he deals with the receipts for 1321, by which the plaintiff is alleged to have recognized the defendant as purchaser on receipt of Nazar. But the previous portion which we have quoted above clearly refers to the Marfatdari receipts, and the remark in the concluding portion of the judgment, where he says that the question whether the defendant paid rent and got Marfatdari receipts is immaterial, must be taken to mean that even if they were genuine they would be immaterial. It should be observed that the defendant did not rely upon the Marfatdari receipts as recognition of him as a tenant and set up a case of express recognition on receipt of Nazar and the grant of the receipt in his own name in the year 1321. The Court of first

(1) 20 Ind. Cas. 664; 17 C. W. N. 1088; 19 C. L. J. 62.

(2) 4 C. W. N. 493.

(3) 15 Ind. Cas. 156; 17 C. W. N. 156 at p. 159.

(4) 17 Ind. Cas. 603; 17 C. W. N. 1105.

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instance also did not rely upon these Marfatdari receipts as constituting recognition. In all these circumstances, we do not think that we should remand the case for considering the question whether the Marfatdari receipts in the circumstances of the case amounted to a recognition.

The learned Pleader for the appellant also contended that the mere fact that there was a transfer by a Kobala executed by the tenant in favour of the purchaser or that the purchaser was in possession, was not sufficient to constitute abandonment unless it was found that the tenant had repudiated the tenancy, and relied upon section 87 of the Bengal Tenancy Act. But it was pointed out in the case of *Samujan Roy v. Munshi Mahaton* (2) that the provisions of section 87 of the Bengal Tenancy Act are not exhaustive and "do not prescribe the only mode in which a holding can be abandoned", and in the case of *Sekh Chand v. Homoni Mohan Roy* (3) it was observed that "in order to entitle a landlord to eject a transferee of the whole of a non-transferable *raiya* holding it is not necessary for him to prove as a fact that the *raiya* has left the holding and disclaims any interest in it. It is a direct inference from the fact that he has sold the entire holding and given possession of it to the purchaser and distinct repudiation or refusal to pay rent need not be proved". We may also refer to the observations made in the case of *Digbijoy Roy v. Ata Rahaman* (3), where the learned Judges said: "It is not disputed that at the time when the present action was commenced, the original tenant was not in occupation, and the person in possession was the defendant. It is also not disputed that the defendant came into occupation on the assumption that he had acquired a valid title by purchase, and that his transferor had severed his connection with the holding. Under these circumstances, the legitimate inference is that there had been an abandonment of the tenancy by the original tenant".

We are of opinion that the decree of the lower Appellate Court is correct and that this appeal must be dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 67 of 1919.

October 8, 1919.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Moore.

THE FIRM OF A. M. MYLAPPA CHETTIAR,
BY PARTNERS, A. M. MUTHU CHETTIAR
AND A. M. MYLAPPA CHETTIAR—
PLAINTIFF—APPELLANT

versus

AGA MIRZA MAHOMED SHIRAZEE,
MANAGING PROPRIETOR OF THE FIRM OF
THAT NAME—DEFENDANT—RESPONDENT.

*Civil Procedure Code (Act V of 1908), s. 20 (c)—
Contract Act (IX of 1872), s. 4—Contract, C. I. F.,
incidents of—Contract for supply of goods—Non-
delivery—Breach—Damages, suit for—Cause of action
—Place of suing—Consignor drawing on bills of lading
and transmitting bills to consignee—Offer and quotation,
distinction between—Completed contract, tests of, when
contract to be made out from correspondence—Con-
struction of terms.*

Plaintiffs, merchants in Negapatam, offered to purchase timber from the defendant trading at Mandalay. Plaintiffs' offer was accepted by the defendant at Mandalay. The course of dealings was that defendant prepared scantlings and then put them on board a ship which was neither the plaintiffs' nor the defendant's. He then made out a bill of lading in his own name and drew on it the money due to him according to his estimate from the National Bank. The National Bank transmitted the bills to the Bank of Madras, which in its turn passed them on to the plaintiffs. As the defendant failed to supply the timber according to the contract, the plaintiffs sued defendant in the Negapatam Sub-Judge's Court for damages:

Held, that the cause of action did not arise wholly or in part at Negapatam and that, therefore, the Negapatam Court had no jurisdiction to entertain the suit. [p. 558, col. 2.]

Incidents of a C. I. F. contract discussed.

An offer of a proposal is distinct from, and should not be confused with, either an invitation to offer or quotations given indicating the value of the articles to be supplied. [p. 554, col. 2.]

Where a contract depends on correspondence, the whole correspondence should be considered and not particular portions of the series. [p. 555, col. 1.]

Where everything essential to make a completed contract has been settled, the mere fact that a formal document has to be drawn up will not render the contract incomplete. [p. 555, col. 2.]

Where both the plaintiff and the defendant reside in the same place, the offer can be communicated at once and would be received at the place from which it emanates. But where the acceptor resides in a different place, it is when the offer reaches him that there can be a complete offer. Until a proposal is received, therefore, there is no offer. The place from which the offer is sent does not furnish a venue for a suit when the acceptor resides elsewhere. [p. 556, col. 1.]

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Appeal against the order of the Court of the Temporary Subordinate Judge at Tanjore, dated the 31st October 1918, in Original Suit No. 9 of 1917.

FACTS.—The plaintiff at Negapatam inquired of the defendant at Mandalay, whether he would supply them with 600 tons of timber and asked for price. The defendant replied asking for the size required. On the plaintiff's reply, the defendant quoted a price subject to immediate acceptance by the plaintiff. The plaintiff ordered 600 tons on the quotation. The defendant stipulated that payment should be arranged at Mandalay. The contract was C. I. F. (cost, freight, insurance). The plaintiff gave an indemnity to the Bank of Madras to their getting endorsed drafts on the plaintiff to the extent of Rs. 12,000 in respect of shipping documents tendered by the defendant. The Bank of Madras arranged with the National Bank at Mandalay to the same effect. On short delivery, the plaintiff brought the present suit for damages in the Negapatam Court. That Court held that it had no jurisdiction. The plaintiff preferred this civil miscellaneous appeal.

Messrs. T. R. Venkatrama Sastri and S. Subramania Aiyar, for the Appellant.—It was held under section 17 of the Civil Procedure Code of 1882 that the place where the contract was made was the place where the letter of acceptance was posted and that a suit for breach of such contract must be brought at such place and not whence the offer was made, *Kamiseti Subbiah v. Katha Venkatasawmy* (1). That part of section 17 is no longer part of the corresponding section 20 of the new Code of 1908, which says simply "where the cause of action, wholly or in part, arises." The change has been considered recently in this Court in *Kuthiravattam Appu Thamban v. Foulkes* (2).

[SESHAGIRI AIYAR, J.—That case can have no application here, as there both offer and acceptance were outside jurisdiction.]

The principle of English Law is well stated in *Green v. Beach* (3).

[SESHAGIRI AIYAR, J., cited *Olarke v. Knowles* (4) as drawing a distinction between offers by post and offers in person.]

The real question in this case is which is the offer and which the acceptance. There can be no offer until one party proposes something definite which is capable of acceptance by the other party, *e. g.*, goods at a specified price; so that the real offer was made when the defendant stated that he was ready to sell timber of a specific description at a certain quotation. This offer was accepted by the plaintiff at Negapatam. Hence in law the contract was concluded at Negapatam. See also 7 Halsbury's Laws of England, pages 350, 351. The fact that the plaintiff asked the defendant for the formality of an 'acceptance' form won't affect the substantial part of the transaction. *Whympere v. Buckle* (5).

Secondly, the contract being a C. I. F. contract, the significant part of it is the tender of shipping documents by the defendant to the plaintiff at the place specified in the contract as the destination of the goods consigned. This tender has, therefore, to be at Negapatam. See 26 Halsbury's Laws of England, page 160; *Soorthingjee Sakalchand v. Mahomed Nasurudeen* (6), *Marshall & Co. v. Naginchand Phulchand* (7).

Thirdly, payment under a C. I. F. contract is on tender of documents and also, therefore, at Negapatam.

[SESHAGIRI AIYAR, J.—Are not the Bank of Madras and through it the National Bank at Mandalay, the agents of the plaintiff?

There is no agency. The plaintiff has simply promised to indemnify the Bank of Madras in case it undertakes certain responsibilities. The same is the relationship between the two Banks.

[SESHAGIRI AIYAR, J.—Payment is arranged to be made at Mandalay.]

Yes. The defendant pledges the shipping documents with the National Bank by endorsing it in their favour and draws money. That Bank in turn re-indorses it to the Bank of Madras, who in their turn endorse it over to the plaintiff. It is only

(1) 27 M. 355.

(2) 54 Ind. Cas. 260; 10 L. W. 445.

(3) (1873) 8 Ex. 203; 43 L. J. Ex. 151; 21 W. R. 550.

(4) (1918) 1 K. B. 128; 87 L. J. K. B. 189; 118 L. T. 253.

(5) 3 A. 469.

(6) 40 Ind. Cas. 526; 32 M. L. J. 146.

(7) 37 Ind. Cas. 644; 42 B. 473; 18 Bom. L. R. 915.

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at the last stage that plaintiff's indemnity to the Bank of Madras comes into prominence. So the real payment is at Negapatam on the documents being tendered.

For these reasons, the Negapatam Court has jurisdiction.

Messrs. T. V. Muthukrishna Aiyar and T. N. Seshachalam Aiyar, for the Respondent.—The forum of an action on a contract or for breach of it was determined by the three tests in Explanation III to section 17 under the old Code. And it has been held that under the new Code, the law on this point is none the more nor less. The law is the same as to what is the cause of action in suits on contracts. *Salig Ram v. Chuha Mal* (8). But see *Manepalli Mangamma v. Manepalli Sathiraju* (9), where Krishnan, J., seems to take a different view.

A mere quotation of prices cannot constitute an offer. *Harvey v. Facey* (10), *Boyers v. Duke* (11), *Hardundoss v. Rani Mohori Bibi* (12). A quotation invites an offer and the offer follows the quotation which is the information required by the offeror. The offer is made from Negapatam. Its postal destination is Mandalay. So the offer is to be deemed to be made at Mandalay. See *Clarke v. Knowles* (4). See also *Perry v. Suffields* (13). Hence the Negapatam Court can have no jurisdiction.

As the contract is a C. I. F. contract, it does not matter that the goods were destined for Negapatam. In such a contract, in the absence of anything to the contrary, the responsibility of the shipper ends at the port of shipment in whatever part of the world the goods may be delivered. He has only to tender the documents at the place appointed by the parties. *Crozier Stephens & Co. v. Auerbach* (14), *Biddell Brothers v. Clemens Horst Co.* (15), *Biddell Brothers v.*

Clemens Horst Co. (16), *Olemens Horst Co. v. Biddell Brothers* (17).

The defendant stipulated that the plaintiff should pay at Mandalay, so that defendant may tender the documents and draw out the money at Mandalay. That is also clear from the fact that the Bank of Madras authorised the National Bank at Mandalay to purchase the documents, and it was done. Further, as it is the plaintiff that arranges the payment at Mandalay, the Madras Bank and the National Bank must be deemed to be the agents of the plaintiff.

I submit, therefore, that no part of the cause of action arose at Negapatam to give jurisdiction to the Court there.

Mr. T. R. Venkatrama Sastri, in reply.—The question of jurisdiction is considered in the English cases on the basis of whether or not title passes at the foreign port of shipment to the buyer. A C. I. F. contract is in essence a contract for the sale of shipping documents, so that the failure to tender even a single document would constitute a breach even though non-delivery of goods shipped may not. *Biddell Brothers v. Clemens Horst Co.* (16), *Arnhold Karberg & Co. v. Blythe Green Jourdain & Co.*, *Theodor Schneider & Co. v. Burgett Newsam* (18), *Mambre Saccharine Co. v. Corn Products Co.* (19). The destination of the goods shipped is the place for the tender of the documents. The port of delivery is not material otherwise.

The consignor takes the bill of lading in his own name, thereby reserving a *jus disponendi* in himself in the event of non-payment. On delivery of the papers, this right ceases to exist and the performance is complete even if the ship be foundered in mid-ocean.

There is no agency as contended for. The plaintiff becomes entitled to the documents only when the Bank of Madras hand it over to him.

JUDGMENT.—The questions argued before us have practically no Indian authority

(16) (1911) 1 K. B. 934 at p. 954; 16 Com. Cas. 197; 80 L. J. K. B. 584.

(17) (1912) A. C. 18; 81 L. J. K. B. 42; 105 L. T. 568; 17 Com. Cas. 55; 12 Asp. M. C. 80; 56 S. J. 50; 28 T. L. R. 42.

(18) (1915) 2 K. B. 379 at p. 389; 84 L. J. K. B. 1673; 118 L. T. 185; 21 Com. Cas. 1; 31 T. L. R. 851.

(19) (1919) 1 K. B. 198 at p. 203; 88 L. J. Q. B. 402.

(8) 11 Ind. Cas. 712; 34 A. 49; 8 A. L. J. 1160.

(9) 37 Ind. Cas. 681; 31 M. L. J. 816; 5 L. W. 246.

(10) (1893) A. C. 552; 62 L. J. P. C. 127; 1 R. 428; 69 L. T. 504; 42 W. R. 129.

(11) (1905) 2 Ir. R. 67; 8 Ir. L. R. 577.

(12) 23 Ind. Cas. 322; 7 Bur. L. T. 136; 7 L. B. R. 343.

(13) (1916) 2 Ch. 187; 85 L. J. Ch. 460; 115 L. T. 4; 60 S. J. 494.

(14) (1908) 2 K. B. 161 at p. 164; 99 L. T. 225; 77 L. J. K. B. 873; 24 T. L. R. 409.

(15) (1911) 1 K. B. 214 at p. 220.

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behind them. Even the English authorities are not quite consistent with each other, as we shall presently show. Before dealing with the points of law the facts should be briefly stated. The suit was by the consignee of timber in Negapatam against the consignor residing in Mandalay. The plaint in paragraph 9 says:—"As the prices of goods contracted for were rising and ruled very high at the end of 1913 and also during 1914, defendant has wantonly withheld supplying the balance." The cause of action is said to have arisen on the date of the breach of contract on the 1st January 1914. It might, therefore, be taken that the suit in terms is one for non-delivery of goods agreed to be supplied. The contract was a C. I. F. contract. The first negotiation began with a letter from the agent of the Bank of Madras in Negapatam to the plaintiff, in which the agent says that the defendant has asked him the names of reliable firms in Negapatam with whom timber dealings can be carried on. This is Exhibit N, dated the 29th of August 1912. Thereupon the plaintiff put himself in direct communication with the defendant. He wrote Exhibit I on the 20th of August 1912, in which he made certain enquiries. He asked for samples and promised "If your quality be suitable for us, we shall order a large quantity." As regards finance, this is the note in the letter, "Please take Bank draft to Madras Bank on seven days sight," to which the defendant replied by Exhibit XXXII, dated the 15th of September 1912. He gives the quotation per ton and states: "*payment to be arranged in Mandalay, that is, on production of bills of lading and bill the amount to be paid to me here without deduction and this can be arranged through the Bank of Madras.*" This letter makes it clear that the defendant demurred to the presentation of the bill in Madras and to receiving payment here. The plaintiff answered that letter on the 23rd of September 1912 by Exhibit II. He says that he accepts the quotation and adds: "Wire us as soon as your shipment be ready and we shall arrange for Mandalay National Bank for money through Madras Bank." By this letter the plaintiff accepted the condition of the defendant that the money should be paid in Mandalay and agreed to constitute the National Bank

to be the agent of the Madras Bank for payment of that money. On the 7th of October 1912 defendant wrote to plaintiff that it is unnecessary to send any sample and concluded in these words: "I shall, therefore, be obliged if you will kindly send me an order for, say, one hundred tons which I shall be very pleased to execute promptly." This letter shows that after quotations and after preliminary discussion it was agreed that the order should come from the plaintiff. Thereupon plaintiff wrote Exhibit III on the 16th of October 1912, in which he asked for further information. Exhibit IV is a telegram making further enquiries in which reference is made to Exhibit III. Exhibit V is a telegram from the defendant in which the information sought for in Exhibit IV is given. Then comes Exhibit XXXV, dated the 28th October 1912, in which the defendant wires to plaintiff: "Yours 25th. I quote Rs. 63 per ton subject immediately reply letter follows." To this, plaintiff replied on the same day by wire: "Accepted your 28th telegram." The contention of Mr. Venkatarama Sastriar for the plaintiff is that Exhibit A concluded the contract and was an acceptance by the plaintiff of an offer made by the defendant from Mandalay. We might at once say that, having regard to the apparent educational qualifications of the draftsmen of the letters and of the telegrams between the parties and to the imperfect knowledge which these men possessed of the value of technical and legal language, no importance should be attached to the words "offer" and "acceptance" which are to be found in the various letters and telegrams which passed between the parties. Both the learned Vakils at one time or other laid stress on these words. We are clear that what we have to see is, not the use of these words, but who in substance made the offer and who accepted the offer. So far, in our opinion, Exhibit XXXV from the defendant must simply be regarded as a quotation and that the offer was what was contained in Exhibit A. The correspondence that followed these two telegrams makes that position fairly clear. By Exhibit VI, dated the 20th of October 1912, the plaintiff wrote to the defendant:—"We are in receipt of your telegram of the 20th instant, our telegram of yesterday

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might have reached you..... We request you to send us acceptance form for 600 tons Mandalay scantlings." This was after Exhibit A. Then there was Exhibit G from the defendant to the plaintiff in which reference is made to the various correspondence that passed and which says: "I shall be obliged if you will kindly arrange with your Bankers to open a credit with the National Bank of India, Limited, in my favour so that I may draw on you demand drafts with shipping documents attached and receive payment without any deduction on presentation of my bills as is being done now." Towards the end the letter says:—"I shall be glad to have your order as to the particular size required so that I may start cutting as soon as I hear from you." So notwithstanding Exhibits XXXV and A, the plaintiff wanted to have the acceptance form and the defendant wanted to have the order from the plaintiff. This was on the 6th November 1912. This letter apparently was written before Exhibit XXXVI had reached the defendant. For we find in Exhibit XXXVI the defendant wrote again on the 21st of November in which he says: "I subjoin an acceptance for six hundred tons as desired by you" Then the form of acceptance was enclosed. As regards this letter there is one thing to be said. It refers to a telegram from the defendant to the plaintiff which apparently has not been produced. Then the plaintiff wrote to the defendant Exhibit XLIX, dated the 30th of November 1912, in which he acknowledges the acceptance form and gives the measurement of the scantlings for 300 tons. This is followed by another letter from plaintiff to the defendant, dated the 13th of March 1912, in which he says: "As soon as the shipments of the sizes be ready, please wire us and we shall arrange for the Bank advice." Another letter of the 31st gives further particulars and asks for a telegram from the defendant. This is Exhibit X, dated the 31st of December 1912. On the 12th of January 1913 the defendant wrote to the plaintiff Exhibit XLVII: "My shipments will be made in time according to my arrangements with you and I am waiting to hear from the Bank that a credit has been opened by you in my favour." On this the plaintiff gave a bond of indemnity, Exhibit J, dated the 20th of

January 1913, to the Bank of Madras for Rs. 12,000. Exhibit B is the telegram of the 21st January 1913 from the plaintiff to the defendant informing the latter that an account for Rs. 12,000 has been opened in the National Bank. Exhibit XLVII, dated the 29th of January 1913, is an intimation by the National Bank to the defendant that the Bank has been authorised "to purchase your 3 days sight drafts on A. M. Malayappa Chetty with full shipping and insurance documents in respect of timber to the extent of Rs. 12,000. The credit shall remain in force till 20th of April 1913." These documents practically conclude what is known as the first of the three contracts entered into between the plaintiff and the defendant. The documents relating to the second contract are Exhibits XX, XXI and V and those relating to the third contract Exhibits 28, 45, 29, 46 and 30. They do not differ materially from the documents discussed. The questions in this state of correspondence are:— (1) Who was the proposer and who was the acceptor? (2) Where did the cause of action arise? In Mandalay or in Negapatam? and (3) Did any portion of the cause of action arise in Negapatam?

We shall now proceed to answer these questions with reference to the correspondence above set out and with special reference to the principles laid down as to the construction of C. I. F. contracts. On the facts our conclusion is that the plaintiff was the person who made the offer and that the defendant was the acceptor. This conclusion is supported by *Boyers v. Duke* (11) cited by the learned Vakil for the respondent. That case is practically on all fours with the present case. Lord O'Brien, L. C. J., and Madden, J., point out that an invitation to offer should not be confused with the offer itself and that quotations given indicating the value of articles to be supplied should not be regarded as offer. Lord O'Brien, L. C. J., at page 622 referring to the reply from the consignee says: "In my opinion it is not the acceptance of an offer, because the letter to which it was a reply was a quotation and not an offer." Mr. Justice Madden puts the matter very clearly. He says: "A quotation might be so expressed as to amount to an offer to provide a definite article, or to do a certain work, at

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a defined price. But the ideas of a quotation and of an offer to sell are radically different. The difference is well illustrated by the case of *Harvey v. Facey* (10).* * * The principle on which this case was decided applies with a greater force to mercantile transactions than to an application for a statement of the price of a single parcel of land. It is a matter of common knowledge that quotations of prices are scattered broadcast among possible customers * * * The catalogue has probably reached many collectors. The order of only one can be honoured. * * * Wholesale dealers have not in stock an unlimited supply of the articles the prices of which they quote to the public at large * * * Transactions of the kind under consideration are intelligible and businesslike, if we bear in mind the distinction between a quotation, submitted as the basis of a possible order, and an offer to sell which, if accepted, creates a contract for the breach of which damages may be recovered. * * *

In my opinion, ... a dealer or manufacturer by furnishing a quotation invites an offer which will be honoured or not according to the exigencies of his business.' In *Harvey v. Facey* (10) Lord Morris in delivering the judgment of the Judicial Committee said:— "Their Lordships are of opinion that the mere statement of the lowest price at which the vendor would sell contains no implied contract to sell at the price to the persons making the enquiry." The learned Vakil for the appellant contended that a contract is concluded when all the essential terms are settled, and not when the formal document is executed. We accept this proposition. The decision in *Perry v. Suffields* (13) is a direct authority in favour of it, and we see no reason to think that the decision in *Hussey v. Horne-Payne* (20) is in any way inconsistent with that decision. In this latter case it was laid down that for a contract depending upon correspondence the whole correspondence should be read and not particular portions of the series. It was an action for specific performance of a contract for sale of land. Some letters passed between the parties and it was contended that the first two letters had settled the terms

and there was a concluded bargain. Lord Selborne said in that case: "it appears to me that no such contract ought to be held established, even by letters which would otherwise be sufficient for the purpose, if it is clear, upon the facts, that there were other conditions of the intended contract beyond and besides those expressed in the letters, which were still in a state of negotiation only, and without the settlement of which the parties had no idea of concluding any agreement." What was said in *Perry v. Suffields* (13) is that where everything essential has been settled, the mere fact that a formal document had to be drawn up would not render the contract incomplete. Referring to *Hussey v. Horne-Payne* (20) Lord Cozens-Hardy, M. R., says: "In those circumstances the House of Lords held that it was a fallacy to say that the letters concluded the whole agreement, because it appeared from the allegations in the statement of claim itself that there were terms, namely, that the purchase-money should be paid by instalments, the amount of such instalments and the periods at which they should be payable, which had not been settled between the parties at that date." Then the learned Master of the Rolls says: "Mere arrangements, which in the ordinary course of business are left to the legal advisers to settle, such as the date for completion, are subsequent matters which do not prevent the two letters constituting a concluded agreement." The other two learned Lord Justices expressed the same opinion. Therefore, if we are persuaded on the date of Exhibit A all the main terms of the contract were settled, we would have held that that document concluded the contract. But the acceptance form was only sent later on. The place of payment, which is a very important item and which had been a subject of difference of opinion between the parties, was settled only subsequently and the exact offer itself and the exact quantity required were only settled later on. Therefore, we are of opinion that the plaintiff was the person who made the offer and that the contract was not concluded when Exhibit A was sent.

Mr. Venkatarama Sastriar contended that even if the plaintiff should be regarded as the proposer, the cause of action must be taken to have arisen at the place where

(20) (1873) 4 App. Cas 311; 43 L. J. Ch. 816; 41 L. T. 1; 7 V. R. 555.

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the offer was made, namely, in Negapatam and relied upon the recent judgment of the learned Chief Justice and Sadasiva Aiyar, J., in *Kuthiravattam Appu Thamban v. Foulkes* (2). The facts of that case are different from the present. Further the decisions relied on in that case were considered and distinguished in *Olarks v. Knowles* (4), which was not referred to in the judgment of the learned Chief Justice. In this latter case Lush, J., says: "The material question is not where the offer was sent from but where it was made, and the making of the offer is proved by showing that it was received." No doubt where the plaintiff and the defendant are in the same place, the offer could be communicated at once and would be received at the place from which it emanates. That was what happened in *Green v. Beach* (3). But where the acceptor resides in a different place, it is when the offer reaches him that there can be a complete offer. The Indian Contract Act by section 4 makes that position clear. It says: "The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made." Therefore, until a proposal is received there is no offer. We do not think that the learned Chief Justice, in the unreported case relied on, intended to lay down that the place from which the offer is sent furnishes a venue for a suit, even though the acceptor resides elsewhere.

The next point for consideration is whether any part of the cause of action arose in Negapatam. The course of dealing was this. The plaintiff in Negapatam made the offer. The defendant in Mandalay accepted it. He prepared scantlings and put them on board ship, which was property of neither the plaintiff nor the defendant. He then made out a bill of lading in his own name. By presenting that bill of lading he drew from the National Bank the sum of money which was due to him according to his estimate. The National Bank transmitted the bill of lading to the Bank of Madras, which in its turn passed it on to the plaintiff. Very learned arguments were addressed to us on both the sides on the question whether in these circumstances a part of the cause of action did not arise in Negapatam. Mr. Muthukrishna

Iyer for the respondent strongly relied upon *Orozier Stephens & Co. v. Auerbach* (14) for the position that the whole cause of action arose in Mandalay. That undoubtedly is a direct decision. In that case some goods were sold under a C. I. F. contract by a foreigner to a purchaser in England, who paid the price in exchange for the bill of lading. But on the goods arriving in England the purchaser after examination refused to accept them on the ground that they were not according to contract. He brought a suit for breach of contract in England against the foreigner. The Court of Appeal held that no part of the cause of action arose in England. Vaughan Williams, L. J., said: "For myself I cannot see that it makes any difference whether the action is for non-delivery or for delivering goods not according to the quality stipulated for in the contract; in either case the time and place of delivery are the time when and the place where the vendor delivers the goods on board ship, it being admitted that the property in the goods passes to the purchaser at the moment of delivery on board and that they are at the purchaser's risk throughout the voyage." Farwell, L. J., said: "In the present case, the alleged breach was in Hamburg, where the defendant shipped the wrong sort of aluminium and the issue of the writ and the leave to serve notice of the writ out of the jurisdiction must be discharged." If this case stood alone, it would be conclusive of the present case. But the decision in *Biddell Brothers v. Olemens Horst Co.* (15), which went up in appeal and is reported in the same Volume at page 934 [*Biddell Brothers v. Olemens Horst Co.* (16)] which was ultimately concluded in the House of Lords in *Olemens Horst Co. v. Biddell Brothers* (17), appears on its face to be not quite consistent with the view taken by Vaughan Williams, L. J., and Farwell, L. J. In *Biddell Brothers v. Olemens Horst Co.* (15) the contract was for the sale of hops "to be shipped to Sunderland, provided that the buyer shall pay for the said hops at the rate of 90 s. per 121 lbs. C. I. F. to London, Liverpool or Hull, terms net cash." Justice Hamilton held: "that the seller was entitled to payment against shipping documents upon the delivery of

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the hops on board ship at the port of shipment, and that the buyer had the right of rejection, if they were found upon examination not to be in conformity with the contract." *Crozier Stephens & Co. v. Auerbach* (14) was quoted in argument. But we do not find the learned Judge making any reference to it in his judgment. In appeal the judgment of Hamilton, J., was reversed by Vaughan Williams, L. J., and Farwell, L. J. But Kennedy, L. J., was for affirming it. It must be remembered that the first two Lord Justices decided *Crozier Stephens & Co. v. Auerbach* (14). Before the Court of Appeal also that case was quoted, although in the judgment of the learned Lord Justice there is no reference to it. We must refer to a sentence or two in the judgment of Kennedy, L. J., because it was that judgment that was ultimately upheld by the House of Lords. He says in page 956: "The bill of lading in law and in fact represents the goods. Possession of the bill of lading places the goods at the disposal of the purchaser. 'A cargo at sea,' says Bowen, L. J., in *Sanders v. Maclean* (21), 'while in the hands of the carrier, is necessarily incapable of physical delivery. During this period of transit and voyage, the bill of lading, by the law merchant, is universally recognised as its symbol and the indorsement and the delivery of the bill of lading operates as a symbolical delivery of the cargo. Property in the goods passes by such indorsement and delivery of the bill of lading, whenever it is the intention of the parties that the property should pass, just as under similar circumstances the property would pass by an actual delivery of the goods.'" It is not necessary to quote further from this judgment. The House of Lords confirmed it. In *Clemens Horst Co. v. Biddell Brothers* (17), Lord Chancellor Earl Loreburn says: "Now, section 28 of the Sale of Goods Act says in effect that payment is to be against delivery. Accordingly we are supplied by general law an answer to the question where this cash is to be paid. But when is there delivery of goods which are on board ship? That may be quite a different thing from delivery of goods on shore. The answer is

(21) (1883) 52 L. J. Q. B. 431; 11 Q. B. D. 327; 42 L. T. 462; 31 W. R. 698; 5 Asp. M. C. 160.

that delivery of the bill of lading, when the goods are at sea, can be treated as delivery of the goods themselves, this law being so old that, I think, it is quite unnecessary to refer to authority for it." This case establishes this proposition, that a mere delivery at the port to the shipping company is not sufficient to pass the goods. It is the delivery of the bill of lading that has that effect. On that proposition it may be said that the performance of the contract is to be in the place where the bill of lading is delivered. Under the Indian law that would be a place where the cause of action in part arises, because section 17 of Act XIV of 1852, Explanation III, clause (3), states:—"The cause of action would arise in the place where in performance of the contract any money to which the suit relates was expressly or impliedly payable." Section 20, clause (c), of the new Code says: "Every suit shall be instituted in a Court where the cause of action, wholly or in part, arises." Whether one agrees with the suggestion that section 20 of the Act of 1908 gives extended jurisdiction and is wider than section 17 of the old Code or not, there can be no doubt that the new section is not restrictive of the right of the suit. Therefore, if it is held that the place where money is payable on the bill of lading is the place where the contract is to be performed and if we come to the conclusion on this case that it was in Negapatam that the bill of lading was really tendered for payment, following *Clemens Horst Co. v. Biddell Brothers* (17) we would hold that the cause of action arose in Negapatam. Before expressing our final view upon that question we may as well deal with a decision quoted by Mr. Venkatarama Sastriar, namely, *Arnhold Karberg & Co. v. Blythe Green Jourdain & Co.; Theodor Schneider & Co. v. Burgett Newsam* (18), which is also a case dealing with C. I. F. contracts. Scrutton, J., says: "I understand the effect of those judgments [referring to *Mirabitta v. Imperial Ottoman Bank* (22) and some other cases] to be that where the seller, by taking the bills of lading in his own name or to his own order, has reserved the *jus disponendi* or power of dealing with the goods, the pro-

(22) (1878) 3 Ex. D. 164; 47 L. J. Ex. 418; 33 L. T. 597.

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party does not pass on shipment, but is vested in the vendor until he receives payment from the buyer in exchange for the documents of title." On appeal from the judgment of Scrutton, J., it was held in *Arnhold Karberg & Co., v. Blythe Green Jourdain & Co.*; *Theodor Schneider & Co. v. Burgett & Newsam* (23) that a C. I. F. contract is a contract for the sale of goods to be performed by the delivery of documents. The view of Scrutton, J., that the contract itself is a sale of documents relating to goods and not a sale of goods, did not find favour with the Court of Appeal. In a subsequent case, *Mambre Saccharine Co. v. Corn Products Co.* (19), McCardie, J., in referring to the judgment of Scrutton, J., and of the Court of Appeal says: "For in reality, as I have said, the obligation of the vendor is to deliver documents rather than goods, to transfer symbols rather than physical property represented thereby. If the vendor fulfils his contract by shipping the appropriate goods in the appropriate manner under a proper contract of carriage and if he also obtains the proper documents for tender to the purchaser, I am unable to see how the rights or duties of either party are affected by the loss of ship or goods, or by knowledge of such loss by the vendor, prior to actual tender of the documents." In the opinion of the learned Judge in the last mentioned case the loss of goods or the loss of the ship would not in the least affect the obligations of the parties. Therefore, it seems to us if we may say so with respect that the decision in *Orozier Stephens & Co. v. Auerbach* (14) is not quite reconcilable with all these subsequent cases.

Now the question is, was the plaintiff entitled to a tender of the bill of lading at Negapatam and did defendant's rights to money arise in Negapatam on such tender? It seems to us that, upon this matter, the correspondence to which we have already referred and the course of business agreed to between the parties make it clear that the plaintiff did not stipulate for a tender of the bill of lading at Negapatam. The bill of lading was made in the consignor's name and was according to arrangement deliverable to the National Bank, Mandalay.

(23) (1916) 1 K. B. 495; 85 L. J. K. B. 665; 114 L. T. 152; 21 Com. Cas. 174; 13 Asp. M. C. 235; 60 S. J. 156; 32 T. L. R. 186.

Vide Exhibit XXXI. As we pointed out early in our judgment, the National Bank were simply the agents of the Madras Bank. The whole money was paid to the consignor in Mandalay. The Bank of Madras and the National Bank were respectively the agents of the plaintiff for the receipt of the bill of lading and for the payment of the money in Mandalay. Through their agency the defendants received the money at Mandalay. That was the stipulation which the defendant insisted upon and that was the stipulation which was finally acceded to. Therefore, it seems to us that the cases beginning with *Biddell Brothers v. Olemens Horst Co.* (15) do not cover the present case. We base our judgment not upon the decision of *Orozier Stephens & Co. v. Auerbach* (14) but on the observations in subsequent cases, wherein it is pointed out that the delivery of the bill of lading is delivery of the goods. According to our construction of the correspondence that delivery was to be made to the plaintiff's agent at Mandalay and the duty of paying for the bill of lading was entrusted to the plaintiff's agent at Mandalay. Consequently the performance of the contract did not become due in Negapatam. For these reasons we are of opinion that no part of the cause of action arose in Negapatam and that the conclusion of the Subordinate Judge is right. This appeal should be dismissed with costs.

M. C. P.

Appeal dismissed.

CALCUTTA HIGH COURT.
APPEAL FROM APPELLATE DECREE NO. 2986
OF 1916.

August 26, 1916.

Present:—Mr. Justice Chatterjea and
Mr. Justice Panton.

HARENDRA KUMAR ROY CHOW.
DHURY AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

DEBENDRA KUMAR DAS AND OTHERS—
DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), ss. 16, 74—Mortgage—
Compound interest, whether penal—Undue influence
—Hardship, relief on ground of.

In the absence of a finding that a contract to pay
compound interest was brought about by

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undue influence on the part of the creditor, or that he had unduly taken advantage of his position in the matter, he cannot be deprived of the compound interest stipulated to be paid. The fact that the borrower failed to realise what the rate of compound interest would work out to in a few years or that he entered into an improvident bargain (unless it is an unconscionable one, would not entitle him to relief from a Court of Justice on the ground of hardship. [p. 559, col. 2.]

Appeal against the decree of the District Judge, Backergunj, dated the 14th of September 1916, affirming that of the Subordinate Judge, 1st Court of that district, dated the 7th of February 1916.

FACTS appear from the judgment.

Dr. Sarat Chandra Basak (with him Babu Sarat Chandra Datta), for the Appellants.—Our claim for compound interest has been disallowed by the Court below, which has given a decree for simple interest at 15 per cent. The lower Court has not been able to find any coercion or undue influence on our part, still it would not allow us our claimed interest. The contract to pay compound interest cannot be assailed and holds good and must be held operative. The learned Judge says that the debtors "did not realise" the effect of their contract. Surely that is a most flimsy argument. Refers to *Aziz Khan v. Duni Chand* (1). It is absurd to hold that the interest of 15 per cent. per annum with annual rests is in the nature of a penalty.

Babu Sarat Chandra Roy Chowdhury (with him Babu Trailokyanath Ghosh), for the Respondents.—It is certainly a case of great hardship. The contract, it cannot be gainsaid, is a highly improvident one and as such unconscionable. The stipulated compound interest is penal and so the Court was quite justified in granting me relief. Refers to *Abdul Majid v. Ksheroode Chandra Pal* (2). Even anything over ten per cent. in case of good security is exorbitant. Cites *Krishna Charan Barman v. Sarat Kumar Das* (3).

Dr. S. O. Basak replied.

JUDGMENT.—This appeal arises out of a suit upon a mortgage.

The amount advanced on the mortgage (on the 31st Bhadra 1304) was Rs. 700. The interest agreed upon to be paid was

at the rate of 15 per cent. per annum with annual rests. In Sraban 1305 the mortgagors paid Rs. 300, which satisfied the interest up to that date and reduced the mortgage debt by Rs. 210; some further payments were subsequently made, and the debt of Rs. 489 and odd, which was due in August 1898, swelled to Rs. 4,727 at the date of the suit.

The Court below has disallowed compound interest, and has given a decree for simple interest at 15 per cent. The plaintiffs have appealed to this Court.

It is not found that the contract to pay compound interest was brought about by any undue influence on the part of the creditors or that they had unduly taken advantage of their position in the matter. The Court below has disallowed compound interest, mainly on the ground that the mortgagors did not realise that the interest would be so much when they entered into the bargain. The learned District Judge observes:—When the rate of interest is stated as a monthly rate, the borrower does not realize what that rate works out at per annum. Far less does a borrower realize at what compound interest works out after a few years. If the mortgagors could have understood that, in spite of the payments they had made, they would have been paying interest at the rate of nearly 150 per cent. on the principal money due at the date of the suit, or that at the present time they would have been paying interest at the rate of 200 per cent, it is certain that they would never have entered into the bargain."

But the mere fact that the borrower did not at the time of borrowing realize what the rate of compound interest would work out after a few years or that he entered into an improvident bargain (unless it is an unconscionable one), cannot deprive the lender of the compound interest stipulated to be paid. In the recent case of *Aziz Khan v. Duni Chand* (1) the Judicial Committee observed: "The transaction was undoubtedly improvident, but in the absence of any evidence to show that the money-lender had unduly taken advantage of his position, it is difficult for a Court of Justice to give relief on grounds of hardship".

The learned District Judge relied upon certain decisions of this Court in support of

(1) 43 Ind. Cas. 933; 23 C. W. N. 130; 101 P. R. 1918; 16 P. W. R. 1918 (P. C.).

(2) 29 Ind. Cas. 843; 42 C. 697; 19 C. W. N. 809.

(3) 34 Ind. Cas. 609; 2 C. W. N. 740; 25 C. L. J. 24; 44 C. 162.

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the position that the Court is competent to grant relief whenever the rate of interest appears to be of a penal character, that is, so unconscionable and extravagant that no Court should allow it. He seems to be of opinion that any compound interest is penal, at any rate the rate of interest (15 per cent. compound interest) in the present case was of a penal character, that it is so unconscionable and extravagant that no Court should allow it. But compound interest is not necessarily penal. What constitutes a stipulation by way of penalty must be determined in each individual case upon its own special circumstances. In *Khogaram Das v. Ram Sankar Das* (4) there was a stipulation for payment of interest on default at 75 per cent. and the creditors were in a position to take advantage of the embarrassment of their debtors. In *Challaphroo v. Bangi Behary Sen* (5) the interest was 48 per cent. per mensem with six monthly rests, the amount advanced, viz., Rs. 400 swelled to 3 lacs and 75 thousand rupees at the date of suit, though the claim was laid at Rs. 3,000. The result of the contract was the plaintiff had become entitled to interest at the rate of 5,858 per cent. which no Court of Justice would enforce. In *Abdul Majid v. Ksheroke Ohandra Pal* (2) the rate of interest was 5 per cent per mensem (compound interest) and the Court took into its consideration the ignorance and want of knowledge of the defendant and the conduct of the parties. Lastly in the case of *Krishna Charan Barman v. Sarat Kumar Das* (3) the interest was at the rate of 75 per cent. and the defendants were poor and ignorant men.

In the present case the interest stipulated to be paid was 15 per cent. per annum with annual rests, and we are unable to hold that it was a penal rate. It is true in the case of *Abdul Majid v. Ksheroke Ohandra Pal* (2), cited above, there is an observation of the learned Judges (Holmwood and Chapman, JJ.) that "where there is ample security, an excessive rate of interest has been held to be anything over ten per cent". We do not find, however, any authority for such a proposition; on the other hand in the case

of *Aziz Khan v. Duni Chand* (1) before the Privy Council the interest was 25 per cent. compound interest. In *Lala Balla Mal v. Akhal Shah* (6) the Judicial Committee observed:—"2 rupees per mensem is by no means an unusual rate of interest in cases from India coming before this Board", and in *Gopewar Saha v. Jadab Ohandra* (7) interest at the rate of 22 per cent (simple) was held not to be exorbitant. We have referred only to the recent cases, in other cases interest at even higher rates was allowed.

As stated above, the question whether the rate of interest stipulated to be paid is or is not penal, must depend on the circumstances of each particular case, and we are unable to hold that 15 per cent. compound interest is of such a highly exorbitant character that no Court should allow interest at such rate.

The learned District Judge observes that "Every time the mortgagors made a payment, they asked that the compound interest should be remitted and though no definite promise was made to them, they were led to hope that some substantial remission would be given. In this way, the debt was allowed to drag on for 17 years for the benefit of the creditors, each year the compound interest increasing more and more rapidly".

The matter has been discussed before us on the evidence and ultimately the learned Pleader for the appellant has agreed on behalf of his client to accept the sum of Rs. 4,000 in full satisfaction of his claim in the suit under the mortgage, provided the amount is paid within three months from this day, and if the said amount is not paid within the time specified, this appeal will stand decreed with costs, i. e., the plaintiff will get a decree for the full amount claimed with compound interest as stipulated in the bond, the amount whereof will be determined by the Court below.

Order accordingly.

(6) 48 Ind. Cas. 1; 23 C. W. N. 233 at p. 239; 35 M. L. J. 614; 16 A. L. J. 905; 124 P. R. 1918; 25 M. L. T. 55; 180 P. W. R. 1918; 29 C. L. J. 165; 1 U. P. L. R. (P. C.) 25; 21 Bom. L. R. 558 (P. C.).

(7) 32 Ind. Cas. 537; 22 C. L. J. 352; 20 C. W. N. 689; 43 C. 632.

(4) 27 Ind. Cas. 815; 42 C. 652; 21 C. L. J. 79; 19 C. W. N. 775.

(5) 31 Ind. Cas. 394; 20 C. W. N. 408; 22 C. L. J. 311.

RAM NARAIN v. HARNAM DAS.

ALLAHABAD HIGH COURT.

PRIVY COUNCIL APPEAL No. 5 OF 1918.

November 21, 1919.

Pr sent:—Sir Grimwood Mears, Kt.,
Chief Justice, and Justice Sir P. C.

Banerjee, Kt.

RAM NARAIN—APPELLANT

versus

HARNAM DAS AND OTHERS—

OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1903), O. XLV, r. 13—Partition suit—Preliminary decree—Appeal to His Majesty in Council—Proceedings for final decree, whether can be stayed—Execution proceedings, when should be stayed.

Inasmuch as proceedings under a preliminary decree are not proceedings in execution of a decree, but are proceedings in the suit for a final decree, an application to stay such proceedings cannot be entertained under the provisions of Order XLV, rule 13, Civil Procedure Code. [p. 56, col. 2]

Where an appellant is pursuing his appeal expeditiously, the Courts should be very chary of removing property from his possession and placing it in the hands of another who may ultimately be found never to have been entitled to it. [p. 56, col. 2.]

Messrs. K. N. Katu and S. Raza Ali, for the Appellant.

Mr. Panna Lal, for the Respondents.

JUDGMENT.

MEARS, C. J.—In this case the appellant is appealing to the Privy Council in respect of proceedings brought and which have up to the present resulted in a preliminary decree of this Court, which decides that the property in dispute in the action is joint property and is liable to partition. Proceedings to ascertain the respective shares are pending or in process of taking place in the Court below, and the appellant has applied to this Court with a view to our staying such proceedings. He has filed an affidavit in which he gives reasons which *prima facie* are good reasons for assenting to that application if, in fact, we have the power to grant it. But our attention has been called to the provisions of Order XLV, rule 13, and to the case of *Laliteswar Singh v. Bhabeswar Singh* (1) from which it appears clear that as the matter now stands we have no power to stay these proceedings. Now at one stage of the matter I thought it extremely desirable that an application should be made to the Court below so that if possible the Judge should make an order

1) 1 Ind. Cas. 812; 9 C. L. J. 561; 13 C. W. N. 690; 9 M. L. T. 11.

adjourning the partition proceedings until the decision of the Privy Council was known. But it has been pointed out that the property consists of a few houses and that the moveable part of it is in cash and shares—things whose value is easily ascertainable. Farther it has been pointed out that when the respondent to the appeal, the present holder of the decree, applies to execute the decree, it will then be open to the appellant to urge before the Judge of the lower Court, reasons why execution should be stayed. I think generally that it would be desirable and I have no doubt that it is the practice for Judges in the lower Courts to be very cautious in these cases, and where they find an appellant pursuing an appeal expeditiously, to be very chary of removing property from the possession of one litigant and placing it in the hands of another who may ultimately be found by the Privy Council never to have been entitled to it. Therefore, if an application is made to execute this decree, I hope that the learned Judge in the Court below will give due consideration to all the circumstances and will do his best to prevent the property already in the possession of the appellant from passing into the hands of the respondent until the decision of the Privy Council is made known.

BANERJEE, J.—I also am of opinion that this application cannot be entertained under the provisions of Order XLV, rule 13. The proceedings in the Court below are not proceedings in execution of a decree but are proceedings in the suit for a final decree for partition. The decree which has already been made is a preliminary decree and this decree has to be made absolute before execution can be taken out. At present the case has not proceeded beyond the stage of a suit in which a preliminary decree has been passed and in which further proceedings are to be taken for the making of a final decree. Order XLV, rule 13, only empowers this Court to direct stay of execution in certain cases where sufficient reason is shown. In the present case no final decree has been passed and no proceedings have been taken for execution of a decree. Therefore, the present application is not justified by the provisions of the rule to which

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I have referred and it seems to me to be premature. When an application for execution is made after the passing of the final decree it will then be time for the present applicant to make such application as may be proper. In my opinion this application should be dismissed with costs.

By THE COURT.—The order of the Court is that the application is dismissed with costs.

Application dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1022 OF 1917.

August 6, 1919.

Present:—Sir Lancelot Sanderson, Kt., Chief Justice, and Justice Sir John Woodroffe, Kt.

UMESH CHANDRA GHOSH—PLAINTIFF
— APPELLANT.

versus

Srimati NISTARINI BESU WIDOW OF
SARAT CHANDRA BESU—

DEFENDANT—RESPONDENT.

Registration Act (XVI of 1908), ss. 72, 76, 77—
Refusal to register document by Sub-Registrar—Appeal to Registrar, dismissal of—Suit to enforce registration, maintainability of.

Where an appeal from the order of a Sub-Registrar refusing to admit a document for registration is rejected by the Registrar, such rejection is tantamount to refusing to order the document to be registered under section 72 or section 76 of the Registration Act, and a suit under section 77 of that Act to enforce registration of the document is maintainable. [p. 563, col. 2; p. 564, col. 1.]

Appeal against the decree of the Subordinate Judge, Dacca, dated the 16th of February 1917, affirming that of the Officiating Munsif, 2nd Court at Manikgunj, dated the 14th of June 1916.

FACTS appear from the judgment.

Babu Probodh Chandra Rai, for the Appellant.—The appeal arises out of a suit for the enforcement of registration of a deed of relinquishment (*muktipatra*). The deed was executed on 30th January 1914 by the defendant-respondent in favour of the plaintiff relinquishing all claims to certain properties. Between

11th May 1914 and 10th June 1914, the document was an exhibit in a criminal case and was tendered for registration on 29th June 1914, by the plaintiff. Under section 23 of the Indian Registration Act the time for registration is four months and another period of four months is allowed under section 25 on showing of reasonable cause for delay and payment of a penalty fee. The Sub-Registrar refused to register and forwarded it to the District Registrar. On 21st September 1914 the latter held that the deed may be accepted for registration on payment of penalty under section 25. In January 1915, the plaintiff applied for registration. The Sub-Registrar again refused on the ground of its being out of time. On 23rd February 1915, an appeal was preferred to District Registrar which was rejected on 1st June 1915. On 3rd June 1915, the present suit was filed. Both Courts have held that the suit is not maintainable; my submission is that there was a refusal to register within section 77. The suit is quite competent and I come in under section 77 inasmuch as the appeal was dismissed by the District Registrar.

Moulvi Fazlul Haq, for the Respondent.—There is a difference between refusal to register and refusal to accept. Acceptance does not amount to refusal. Section 77 provides a remedy for a party who has got over the preliminary stages. Here the matter did not reach the stage of registration at all. Section 77 is in part XII under the heading, 'On Refusal to Register.'

Going back to sections 23 and 25 they relate to initial stages after which part VI comes and then part XII. The question before the Registrar was whether the document was to be accepted for registration or not. The document was not presented within the time prescribed by section 23. Then the District Registrar rejected the appeal on the ground that no case was made out for registering the document. The Act does not contemplate that the parties should wait for a long time before taking the necessary action. The wording of section 72 is apparently against me. Under that section appeal is allowed to the District Registrar on various grounds. My submission is that the Courts below were perfectly justified in dismissing the suit on the ground of its not being maintainable.

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Babu Probodh Chandra Rai replied briefly.
JUDGMENT.

SANDERSON, C. J.—This is an appeal by the plaintiff against the judgment of the learned Subordinate Judge of Dacca, who held that the suit which was brought by the plaintiff under section 77 of the Indian Registration Act for the registration of a Muktipatra was not maintainable. The facts stated to us to-day by the learned Vakil are as follows:—

The deed is alleged to have been executed on the 30th of January 1914; it was tendered to the Sub Registrar for registration on the 29th of June 1914 which was more than four months from the date of execution, the period prescribed by section 23 of the Registration Act. But it was alleged that the document had been kept in the possession of the Criminal Court for the best part of a month, and for that and other reasons the present plaintiff alleged that the delay ought not to be allowed to prevent the registration. On the 1st of July the Sub-Registrar sent the matter to the Registrar. More than two months and a half elapsed, and then on the 21st of September 1914, the Registrar held that the deed might be accepted for registration, on the payment of a penalty. No time was mentioned in the order as to when the penalty of Rs. 25 was to be paid. The plaintiff alleged that no notice of this order was given to him, but that on an enquiry by the plaintiff himself at the office he ascertained that the order had been made, and, therefore, on the 25th of January 1915, he applied to the Sub Registrar to accept the fee and the penalty and to have the document registered. The Sub-Registrar made an order to this effect; "Eight months have passed; the deed cannot be accepted for registration." I think that this order shows some misconception of the sections of the Statute. A period of four months is allowed by section 23 for presentation for the purpose of registration, and section 25 empowers the Registrar to direct that the document shall be accepted for registration in certain circumstances and on certain conditions in cases where the delay in presenting does not exceed four months. The words in section 25 are these: "If owing to urgent necessity or unavoidable accident, any document executed..... in British India is not presented for re-

gistration, till after the expiration of the time hereinbefore prescribed in that behalf" (that is to say, four months mentioned in section 23) "the Registrar, in cases where the delay in presentation does not exceed four months, may direct that, on payment of a fine not exceeding ten times the amount of the proper registration fee, such document shall be accepted for registration." In this case there was delay in presentation but such delay did not exceed four months; the document was executed on the 30th January 1914, the four months specified by section 23 would expire on or about the 30th May 1914. The document was tendered on the 29th June 1914, so that there was about a month's delay only in presentation of the document, and the Registrar on the 21st September 1914 exercised the powers vested in him by section 25 and directed that the document should be accepted for registration. The next material date is the 23rd of February 1915, when the plaintiff made an application to the Registrar. On the 1st of June 1915 the Registrar made the following order: "No case has been made out for registration. The appeal is rejected." Then the suit was brought on the 3rd of June 1915.

The learned Judge has held that the aforesaid facts go to show that the registration was not refused under sections 72 and 76 of the Registration Act, but that the document was refused to be accepted for registration as the plaintiff failed to pay the penalty in due time.

The first matter, to which it is necessary to refer, is that section 72 applies to an order of the Sub-Registrar refusing to admit a document to registration, and provides for an appeal to the Registrar, if presented to him within thirty days from the date of the order and the Registrar may reverse or alter such order. In this case there was a refusal by the Sub Registrar to admit the document to registration within the meaning of section 72; and, consequently there was an appeal to the Registrar, and the order which the Registrar in fact made was, that he refused to register the document. Therefore, in my judgment, this case comes within the words of section 77 because the Registrar did refuse to order the document to be registered under section 72 or section 76 of

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the Registration Act. Consequently, the suit was maintainable.

This matter must go back to the Court of first instance, because other defences were raised, as for instance, the defendant denied that he executed the deed. That and any other matters which are open to the defendant will have to be decided before the Court can give a direction to the Registrar to register the document.

Therefore, this appeal is allowed and the matter remanded to the Court of first instance for determination on the other issues.

The appellant will have his costs in this Court and in the lower Appellate Court, and also the costs of the hearing in the first Court which was limited to the question whether the suit could be maintained. These costs must be distinguished from the general costs of the suit.

WOODROFFE, J.—I agree.

Appeal allowed.

ODDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REFERENCE FOR RULING NO. 1 OF 1919.

August 22, 1919.

Present:—Mr. Stuart, J. C., and Pandit Kanhaiya Lal, A. J. C.

ALI BAHADUR KHAN—APPLICANT

versus

BISHESHAR SINGH—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1903), ss. 68, 71, O. XLVI, r. 1—Collector executing decree, whether "Court" —"Court" in O. XLVI, r. 1, meaning of—Reference by Collector, whether competent.

Only a Court has jurisdiction to make a reference under Order XLVI, rule 1, of the Civil Procedure Code, and the word "Court" in the rule means a Court of civil judicature.

The functions of a Collector in executing a decree transferred to him for that purpose, though designated as judicial, are purely ministerial, and in the exercise of these functions he is not a Court of civil judicature. A Collector, therefore, to whom a decree is transferred for execution under section 68, Civil Procedure Code, has no jurisdiction to make a reference under Order XLVI, rule 1, of the Code.

Reference submitted by the Deputy Commissioner, Sultanpur, for orders of the Court of the Judicial Commissioner.

Mr. Niamat-ul lah, for the Applicant.

Messrs. A. P. Sen, Ali Mohammad and Shambhu Nath, for the Opposite Party.

JUDGMENT.—A preliminary objection is taken by the learned Counsel for Thakur Bisheshar Singh to the effect that the learned Collector had no jurisdiction to make a reference under Order XLVI, rule 1. We consider that this objection must prevail. The rule in question states amongst other things that where, in the execution any such decree, any question of law or usage having the force of law arises, on which the Court executing the decree entertains reasonable doubt, the Court may draw up a statement of the facts of the case and the point on which doubt is entertained and refer such statement with its own opinion on the point for the decision of the High Court. It is clear from the rule that only a Court has jurisdiction to make such a reference. What does the word "Court" mean in this connection. We have no hesitation in saying that the word "Court" in this connection must be taken to mean a Court of civil judicature. The Code of Civil Procedure is described in the preamble as an Act to consolidate and amend the laws relating to the procedure of the Courts of civil judicature and the word "Court" used throughout the Code usually means a Court of civil judicature. We consider that the word bears this meaning in the rule in question. A Collector acting in execution of a decree transferred to him under section 68 is deemed to be acting judicially under the provisions of section 71 and in a case such as the present, where action has been taken under section 326 of the old Code which corresponds to section 72 of the new Code, it might be held that the provisions of section 71 have application. But it does not follow that, because the Collector is deemed to be acting judicially in execution of the decree, he, therefore, is a Court. His functions in the present instance are delegated functions of a ministerial character. While exercising those functions he may be acting judicially but he is not a Court of civil judicature. For the above reasons we find that the learned Collector has no authority to make the reference in the present case and that we have no authority to express an opinion upon it. We return the papers to him accordingly.

Papers returned.

RAHIMUNNISSA BEGAM v. SRINIVASA AYYANGAR.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 97 OF 1919.

October 8, 1919.

Present:—Mr. Justice Seshagiri Aiyar and
Mr. Justice Moore.

RAHIM-UN-NISSA BEGAM AND OTHERS

—CLAIMANTS-PETITIONERS NOS. 2 TO 5—

APPELLANTS

versus

M. A. SRINIVASA AYYANGAR

PLAINTIFF—RESPONDENT.

*Civil Procedure Code (Act V of 1908), O. XXII,
r 9—Abatement of suit, effect of—Appeal, whether lies
—Application to set aside abatement, rejection of—
Right of judgment-creditor of deceased plaintiff, whether
affected by abatement order.*

An order of abatement is a judgment and should be followed up by a decree. It is also appealable as a decree [p 568, col. 1.]

An order of abatement operates as a judgment in favour of the defendant and the only course open to a legal representative of the deceased plaintiff to escape the effect of the abatement order is to apply to set aside the abatement. If he does not succeed in vacating the judgment and so long as the defendant continues in possession, the order of abatement is conclusive of the defendant's rights to the property. [p. 568, col. 1.]

Goda Coopuramier v. Sundarammal, 3 Ind. Cas. 739; 33 M. 167; 6 M. L. T. 271, followed.

Jaysingh v. Gopal, 6 Bom. L. R. 633, distinguished.

A person who has obtained a decree against the deceased plaintiff stands in no better position and is equally concluded by the abatement order. Though the principle of *res judicata* may not apply to him he has to displace a claim in the title of the defendant, and has to establish against a party in possession and in whose favour an order of Court has been passed that that party is not entitled to retain possession as owner of the property. [p. 567, col. 1.]

The prohibition against suit applies equally to execution and the decree holder cannot execute the decree against the property as if it belonged to the judgment-debtor. [p. 567, col. 1.]

Appeal against the order of the District Judge, Chingleput, in Miscellaneous Petition No. 423 of 1915, (Execution Petition No. 34 of 1915, and in Original Suit No. 43 of 1913).

Mr. O. Venkatasubbaramiah, for the Appellants.

Messrs. T. Narasimha Aiyangar and N. S. Rangasawmi Aiyangar, for the Respondent.

JUDGMENT.—The respondent obtained a money decree in Original Suit No. 43 of 1913, in the District Court of Chingleput against the assets of a Muhammadan lady

named Rahimat-un-nissa Begam in the hands of the defendants, and in execution attached certain immovable properties belonging to the deceased judgment-debtor. Rahimat-un-nissa Begam's father Abdul Razak put in a claim petition alleging that the property belonged to him, exclusively, and that his daughter had no interest in it. Abdul Razak having died, the present appellants were brought on record as his legal representatives. The sale-deed for the property admittedly stands in the name of Abdul Razak, her father. The District Judge dismissed the claim petition and allowed execution to issue. Hence this appeal. In Original Suit No. 12 of 1909, in the District Court of Chingleput the judgment-debtor brought a suit against her father and his alienees for recovery of these properties on the allegation that the sale-deed was *benami* for her and that she was the real owner. She died during the pendency of the suit, and an order was made on the 16th of October 1912, declaring that the suit abated. The present respondent first applied to set aside the abatement on the ground that as a creditor he was entitled to the relief. That was dismissed. (*Vide Exhibit D*). Thereupon he obtained Letters of Administration to his judgment debtor's estate on the 31st of March 1915, and again applied for setting aside the abatement. That also was rejected. The question for decision is whether, having regard to the abatement of the suit and to the dismissal of the application for setting aside the abatement the respondent is precluded from attaching the property as that of his judgment-debtor. We are unable to agree with the appellant's Vakil on this question. The capacity in which he seeks to execute his decree is not that of a person who has obtained Letters of Administration or generally as the legal representatives of the judgment debtor, but in his capacity as decree-holder. We do not think that there is any estoppel against his being permitted to execute the decree.

The more difficult question is whether so long as the abatement stands the decree-holder can treat the property as that of his judgment-debtor. Two questions arise for consideration, (1) what is the effect of an order of abatement; and (2) how far

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does it affect persons who are not the legal representatives of the deceased plaintiff? On neither of these questions is there any direct authority. But it seems to us that both the questions must be answered against the decree-holder. It has been consistently held in this Court that an order of abatement is appealable as a decree. It was first laid down in *Subbayya v. Saminadayyar* (1) and was followed in *Meenatchi Achi v. Ananthanarayana Ayyar* (2). In *Suppu Nayakan v. Perumal Ohetty* (3) all the earlier authorities were reviewed and it was pointed out that an order of abatement is a judgment and should be followed up by a decree. These decisions are supported by the *dictum* of the Judicial Committee in *Brij Indar Singh v. Kanshi Ram* (4). Their Lordships say at page 109: "An order abating the suit, looking to the terms of section 371 already quoted, may be said to be really tantamount to a judgment in favour of the defendant." This observation was made with reference to the Civil Procedure Code of 1882. Order XXII, rule 9, reproduces without any material alteration the language of the old Code. The *dictum* of the Judicial Committee that an order of abatement operates as a judgment in favour of the defendant shows that in effect no distinction is made between a judgment obtained on merits and a judgment obtained on failure to prosecute the suit. So long as the plaintiff is unable to vacate the judgment and so long as the defendant continues in possession he can plead against the plaintiff and those claiming under him that the order of abatement is conclusive of his rights to the property. *Goda Coopuramier v. Sundarammal* (5) lays down that the only course open to a legal representative if he wants to escape the effect of the abatement order is to apply for setting aside the abatement and that so long as it stands unreversed, it is

binding on him. Thus far it is clear that the heirs of the plaintiff who are out of possession are concluded by the abatement orders.

Mr. Narasimha Aiyangar, for the respondent drew our attention to *Jayasing v. Gopal* (6) wherein the learned Judges held that an order of abatement does not operate as *res judicata*. In that case, the legal representative of the plaintiff, on whose death the suit abated, got into possession of the property. It was decided that, being in possession, he was entitled to resist the suit brought to oust him from possession and that the previous order of abatement did not preclude him from setting up title. Accepting this judgment as rightly laying down the law, it does not affect the present case. In this case the heirs of the defendant in the first suit are still in possession. The learned Vakil for the respondent argued that the possession of the father of the defendant in the first suit, after the death of his debtor which event happened earlier, must be attributed in his right as the heir of the debtor and not a higher title; he relied upon this Court's decision in *Velayutham Pillai v. Subbaroya Pillai* (7). There is no force in this contention. The father had, in the language of the Judicial Committee, obtained a judgment declaring his rights to the property which stood in his name and which right was challenged by the plaintiff. It is impossible to suggest that he, either voluntarily or by a fiction of law, gave up this right and substituted for it a right to a share in that property. *Velayutham Pillai v. Subbaroya Pillai* (7) does not lay down any such proposition. Therefore, the right position is this, the decree-holder has to establish against a party in possession and in whose favour an order of Court has been passed that that party is not entitled to retain possession as owner of the property. In other words the effect of upholding the contention of the respondent will be to give a person who derives title from the alleged owner a larger right of attack against persons in possession than owner himself possessed. No authority has been cited for such a proposition. The decision in *Ranee Chand Kour v.*

(1) 18 M. 496; 5 M. L. J. 63.

(2) 26 M. 224; 12 M. L. J. 380.

(3) 84 Ind. Cas. 372; 30 M. L. J. 486; (1916) 1 M. W. N. 301; 19 M. L. T. 364.

(4) 42 Ind. Cas. 43; 45 C. 94; 33 M. L. J. 486; 22 M. L. T. 262; 6 L. W. 592; 126 P. W. R. 1917; 15 A. L. J. 777; 19 Bom. L. R. 866; 3 P. L. W. 313; 26 C. L. J. 572; 104 P. R. 1917; (1917) M. W. N. 811; 22 C. W. N. 169; 127 P. L. R. 1917; 44 I. A. 218 (P. O.).

(5) 3 Ind. Cas. 739; 23 M. 167; 6 M. L. T. 271.

*Page of 45 C.—Ed.

(6) 6 Bom. L. R. 638.

(7) 31 Ind. Cas. 398; 2 L. W. 989; 18 M. L. T. 424; (1915) M. W. N. 873; 39 M. 879.

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Partab Singh (8), in which the Judicial Committee held that a dismissal for default does not operate as *res judicata* has no bearing on this question.

Now comes the last point, whether the respondent who is not claiming title under his deceased judgment-debtor, is affected by the order in abatement. We have pointed out already that the legal representatives are barred. Is there any warrant for giving to a stranger a better title than to the alleged owner or his legal representative? The principle of *res judicata* may not apply to a stranger; but he has to displace what has been described in more than one judgment of this Court a chain in the title of the defendant. To repeat that attempt the defendant can plead the previous judgment. There are numerous cases in this Court which have held that a judgment as a chain of title is an exception to the rule as *res inter alios acta*. *Srinivasa Aiyangar v. Arayar Srinivasa Aiyangar* (9), *Sayam Ramamoorthi v. The Secretary of State* (10), *Suppa Bhattar v. Suppu Sakkaya Bhattar* (11) and *Khaji Sayyid Yusuf Sahib v. Ediga Narasimhappa* (12), all lay down this proposition. We see no reason for not following these decisions.

It was said that the cause of action for the execution is different from the cause of action for the suit brought by the judgment-debtor against her father. We fail to see the difference. The decree-holder is agitating the same right and is challenging the same infringement which formed the basis of suit in the previous litigation. We must, therefore, hold that the right and the infringement are the same on both the occasions. For these reasons we are of opinion that the decree is not executable against the property as if it belonged solely to the judgment-debtor. We must allow the appeal and set aside the order of the District Judge. Each party will bear his own costs throughout.

M. C. P.

Appeal allowed.

(8) 16 C. 98; 15 I. A. 156; 5 Sar. P. C. J. 243; 177 P. R. 1888.

(9) 6 Ind. Cas. 229; 33 M. 483; 8 M. L. T. 33; 20 M. L. J. 546; (1910) M. W. N. 479.

(10) 19 Ind. Cas. 656; 36 M. 141; 24 M. L. J. 459.

(11) 30 Ind. Cas. 62; 29 M. L. J. 558; 18 M. L. T. 402; (1915) M. W. N. 829; 2 L. W. 1005.

(12) 44 Ind. Cas. 367; (1918) M. W. N. 175; 8 L. W. 377.

COURT OF THE BOARD OF REVENUE,
UNITED PROVINCES.

SECOND APPEAL No. 60 OF 1918-19.

September 17, 1919.

Present:—Mr. Ferard, S. M. and
Mr. Harrison, J. M.

RAM GOPAL—APPELLANT

versus

BHOORAJ SINGH—RESPONDENT.

Agra Tenancy Act (II of 1901), ss. 18 (c), 22 (b)—
Occupancy holding—Surrender by widow, effect of.

The surrender by a widow of an occupancy holding which she has inherited from her husband under section 22 (b) of the *Agra Tenancy Act* has the effect of completely extinguishing the occupancy right, and no rights, present or future, remain to persons who might otherwise have had a contingent right, if she had retained the holding till her death or re-marriage. [p. 568, col. 1.]

Second appeal from the order of the Commissioner, Rohilkhand Division, dated the 11th of February 1919, in the case of ejectment.

JUDGMENT.—It is common ground that the holding used to be the occupancy holding of Sarabsukh who adopted Parasram brother of the respondent Bahore. Parasram succeeded to the holding and died 5 or 6 years ago and it passed to his widow *Musammatt Kiwalia*. She relinquished it in favour of the landlord, appellant, in 1917, and he gave the land to the respondent Bahore, whom he has now sought to eject as a year to year tenant. The Assistant Collector found that *Musammatt Kiwalia's* relinquishment was valid. The Commissioner finds that a widow having a limited interest only under section 22 (b) cannot relinquish in the presence of an heir, Bahore, under section 22 (c).

The Commissioner is wrong in thinking that Bahore is an heir of Parasram under section 22 (c). Parasram had gone by adoption into Sarabsukh's family. He was thus no longer brother of Bahore in Hindu Law, though they had been born true brothers. The landlord, however, has admitted that Bahore is the nephew of Sarabsukh, so he can inherit under section 22 (e) if he co-shared in cultivation with Parasram at the time of his death. The Assistant Collector found that he did not. The Commissioner has not touched the point. It does not arise if the Commissioner is wrong in his finding that *Musammatt Kiwalia*, a Hindu widow with a limited interest

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under section 22 (b), could not surrender the holding outright.

The appellant's Counsel quotes section 11 and section 87, Tenancy Act and a decision of Sir Duncan Baillie, Petition No. 17 of 1909-10, *Uman Datt v. Janardhan Prasad Singh* (1). Against this the respondent's Counsel quotes a decision of the High Court, *Babu Jay Gopal Singh v. Kam Tahal*, Second Appeal No. 522 of 1909 (2).

These cases refer to surrender by mortgagors of occupancy rights, and not to cases in which a widow tenant under section 22 (b) surrenders the holding under section 18 (c), Tenancy Act.

The Board has considered the point in a decision which is about to be published as a selected decision and has decided that when a widow surrenders the occupancy holding which she has inherited from her deceased husband under section 22 (b), the occupancy right is completely extinguished, no rights, present or future, remain to persons who might have otherwise had a contingent right if she had retained the holding till her death or re-marriage.

I would, therefore, allow the appeal, set aside the Commissioner's appellate order and restore the decree of ejectment passed by the Assistant Collector.

Costs to the appellant throughout.

Appeal allowed.

(1) Rev. & Cr. L. J. 33.

(2) 2 U. D. 673.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 53 OF 1917.

May 23, 1919.

Present:—Mr. Justice Chatterjea and
Mr. Justice Daval.

SATINDRA NATH BANERJEE AND
OTHERS—DEFENDANTS—APPELLANTS

versus

Kumar BANWARI MUKUNDA DASS
NANDY BAHADUR AND ANOTHER—

PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115, O.

IX, r. 8—Government of India Act, 1915, (5 & 6 Geo. V, C. 61), s. 107—Suit, trial of—Commissioner, appointment of—Dismissal for default before Commissioner makes report, legality of—Appeal, whether lies—Revision—High Court, interference by.

A Court is not competent to dismiss in default a suit in which a Commissioner is appointed and has not made his report, as such suit cannot be heard until the Commissioner has finished his work. [p. 569, col. 1.]

No appeal lies against such order of dismissal but the High Court can set it aside under section 115 of the Civil Procedure Code or under section 107 of the Government of India Act [p. 569, col. 1.]

Appeal against the order of the District Judge, Burdwan, dated the 9th of January 1917, reversing that of the Munsif, 2nd Court, Katwa, dated the 3rd of February 1916.

FACTS appear from the judgment.

Babu Bepin Bihari Ghose (with him Babus Mahesh Ohandra Banerjee and Sib Prasanno Bhattacharjee), for the Appellants.—I submit that second appeal lies in the present case, the order being one for dismissal for default.

Order XVII, rule 3 *Bandiram Mookerjee Purna Ohandra Roy* (1).

Under Order IX, rule 8, the order of the Munsif was an order of dismissal for default. The 1st Court might have restored the case.

My submission is that the Judge had no jurisdiction to reverse an order for default and also he had no jurisdiction to remand the case.

The proper way would have been under Order IX, rule 9.

The order of remand made by the lower Court is absolutely without jurisdiction. The order could not be made under Order XVII, rule 3.

Babu Prodash Ohandra Mitra (with him Babu Kanai Dhan Dutt), for the Respondents.—In the Appellate Court an application was made and also an appeal was preferred. The lower Court admitted the appeal but rejected the application. The application may now be restored if the appeal was admitted wrongly.

JUDGMENT.—This appeal is against an order of the District Judge of Burdwan, setting aside an order of the Munsif of Katwa, dismissing a suit for default and remanding the case for trial by the Munsif.

(1) 43 Ind. Cas. 758, 27 O. L. J. 115, 45 C. 926.

KUDAI KHAN V. JAGAT NARAIN DUBEY.

It is contended on behalf of the defendant-appellant that no appeal lay to the District Judge because the order was not one under Order XVII, rule 3 of the Code and that, therefore, the order of remand made by the District Judge was without jurisdiction.

It appears that the main question involved in the suit related to boundary disputes and two Commissioners were successively appointed for laying the boundary. On the 4th January 1916, the Court directed the defendant to deposit Rs. 150 as additional costs for the fee of the Commissioner and the latter was directed to proceed with the work as prayed for by the defendant. The 3rd February 1916 was fixed for the hearing of the case. On the 3rd February the following order was made:—"The Pleader takes no steps to-day, the defendant is present by his Pleader. Pleader is absent at repeated calls. It is, therefore, ordered that the suit be dismissed with costs. Let the Commissioner be informed."

It seems to us that the suit should not have been disposed of in the manner it has been done on the 3rd February 1916. The Commissioner had not finished his work then; and until that was done the suit could not be heard. We do not understand what the Court meant by saying 'The Pleader takes no steps to-day' (meaning thereby the plaintiff's Pleader) when as a matter of fact the Court had directed the defendant to deposit Rs. 150 being the additional fee of the Commissioner. The order dismissing the suit for default ought not to have been passed on the 3rd February.

The order, however, is not appealable, but the respondent before us has put in a petition under section 115 of the Code and under section 107 of the Government of India Act, asking us to exercise our powers of revision.

Under the circumstances we think we ought to interfere. The order of the Munsif, dated the 3rd February 1916 dismissing the suit for default is accordingly set aside and the case sent back to the Court of first instance. The suit will be taken up at the stage where it stood on the 3rd February 1916. The Commissioner's work must be proceeded with and

finished, and the suit tried in due course of law.

This order is made by us in substitution of the order of the District Judge whose order is set aside.

Each party to bear his own costs in the proceedings from the 3rd February 1916 up to this date. The future costs will abide the result.

*Order set aside;
Case returned.*

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND APPEAL NO. 105 OF 1918 19.

December 2, 1919.

Present:—Mr. Ferard, S. M. and Mr. Harris, J. M.

KUDAI KHAN—APPELLANT

versus

JAGAT NARAIN DUBEY—

RESPONDENT.

Landlord and tenant—Thekadar, whether landlord—Ejectment suit by thekadar, maintainability of.

On the transfer by a proprietor of his proprietary rights to a *thekadar* the latter becomes the tenant's landlord, and unless the proprietor has reserved to himself the right of ejectment, he has the power to eject the tenant [p. 57, col. 2.]

Second appeal from the order of the Commissioner of the Gorakhpur Division, dated the 27th of March 1919, in the case of ejectment.

JUDGMENT.

FERARD, S. M.—(November 22, 1919).—The respondent's Pleader has not raised the point that the Commissioner's decision does not amount to a preliminary decree but only to an order to which Chapter XLIII, Civil Procedure Code, is not applicable under section 93 (a), Tenancy Act. I need not, therefore, go into the debatable point as to whether the appeal is premature and should have been postponed till the further issues had been decided.

Kudai, defendant appellant, is a tenant. The plaintiff-respondent and proprietor sued to eject him. The plaintiff respondent's proprietary rights are admittedly under *theka* with one Bellar Singh *pro forma* defendant No. 2 (who has not appealed.) The

ABIRJAN BIBI v. GOLE MAHAMED.

defendant's case was throughout, and still is that the right to sue for ejectment lay with the *thekadar* Bellar Singh and not with the plaintiff respondent. The first Court in issue No. (1) placed the burden of proving on the plaintiff-respondent that he was entitled to sue, and found against him as he failed to prove that he reserved the right to sue tenants when he gave the *theka* to Bellar Singh. The Commissioner practically found that the onus was wrongly laid and found that the plaintiff-respondent was entitled to sue because the defendant did not produce the *thekanama* shewing that the *thekadar* has the right to eject tenants under the *theka*. I do not agree with this view. The person entitled to eject is the tenant's landlord, the person to whom his rent is payable. If a proprietor hands over his proprietary rights to a *thekadar*, the latter becomes the tenant's landlord, and has the power to eject unless as held by the Board in Petition No. 542 of 1914-15, *Maharaja Bhagwati Prasad Singh v. Ajudhia Khatik* (1) and Petition No. 78 of 1911-12, *Jagan Nath v. Maharaja Balrampur* (2), the proprietor has expressly reserved to himself the right of ejectment and not made it over to his *thekadar*. The onus was rightly placed on the superior proprietor in this case, to prove this reservation.

His Pleader offers, and I have allowed him to put in a registered copy of the *thekanama*. It shows that he made over to the *thekadar* the power to sue for arrears of rents, to distrain, to enhance rent, to settle rents, and to put in *darkhast kharij kasht*, i. e., application for striking off cultivation, a very ambiguous term which may either be interpreted or not as a power to remove non-occupancy tenants from their holdings.

The passage runs thus "*wa thekadar ko ikhtiyar hoga ki misl hamare ke (sic) asaman par nalish baggaya lagan wa darkasht ikhra-kasht wa ezapha lagan wa tanqih logan ka hasil rahe.*"

It is probably owing to this ambiguity of expression that neither party has put in the *thekanama* till this late stage in the proceedings.

(1) 2 C. D. 393.

(2) 2 U. D. 508.

The plaintiff-respondent, proprietor, was responsible for using clear language if he intended to reserve to himself the right of ejectment when giving the *theka*. I would hold that he has not discharged the burden rightly laid on him by the Assistant Collector, of proving this reservation, and that, therefore, the power of ejectment rested with the *thekadar* and not with him. His suit for ejectment was, therefore, bad and I would allow the appeal. It follows that if the decision on the further issues has been given against the tenant and he has been ejected (which I am informed is the case) all those proceedings also are invalid and possession should be restored to him. I would order accordingly. I would give the appellant his costs throughout.

HARRISON, J. M.—(December 2, 1919.)—I agree.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 817
OF 1917.

July 17, 1919.

Present:—Justice Sir Ernest Fletcher, Kt.,
and Mr. Justice Duval.

ABIRJAN BIBI, WIDOW OF LATE *Sheikh*
BASIR AND ANOTHER—PRINCIPAL
DEFENDANTS—APPELLANTS.

versus

Sheikh GOLE MAHAMED, LEGAL REPRESENTATIVES, AYMAN BEWA (AYMANNESSA BIBI IN *Vakalatnama*) AND OTHERS—
RESPONDENTS.

Registration Act (XVI of 1908), s. 77—Registration of document—Application for registration, dismissal of, whether amounts to refusal to register—Suit to enforce registration, maintainability of.

The dismissal of an application for registration owing to the failure of the applicants to appear before the Sub-Registrar is, under the Registration Act, in the practice of the Court, equivalent to a refusal to register. Such dismissal does not take away the right of suit under section 77 of the Registration Act, to enforce registration. [p. 571, col. 2.]

ABIRJAN BIBI v. GOLB MAHAMED.

Appeal against the decree of the Subordinate Judge, 1st Court, Mymensingh, dated the 31st of January 1917, reversing that of the Munsif 3rd Court at Kishoreganj, dated the 20th of December 1915.

FACTS appear from the judgment.

Babu Jaindra Mohan Chowdhury, for the Appellants.—There was no enquiry as is required by sections 73, 74 and 77 of the Registration Act. There was no adjudication. Refers to *Nasiruddin Mridha v. Sidhoo Mia* (1) which says there must be an enquiry.

In this case, the refusal was owing to the absence of the applicants at the time the Registrar was prepared to take up the case. The suit is not maintainable under the aforesaid circumstances. The plaintiffs have no right of suit. The effect of the order of refusal is equivalent to dismissal for default and so the plaintiffs cannot come again to the Civil Court under section 77.

Babu Biraj Mohan Mojumdar (with him Babu Hemendra Oommar Das), for the Respondents.—The plaintiffs' right of suit cannot be taken away. The order runs thus:—"Registration is refused," so I was bound to sue under section 77. Cites *Sajibullah Sirkar v. Hazi Khosh Mohamed* (2) and *Surendra Nath Nag Chowdhury v. Gopal Chunder Ghosh* (3).

Babu Jatindra Mohun Chowdhury replied and submitted that the observation in *Surendra Nath Nag Chowdhury v. Gopal Chunder Ghosh* (3) is in the nature of an obiter.

JUDGMENT.

FLETCHER, J.—This appeal is preferred by the defendants Nos. 1 and 2 against the decision of the learned Subordinate Judge of Mymensingh, dated the 31st of January 1917, reversing the decision of the Third Munsif at Kishoreganj. The suit was brought by the plaintiffs in the Court of the Munsif under the provisions of section 77 of the Indian Registration Act for the purpose of enforcing a release. The case made by the plaintiffs is this: The defendants Nos. 1, 2 and 3 executed in their favour a certain release. The defendant No. 3 admitted execution, but the other two defendants would not go to the

Sub-Registrar. Under the provisions of the Registration Act or the practice of the Court that is deemed to be equivalent to refusal to registration and the document can only be registered in proceedings instituted under the provisions of the Indian Registration Act. The plaintiffs did institute these proceedings and they terminated in this way. That the application was refused by the District Sub-Registrar. That is what the Registrar says in his order. It is quite true that it was refused because the applicants were not present at the time the learned Registrar was prepared to take up the case. But that itself is not sufficient to preclude a suit under the provisions of the Indian Registration Act. The right of suit is given by section 77 where the Registrar refuses registration and the authorities in this Court are clear that the mere fact that the Registrar refuses the application because the applicant or his witnesses are not present is not itself sufficient for holding that the suit is not maintainable. In support of that it will be sufficient to refer to the decision of this Court in *Sajibullah Sirkar v. Hazi Khosh Mohamed* (2). That case has been approved of recently in the decision reported as *Surendra Nath Nag Chowdhury v. Gopal Chunder Ghosh* (3). So, the mere fact that the application was dismissed by the Registrar owing to the applicants not being in attendance is not sufficient to take away the plaintiffs' right of suit. If the plaintiffs have got a right of suit, there is nothing in this case to say because the learned Judge of the lower Appellate Court has found definitely that the defendants Nos. 1 and 2 executed the release. In my opinion, the appeal fails and must be dismissed with costs.

DUVAL, J.—I agree.

Appeal dismissed.

(1) 44 Ind. Cas. 361; 27 C. L. J. 538.

(2) 13 C. 264.

(3) 8 Ind. Cas. 794; 12 C. L. J. 464 at p. 457.

GOVIND PANDEY v. DIPA KOERI.

COURT OF THE BOARD OF REVENUE,
UNITED PROVINCES.

SECOND CIVIL APPEAL No. 64 OF 1918-1919.

September 1, 1919.

Present:—Mr. Ferard, S. M., and
Mr. Harrison, J. M.

GOVIND PANDEY—APPELLANT
versus

DIPA KOERI AND OTHERS—RESPONDENTS.

Agra Tenancy Act (II of 1901), ss. 18 (c), 22 (b), (e)
—Occupancy holding—Surrender by widow, effect of
—Reversioner, whether can revive holding.

A tenant under section 22 (b) of the Agra Tenancy Act is entitled to surrender her occupancy holding and this surrender absolutely extinguishes the occupancy rights. Possible reversioners under section 22 (e) of the Act cannot revive it later when the lady who has surrendered it dies or re-marries.

Second appeal from the order of the Commissioner, Gorakhpur, dated the 14th of December 1918, in the case of ejectment.

JUDGMENT.

FERARD, S. M.—(August 9, 1919).—The facts as found are that the holding in suit was the occupancy holding of Bihari Koeri, whose nephews, the respondents, Dipa, etc., helped him in cultivation. On the death of Bihari two years ago his occupancy right passed to his widow Musammatt Chaudharia till her death or re-marriage under section 22 (b), Tenancy Act. She has neither died nor re-married but has surrendered the holding to the superior landlord who seeks to eject Dipa, &c., respondents, as non occupancy tenants. The Assistant Collector decreed his suit but the Commissioner has taken a different view. He holds that the respondents have as much right to inherit under section 22 (e) on the extinction of Musammatt Chaudharia's interest by surrender as they would have on its extinction by her death or re marriage. He argues that if this were not so the Zemindar might put in another tenant who by 12 years' cultivation would acquire occupancy rights; that when the widow dies or re marries 12 years later, the respondents would still be entitled to come in under section 22 (e) but would find this other tenant already established, the result being two sets of occupancy tenants with separate but complete occupancy rights in the land. What this view amounts to is that a female tenant under section 22

(b) cannot surrender her holding in the presence of possible reversioners under section 22 (e); this involves a limitation of section 18 (c) to the case of tenants with complete rights. The Counsel can shew me no previous decisions of the Board of Revenue on this point, and the only precedent cited is *Jhabbar Maslaman v. Surai Frasad*, cited also in note 8, section 22 of Mr. Agarwalla's Commentary on the Agra Tenancy Act; in that case a single Judge of the High Court certainly found in the particular case before him that the widow could not surrender her occupancy rights to the prejudice of a co tenant, but that was a very different case from the present one in which the question is of collaterals only.

I would hold that, in view of the positive provision of section 18 (c) that a right of occupancy shall be extinguished in a holding which a tenant surrenders, a tenant under section 22 (b) is entitled to surrender her occupancy holding and that this surrender absolutely extinguishes the occupancy right. Possible reversioners under section 22 (c) cannot revive it later when the lady who has surrendered it dies or re-marries.

I would, therefore, allow the appeal, set aside the Commissioner's appellate order and restore the finding of the Assistant Collector with costs to the appellant throughout.

HARRISON, J. M.—(September 1, 1919).—I concur. The case cited in the senior member's judgment dealt with the effect of a surrender on an existing co-tenant's right. Here we are concerned with a contingent right. If the argument which the respondent asks the Board to uphold were pushed to its logical conclusion then a tenant who had a son living could not surrender, and that seems to me absurd.

Appeal allowed.

In re RAJASAHB RASULSAHB.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 26
OF 1919.

June 20, 1919.

Present:—Mr. Justice Shah and Mr. Justice
Hayward.

In re RAJASAHB RASULSAHB.

*Muhammadian Law—Divorce, mode of effecting—
Presence of wife, whether necessary.*

There is no provision of the Muhammadan Law requiring that a divorce should be pronounced in the presence of the wife or that it should be immediately communicated to her. All that is necessary is that the fact of the divorce having been effected should be brought to the notice of the wife [p. 573, col. 2; p. 574, col. 1.]

Criminal application for revision from an order passed by the Sessions Judge, Bijapur confirming the order of the City Magistrate, First Class, Bijapur,

Mr. H. B. Gumaste, for the Applicant.

Mr. V. D. Limaye, for the Opponent.

JUDGMENT.

SHAH, J.—The parties to this application are Muhammadans. The wife applied to the Magistrate in the first instance for maintenance for herself and her daughter. An order was made by the Magistrate under section 488 of the Criminal Procedure Code, on the 22nd of July 1918, awarding her Rs. 10 per month for their maintenance. The husband executed a *talaknama*, on the 14th of August 1918, in the presence of witnesses and that document was registered. Subsequently, on the 4th of December 1918, he made an application to the Magistrate for the cancellation of the said order in favour of his wife on the ground that he was no longer bound to maintain her. The learned Magistrate was of opinion that the *talaknama* was not valid as it was not made in the presence of a Kazi and that there was no ground to cancel his previous order. The husband then applied to the Sessions Court. But that Court refused to take any action on his application, though it was of opinion that the *talaknama* was valid. He has now applied to this Court for the revision of the order made by the Magistrate on the ground that the *talaknama* is valid and that the amount of maintenance should be reduced proportionately.

I am of opinion that the *talaknama* is valid according to Muhammadan Law. It is true that it was not made before a Kazi,

that it was not made in the presence of the wife, and that no attempt appears to have been made immediately on the execution of the *talaknama* to communicate it to her. It is clear, however, on these proceedings that this *talaknama* came to the notice of the wife at the latest when the husband made the present application for the cancellation of the previous order for maintenance.

Mr. Limaye appearing for the wife has contended that the *talaknama* is not valid, as no attempt was made immediately to communicate the same to the wife. He has not, however, been able to cite any authority in support of this proposition; and all that appears necessary is that the fact of the *talak* having been effected must come to the notice of the wife. There is nothing to show that it must be brought to the notice of the wife within a particular time from the date on which it is executed. In the present case the *talaknama* came to her knowledge within a reasonable time from the date of its execution; and that seems to be sufficient to satisfy the requirements of the Muhammadan Law. The observations in *Sarubai v. Rabiabai* (1), *Ful Chand v. Nawab Ali Chowdhry* (2) and *Asha Bibi v. Kadir Ibrahim* (3) bearing on the point support this view: I am, therefore, unable to agree with the Magistrate that the *talaknama* is invalid.

Taking the *talaknama* to be valid, the question is whether any case for the reduction of the amount of maintenance is made out. The *talaknama* states in terms that one of the reasons for the divorce was the fact that the wife had obtained an order for maintenance. The child whose maintenance is obligatory upon the present petitioner is said to be about three years old. The mother is entitled to the custody of the child and it is not disputed before us, and indeed it cannot be disputed, that the petitioner is bound to provide adequate maintenance for the child. No doubt at first sight it would appear that some reduction might fairly be made in favour of the petitioner. But having regard to the circumstances under which this *talaknama*

(1) 30 B. 537; 8 Bom. L. R. 35.

(2) 1 Ind. Cas. 740; 36 C. 184; 9 C. L. J. 105; 13 C. W. N. 134.

(3) 3 Ind. Cas. 730; 33 M. 22; 6 M. L. T. 295; 20 M. L. J. 1.

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came to be executed and to the necessity of keeping the child with the mother, I do not think that any reduction would be appropriate.

On these grounds, I would not reduce the amount of maintenance which was awarded in the first instance for the wife and the child, but would allow that order to stand making it clear that it is for the maintenance of the child only.

I would discharge the Rule.

HAYWARD, J.—I concur that no reason has been shown for reducing the maintenance granted by the Magistrate. It is true that that maintenance was granted both for the infant child and the wife, but it would, in my opinion, only be sufficient for the maintenance of the infant child even if supported by the opponent not as a wife but as a third party, as pointed out by the learned Sessions Judge.

It has been argued that the wife has been duly divorced and is, therefore, in the position of a third party. It is not strictly necessary in the view taken of the sufficiency of the maintenance to decide the question. There is, however, a clear divorce in writing registered, which could leave no doubt whatever as to the intention to divorce the wife. It is also clear that knowledge of this intention was brought to the notice of the wife not many months afterwards by these very proceedings taken before the Magistrate. It seems to me that the divorce was wrongly held to be invalid by the Magistrate and that the correct view of the matter was taken by the learned Sessions Judge. It would appear that there is no provision requiring that the divorce should be pronounced in the presence of the wife or that it should be immediately communicated to her under Muhammadan Law, and these views find support in the recent decision in *Sarabai v. Rabiabai* (1) in this Court, which was approved by the Calcutta High Court in the case of *Ful Chand v. Nawab Ali Chowdhry* (2) and by the Madras High Court in the case of *Asha Bibi v. Kadir Ibrahim* (3).

The Rule, therefore, should, in my opinion, be discharged.

Rule discharged.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND APPEAL No. 237 OF 1918-19.

November 26, 1919.

Present:—Mr. Harrison, J. M.

RAM HARAKH—PLAINTIFF—APPELLANT

versus

Srimati Maharani JAGDAMBA

DEBI—DEFENDANT—RESPONDENT.

Landlord and tenant—Ejectment suit—Lease held binding in previous suit not inter partes and not produced before Court, value of.

Where in a suit to contest a notice of ejectment the defendant relied upon a lease which was not produced and the only evidence of its existence was contained in an appellate judgment in a suit not *inter partes*:

Held, that the lease could not be held to be binding between the parties to the ejectment suit. [p. 575, col. 1.]

Second appeal from the order of the Commissioner of the Fyzabad Division, dated the 22nd of May 1919, in the case of ejectment.

JUDGMENT.—This is a second appeal in a suit to contest a notice of ejectment. The village concerned is apparently one of the *waqf* villages of the Ajudhia Estate and was formerly recorded as held by Narsingh Narain Singh, natural father of the last Maharaja of Ajudhia, as *muafidar*. The plaintiff-appellant's case is that he holds the land in suit on a perpetual lease granted by Narsingh Narain Singh in 1874 to his predecessor Gudnu and others.

No lease has been produced in this case and the only evidence of its existence is contained in an appellate judgment of the Commissioner, delivered in 1880, which set aside a notice of ejectment regarding two plots, one of which was found by him to be held under a perpetual lease. In 1892 there was another decision by a Deputy Collector in a suit between Gudnu, the predecessor of the plaintiff here, and Ramdhari Thekadar, in an ejectment case covering all the plots now in suit. The land was then decided to be covered by the permanent lease referred to by the Commissioner in 1880 which was, however, not produced. The case before the Commissioner had been between Gudnu and Narsingh Narain himself.

The lower Courts held that the lease, even if held good against the Thekadar, could not be binding on the actual proprietor, but they both overlook the fact that apparently the same lease was held good

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against the former proprietor himself. The Deputy Collector's judgment, however, extended the Commissioner's finding to a number of plots certainly not covered by his judgment without ever seeing the lease and though he referred to a list of plots it is not apparent where it came from. On the whole I consider it too dangerous to assume that because a lease was held to be binding between the parties in respect of one plot without any indication of the extent of the whole lease it can be taken to be fully proved by a judgment in a suit not *inter partes*.

I must, therefore, uphold the decisions of the lower Courts and dismiss the appeal with costs.

Appeal dismissed.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 142 OF 1919.

July 8, 1919.

Present:—Mr. Pratt, J. C.

MAUNG PO LAT—APPLICANT

versus

MA NGWE MA—RESPONDENT.

Buddhist Law, Burmese—Divorce—Revival of marriage—Re-union, effect of.

Under Buddhist Law mere physical re-union with a divorced wife is not sufficient to revive the status of marriage. In order to have this result the re-union must be of such a nature that had there been no divorce it would have amounted to a valid marriage.

Mr. A. O. Mukerjee, for the Applicant.

Mr. L. Pillay, for the Respondent.

JUDGMENT.—Ma Ngwe Ma obtained an order for maintenance against Maung Po Lat as his wife. The Magistrate found that there had been a divorce but that the parties had been re-united.

The respondent in the lower Court admitted a re-union after the first divorce but alleged that a second divorce took place a year ago after which there had been no re-union.

There was evidence of a second divorce about March 1918 and applicant herself

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had to admit the fact of a second divorce. There was some evidence that Maung Po Lat paid clandestine visits at night to his divorced wife after the second divorce.

He was at that time living with another wife and it is clear that after the second divorce he never again lived openly with Ma Ngwe Ma as his wife.

The mere fact that he paid clandestine visits to Ma Ngwe Ma after the divorce would not in my opinion be sufficient to constitute a valid re-marriage.

No authority is cited for the proposition that under Buddhist Law mere physical re-union with a divorced wife is sufficient to revive the status of marriage.

It seems clear that the re-union must be of such a nature that had there been no divorce it would have amounted to a valid marriage. On the facts it is not satisfactorily established that Ma Ngwe Ma re-gained the status of wife after her second divorce. This being so she was not entitled to maintenance.

I set aside the order of the Sub-Divisional Magistrate. Applicant will be allowed costs.

Appeal allowed.

COURT OF THE BOARD OF REVENUE,
UNITED PROVINCES.

SECOND APPEAL No. 161 OF 1918-19.

December 2, 1919.

Present:—Mr. Ferard, S. M., and
Mr. Harrison, J. M.

ISHWARI CHAUDHARI—
APPELLANT

versus

DUKHI AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXII, rr. 1, 4—Agra Tenancy Act (II of 1901), s. 63—Ejectment suit—Minor plaintiff—Next friend, wrong person named as—Substitution after expiry of limitation for suit, whether permissible.

Where in a suit for ejectment a minor is included among the plaintiffs under the guardianship

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of a person and there is a dispute between that person and another as to who is the minor's guardian resulting in the latter being substituted as the guardian, the suit as originally filed is not faulty in its citation of plaintiffs, even though the substitution is made after the period prescribed for the filing of the suit has expired.

Second appeal from the order of the Commissioner of the Gorakhpur Division, dated the 1st of July 1919, in the case of ejection.

JUDGMENT.

FERARD, S. M.—(November 26, 1919).—In this suit filed on 24th September 1917 Sadho Saran, minor, was included among the plaintiffs under the guardianship of Ajudhia. The defendant objected on 29th October 1917, that Abhiraj and not Ajudhia was the guardian of Sadho Saran and an issue on this point was framed on 30th October. Abhiraj, on 3rd May, supported this with an application that he should be substituted for Ajudhia and the case proceeded. The Court accordingly the same day ordered that the plaint be amended. No alteration was actually made in the plaint but the application and order were placed on the record. The Assistant Collector decided the suit the same day in favour of the plaintiff; the first part of his judgment contains his finding that Abhiraj and not Ajudhia was the guardian—there was carelessness in the decree as Ajudhia's name and not Abhiraj's is contained in it. The defendant appealed to the Commissioner and cited Abhiraj and not Ajudhia as Sadho Saran's guardian. He made the original defect in the name of the guardian as one of his grounds of appeal. The Commissioner allowed the appeal on the preliminary ground that as Abhiraj's name was substituted for Ajudhia's after the period of limitation under section 63, Tenancy Act for filing the suit, (i. e., after the 1st day of October 1917) the suit as originally filed was faulty in its citation of the plaintiff and when corrected afterwards was barred by time. Against this the appellant's Counsel quotes *Selected Decision No. 14 of 1891, Lala Janki Prasad v. Baladin* (1) and refers to rule 17, Order VI, Civil Procedure Code, which allows a Court to amend the pleadings at any stage

of the proceedings. He contends that this covers a change of plaintiff. He further refers to rules 1 and 4, Order XXXII as showing that Ajudhia's posing as the minor's next friend was not legally fatal especially as in this particular case Ajudhia's interests were not adverse to those of Sadho Saran, minor.

I cannot quite accept the argument that pleadings in rule 17, Order VI, Civil Procedure Code, include the name of the plaintiff but I do accept the argument based on rules 1 and 4, Order XXXII, Civil Procedure Code, and, even if I did not, I should call in section 151 for the equitable decision of this case. It would be absolutely inequitable that the suit of the minor Sadho Saran and the remaining plaintiffs should be invalidated because there was a quarrel between two persons as to which was the minor's guardian.

I would allow the appeal and return it to the Commissioner to decide on the merits which he has not touched. Costs to follow result.

HARRISON, J. M.—(December 2, 1919).—I agree. I am doubtful, moreover, whether the period fixed for filing ejection suits is subject to the rules of limitation, i. e., whether a plaint in such a suit cannot be corrected at any time. The time limit in such a case no doubt operates in much the same way as limitation but a suit brought in the next year would not be barred by limitation. It might have no chance of success but it would have to be tried out.

Appeal allowed.

(1) File No. 1715 of 1891.

NGA NAN DA V. EMPEROR.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 66 OF 1919.

July 24, 1919.

Present:—Mr. Pratt

NGA NAN DA—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss 99, 332, 333—Criminal Procedure Code (Act V of 1898), s. 46 (3)—Arrest of offender—Use of more force than is necessary—Right of private defence, extent of—Causing grievous hurt to public servant in discharge of duty.

Accused, who was in illegal possession of opium, was ordered by an Excise Inspector to stop, and the latter fired two shots to frighten him. The accused thereupon turned round and wounded the Excise Inspector with his sword. He was then caught and while a peon was proceeding to disarm him, the accused wounded the peon also with his sword:

Held, (1) that the Excise Inspector was entitled to arrest the accused and for that purpose to use all necessary means; [p. 577, col. 2.]

(2) that he was not, however, justified in causing death in effecting the arrest under section 46 (3) of the Criminal Procedure Code; [p. 577, col. 2.]

(3) that inasmuch as apprehension of death had been caused to the accused, he had a right of private defence against the Inspector which had not been exceeded; [p. 577, col. 2.]

(4) that the accused had no right of private defence against the peon after he had been caught and that, therefore, he was guilty of causing grievous hurt to a public servant in the discharge of his duty. [p. 578, col. 1.]

Mr. H. M. Lutter, for the Crown.

JUDGMENT. Excise Inspector Mahomed Wali laid a trap for a party of Shan opium smugglers.

He lay in wait in uniform with excise peon Maung Maung and others. When the smugglers, who were being detained in conversation as arranged, became restless, the Inspector gave orders for their arrest.

When one of their number was arrested, appellant Nan Da and his companions fled, pursued by the Inspector.

The Inspector according to his own account, and there is no other direct evidence, came up with Nan Da, ordered him to stop and fired his revolver twice to frighten him. When he was about to overtake Nan Da, the latter drew his Shan sword from its sheath and cut the Inspector on the thigh but did not cause a severe wound.

The Inspector caught hold of appellant by the top knot, and in response to his shouts for help, peon Maung Maung came

to his assistance and tried to seize Nan Da by the wrist with the intention of disarming him. Before he could do so Nan Da slashed him on the forearm, severing his wrist and inflicting a wound, which might easily have proved fatal.

The Excise Inspector was entitled to arrest accused, who was armed and in possession of opium, and for that purpose to use all necessary means.

He was not justified in causing death in effecting the arrest under section 46 (3) of the Criminal Procedure Code.

It is clear that until the Inspector fired the shots, appellant did not unsheath his sword or make any show of resistance. All he did was to run away as fast as possible.

If the Shan had reasonable ground for believing that the Inspector intended to cause death or grievous hurt, he had a right of private defence against him (section 99, Penal Code).

Accepting the Inspector's statement that he fired into the air and not at the Shan, the fact remains that he did fire his revolver twice at close quarters, when chasing appellant. It may be remarked that the encomiums of the Magistrate on the Inspector's coolness seem hardly called for.

Appellant is a wild Shan and as the shots came from behind would not unnaturally conclude that the shots were fired at him with intent to kill or wound him, and that the only way to save his life was to stand at bay and fight.

Under the circumstances it must be held, in my opinion, that the act of the Inspector in firing the revolver twice at close quarters from behind appellant would reasonably cause the apprehension of death or grievous hurt.

Under this apprehension the Shan had a right of self-defence and it was not exceeded. In cutting the Inspector, therefore, I hold that he committed no offence.

As regards the injury to peon Maung Maung, the case is quite different.

He came up after appellant had been caught by the Inspector and under his instructions tried to disarm him. He was armed with a *dahlu* but made no attempt to use it. The appellant alleges that Maung Maung

In the matter of AMRITA BAZAR PATRIKA.

struck him with a stick and I see no reason to doubt that it is true.

The Shan undoubtedly received a contused wound on the head, and the probability is that Maung Maung would use force in his attempt to disarm him.

He was, however, entitled to do so to effect his arrest and did not use unnecessary force, so far as can be deduced from the evidence.

The Excise Inspector was holding appellant by the hair at the time and the latter still had a naked sword in his hand and was waving it to and fro.

I do not consider there is any justification for holding on the facts that at the time he cut the excise peon, appellant had a reasonable apprehension of death or grievous hurt. It is clear the Inspector made no further attempt to use his revolver.

What really seems to have happened is that when he found himself caught, appellant lost his head completely and when the peon closed with him, struck at him with his sword with the intention of disabling him. In doing so he had no right of private defence and has been correctly convicted of causing grievous hurt to a public servant in the discharge of his duty.

At the same time it is necessary to take into consideration that he is a wild Shan and was probably terrified at having had a revolver fired twice within close proximity to his back. When assistance came, he may have thought he would be still further ill-treated and that any measures were justifiable in a frantic last attempt to escape.

He had a cut on his leg and I am very sceptical as to its having been the result of an accident, though it is not quite clear when he received it.

Possibly it was after his arrest. It is unfortunate that the evidence is all on one side.

In any case it is certainly a legitimate inference that appellant was struck on the head before he slashed at Maung Maung.

On the evidence the conviction under section 333 was justified and is confirmed.

The question of sentence is not easy.

Appellant is an elderly man. He no doubt was under the influence of terror when he wounded the excise peon, but it is impossible to overlook the fact that he was a member of an armed gang of smugglers.

Taking the whole of the circumstances into consideration, I am of opinion substantial justice will be done if the sentence is reduced to four years' rigorous imprisonment.

The conviction and sentence under section 332 are set aside.

Sentence reduced.

CALCUTTA HIGH COURT. SPECIAL BENCH.

IN THE MATTER OF AN APPLICATION UNDER
SECTION 17 OF ACT 1 OF 1910.

July 28, 1919.

Present:—Justice Sir John Woodroffe, Kt.,
Justice Sir Asutosh Mookerjee, Kt.,
and Justice Sir Ernest Fletcher, Kt.

*In the matter of THE AMRITA BAZAR
PATRIKA PRESS, LIMITED.*

Press Act (I of 1910), ss. 4, 17, 22—Forfeiture of security—Application to set aside forfeiture High Court, duty of—Construction of documents—Intention of author, whether material—Object of Act.

In dealing with an application under section 17 of the Press Act to set aside an order directing the forfeiture of security, the Court has to see that the matter which is the subject of the order is not obnoxious to the provisions of section 4 (1) of the Act, as if it contains words of the nature described in sub-section (1) of the section, the Court cannot, under section 22, set aside the forfeiture. [p. 593, col. 2; p. 602, col. 1.]

In considering whether a document offends against clauses (a) to (f) of section 4 (1) of the Press Act, the Court has nothing to do with the intention of the author: it has to look at the document and after a fair reading ascertain what is its meaning and then say whether the words were of the nature or tendency mentioned in the clauses. [p. 594, col. 2; p. 603, col. 2.]

The intention of the author is material only where the Court has to deal with comments on the measures or actions of Government, or the administration of justice: such comments are protected if they are made with a view to obtain an alteration by lawful means of the measures of Government, or if they are made on the actions of Government or administration of justice, and there is no attempt to excite hatred, contempt or disaffection. [p. 595, col. 1; p. 604, col. 2.]

The Press Act is essentially a preventive measure with a view to prevent crime, that is, crime imperilling the existence of the State, the safety of its officers, public order and the like. [p. 596, col. 1.]

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In distinguishing between the meaning of an article and the intention of its author, the article must be construed by grammar and logic, the primary organs of interpretation, and, when necessary, by evidence to make the words which are used fit the external things to which the words are appropriate. [p. 599, col. 2.]

Application by the keeper of the Amrita Bazar Patrika Press and of the Amrita Bazar Patrika Company, Limited, under section 17 of the Press Act I of 1910,

FACTS appear from the judgment and arguments.

Mr. C. R. Das (with him Messrs. A. N. Roy Chaudhuri, I. B. Sen Gupta, B. K. Lahiri, S. O. Roy, B. K. Chowdhury and D. N. Sen), for the Petitioners, said that that was an application under section 17 of the Press Act, 1910, an "Act for the better control of the Press." It appeared that on the 29th of May 1913, there was an order of the Government of Bengal by which a security of Rs. 5,000 was required to be deposited by the Amrita Bazar Patrika Press. The articles in the *Amrita Bazar Patrika* with regard to the present matter appeared, one on the 10th of April 1919, and another on the 12th April 1919. On the 15th April by an order of the Government of Bengal the security of Rs. 5,000 and all the issues of the *Amrita Bazar Patrika* of those two dates were ordered to be forfeited under section 4, clause 1, of the Act. Counsel then read section 4, clause 1, of the Press Act and said that he would presently submit to their Lordships that the law contained in that clause was the law of sedition which was to be found in the Indian Penal Code, and it was exactly the law of sedition which prevailed in England at present. Counsel then dealt with the two articles and said that the article of the 10th April last dealt with the question that the officers of the Government had been entrusted with very large powers and that, in spite of the declarations made in that behalf from time to time by the Sovereign and statesmen, India was not ruled by England but practically ruled by those officers, and they had set themselves against all reforms which had been proposed from time to time; in fact that they were the real proprietors of India. The article suggested that the time had come when there should be a radical change in the system of Government and that this country should not

be ruled any longer as an estate. The article of the 12th April referred to what happened in the Panjab, which appeared in the different telegrams and in different newspapers, and the *Amrita Bazar Patrika* criticised the action of the Executive Government in respect of those events and it ended up by saying that the people had by those unconstitutional activities of the Executive Government been roused to believe that there was an end of the reign of law. Counsel said that he had given their Lordships the strongest comments which appeared in those two articles. By reason of those two articles,—the Local Government did not say whether one of those articles was sufficient reason which induced them to pass the order of the 15th April—the order of forfeiture was made. The order was the combined effect of those two articles. Mr. Das then read the order of forfeiture and section 17 of the Press Act, under which he applied to the High Court, and section 19 of the Act, under which their Lordships could set aside the order of the Government. Section 19 gave their Lordships power to set the order aside, if they came to the conclusion that the words employed were not such as were described in section 4, clause 1.

[The Advocate General, for the Crown, asked Mr. Das to read section 22.]

Mr. Das said that he was asked to read section 22 and he would do so. He then read the section and said that there was a conflict of judicial opinion in this country as to what that meant. There was a decision of the Calcutta High Court, according to which section 22 meant that they must take it that the forfeiture was a legal order. There was another decision of the Madras High Court, which held that all that section 22 meant was that they could not call into question the fact of forfeiture, but as to whether it was a legal forfeiture or not depended on the construction of sections 17 and 19. If it was contended that, because section 22 said that the forfeiture referred to had taken place, the order of forfeiture was a legal order then it seemed to him that there was nothing for their Lordships to try, that the provision of appeal was merely a sham. If their Lordships were to entertain that application, as the Act clearly implied, and if the Act was not illusory—he would certainly ask their Lordships to hold

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that it was not illusory and that it was real—he would submit that it could be hardly contended that under section 22 they must at once take it for granted that the order of forfeiture was legal. If it was legal, what was there to try?

FLETCHER, J.—Will you, Mr. Das, give us those two references?

Mahomed Ali, In re (1) and *Mrs. Annie Besant v. Government of Madras* (2). The last case went up in appeal to the Privy Council and there is a recent decision of the Privy Council which is reported in the *Times* of the 14th of May [*Mrs. Annie Besant v. Advocate General of the Government of Madras* (3)].

Mr. Das then read the articles which appeared in the *Amrita Bazar Patrika*. The first article was headed: "To whom does India belong?" and the second was headed: "The arrest of Mr. Gandhi—More outrages." Counsel did not desire to comment on those articles at present but he would do so after he had made his submission on the law. The first thing that he would point out to their Lordships was that a portion of the Government order was not in accordance with the section and that it was clearly wrong. It was stated in the article "and the officers of the Government recruited in England." That portion, Counsel submitted, was not in accordance with section 4 under which the order was made. Section 4 referred to "bringing into hatred or contempt His Majesty's Government or Government established by law in British India," etc. That referred to a class in British India, whereas those words in the articles were absolute. In passing that order, therefore, so far as that portion was concerned, the Government of Bengal had not applied section 4, clause (c), but was trying to establish a crime which was not to be found in the section.

[The Advocate-General.—I submit that this matter is not open to my learned friend because of sections 23 and 17 read together.]

WOODROFFE, J.—We will take note of your objection, Mr. Advocate-General.

Mr. Das, continuing, said that he was

(1) 20 Ind. Cas. 977; 41 C. 466; 18 C. W. N. 1; 14 Cr. L. J. 497.

(2) 37 Ind. Cas. 525; 39 M. 1035; (1916) 2 M. W. N. 385; 5 L. W. 1; 18 Cr. L. J. 157; 21 M. L. T. 124.

(3) 52 Ind. Cas. 209; (1919) 35 T. L. R. 500; 23 C. W. N. 986; 37 M. L. J. 134; 20 Cr. L. J. 593; 17 A. L. J. 925; 21 Bom. L. R. 867; (1919) M. W. N. 555; 10 L. W. 451; 46 I. A. 176; 26 M. 1, T. 408; 1 U. P. L. R. (P. C.) 74 (P. C.).

entitled to apply to their Lordships under section 17 to set aside the order, on the ground that the newspaper did not contain any word of the nature described in section 4. He was now pointing out to their Lordships that the order which was passed by the Government was not in accordance with the terms of section 4. Their Lordships could not look into the policy of the Government. How did their Lordships know, sitting there, as to whether the Government of Bengal was not thinking of the officers of that Government resident in England? They could not judge that. It was for the Bengal Government to do that. All that was necessary was that the Government of Bengal must exercise their discretion in terms of section 4 (c). They had not done so and that was apparent from the words that they had employed. It was a statutory requirement and it must be strictly followed. It was their Lordships' duty to see that the Government did act according to the terms of the section under which they purported to act. In fact that was the only check on the action of the Bengal Government which the Act provided. Their Lordships, Counsel submitted, were not to construe whether some other order of the same nature might or might not have been passed. They were precluded from going into such questions. What their Lordships had to consider was whether the words complained of came under the section and whether the articles came within the purview of that section.

The next point that Counsel desired to submit was that the law as contained in section 4, clause (1), was exactly the same as it was in section 124 of the Penal Code, and exactly the same as the English Law. This was a point of great importance in this application. Counsel then read section 124 of the Penal Code and section 4 of the Press Act. He said that in order to apply the section an inference as to sedition, whether direct or indirect, must arise and it must be a question of intention. It had sometimes been said that in section 4 there was no question of intention at all; they had got the words and if the words were likely to or had a tendency to bring into hatred, that was quite enough. He submitted that such a view was entirely wrong, because the explanation added to the section showed the meaning of the section, and the Privy Coun-

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oil had stated that even without Explanation (2) the meaning of section 4 (c) was exactly the same. In order to apply section 4 (c) there must be what was called in the English Law a seditious intention, and they gathered that intent from words used and other circumstances. It was absolutely essential that they must have seditious intent. Their Lordships had held in the Calcutta case that section 4 was very wide. He hoped that they would not come to that conclusion again for the benefit of society. He then read section 511 of the Penal Code to see what "attempt" meant and submitted that it was impossible to construe "attempt" without considering the question of intent. There could not be an unconscious attempt to do a thing. If one attempted to do a thing, one must intend to do it. The mere attempt was not an indictment but something more than an attempt was necessary.

[FLETCHER, J.—Do you mean that tendency means attempt?]

Tendency alone is not sufficient without there being an attempt. In considering whether there was a seditious intent you must consider the tendency of the words used. The use of the word "tendency" shows that what is aimed at is the mentality of the thing. When you use the word "tendency" you are looking at the effects which are produced in other people's mind.

Continuing Mr. Das said that his defence was that the first article at any rate was an article which suggested an alteration in the system of Government and what went before were the reasons which were put forward. If that was so, then Explanation (2) of section 4 applied. Then they had to consider whether in suggesting the alteration in the system of Government they had not also excited or attempted to excite hatred, and they had got to see whether as a matter of fact excitement had resulted. This needed evidence. He then submitted to their Lordships that it was absolutely the same principle laid down in the English Law, and read authorities.

Mr. Das then referred to the cases of *Reg. v. Sullivan* (4), *Reg. v. Burns* (5), *Rex v. Aldred* (6) and *Reg. v. M'Hugh* (7) and said that what

(4) (1869) 11 Cox. C. C. 41.

(5) (1886) 16 Cox. C. C. 355 at p. 365.

(6) (1909) 22 Cox. C. C. 1.

(7) (1901) 2 Ir. R. 509; 6 Ir. L. R. 268; 34 Ir. L. T. R. 207.

was laid down in those cases was that seditious intent was absolutely necessary. If their Lordships came to the conclusion that these articles in the *Amrita Bazar Patrika* were intended for the alteration of the existing system of administration, then there was no seditious intent. Their Lordships had to construe these articles not taking one or two strong words here and there but the whole of them fairly and generously and also look at the surrounding circumstances. If their Lordships looked at these articles from the point of view of the actual politics of the present day, it was only then that they could judge whether the intention was a seditious intention or merely an intention of reformation or alteration of the existing system. Here strong language did not create sedition; there must be a seditious intention. Having regard to all the circumstances, and considering the class of persons who were likely to read the *Amrita Bazar Patrika*, the whole question was whether the words used came within the meaning of section 4, clause (c), of the Press Act. Mr. Das then referred to the case of *Mahomed Ali, In re* (1) and said that in the interests of justice their Lordships should investigate this matter. He was not asking their Lordships to express any opinion on the propriety or otherwise of the order of the Government. What he was asking their Lordships was to look at the matter from a judicial point of view and see whether these articles came within the provision of clause (c), section 4.

Mr. C. R. Das, continuing his argument on behalf of the appellants the following day, referred to the case reported as *Mrs. Annie Besant v. Government of Madras* (2). Dealing with the question of intention Mr. Justice Ayling referred to clause 4, Explanation 2, and said how could a comment attempt to excite. His Lordship was not able to accept the Advocate-General's argument in this respect, and at page 1144* he said: "As I have already stated, I have nothing to do with the intention of the writer. We have merely to consider the effect of his writing." Counsel was pointing that out to show that phrases were sometimes very loosely used. He then dealt with the judgment of Justice Seshagiri Aiyar, and said that at page 1147* his Lordship was discussing section 22 and at page 1151* he was dealing with

*Page of 39 M.—Ed.

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the question of intention. On the question of intention their Lordships had it that all the three Judges of the Madras High Court, the Officiating Chief Justice, Mr. Justice Ayling and Mr. Justice Seshagiri Iyer were of the same opinion.

[The Advocate-General.—Under Explanation 2.]

Yes, I am confining my remarks to clause (c). The order against us was passed under clause (c).

Mr. Das continued that he did not know whether the other side preferred to bring the case under hatred. That was not covered by the Explanation. All other things were covered by Explanation 2. There were Government measures, there were administrative actions, and so forth. If a man attacked Government simply for the purpose of attacking it, then it stood on a different footing. When a man attacked Government without intending to alter any law, without attempting to point out to the Government what administrative measure should be altered, he merely attacked for the purpose of attacking. There the seditious intent was obvious, and it must follow that the intention was simply to abuse and libel Government. Supposing they had not got Explanation 2, they had still got to consider the question of seditious intent. But where the man was really asking Government to alter a particular measure or to alter the administration in a particular way, it might be that even then he had a seditious intent, but *prima facie* he had no such seditious intent at all. The next point which Mr. Justice Iyer took up was the question of hatred. In that case Mr. Justice Iyer held that he was unable to see that the article was covered by any of the clauses of section 4. The net result in this case was this that although their Lordships said that the section was wider and that they were not prepared to go to the length of 45 Calcutta, they were all agreed, at any rate, that wherever Explanation 2 applied their Lordships had to consider the question of seditious intent. And in regard to the question whether the article came under section 4, they had applied the same principles which were applied here in the prosecution under section 124 A of the Penal Code and under the English Law. Counsel, therefore, submitted that

the authority in that case was in his favour. In so far as it drew a distinction between the section and the Explanation, he submitted that it was overruled by the Privy Council, which laid down that the Explanation did not add to or detract from the section. He then cited *Queen-Empress v. Bal Gangadhar Tilak* (8) and said that if the case of a journalist was that the interest of India required that a particular machinery, which was at present in the hands of the Europeans, should be in the hands of the Indians, he had got to deal with the foreign character of it. He had to point out that it was ineffective. Such criticism according to Mr. Justice Iyer would not be seditious. If the case of the journalist was—and that was his conviction—that it was because the administrative machinery was left in the hands of a particular set of people they did not look to the well-being of the people, he had to point that out, saying that such an evil might not follow in the future. In such a case, Counsel submitted, it was not seditious, because otherwise they could not reason, they could not argue. Counsel then extracted the following passage from *Queen-Empress v. Bal Gangadhar Tilak* (8): "A journalist is not expected to write with the accuracy of a lawyer or with the precision of a man of science." That passage was very important and Mr. Justice Fletcher, Counsel found, quoted that passage in *Manmohan Ghose v. Emperor* (9). Counsel said that at p. 259* the point was whether the other articles in the paper were admissible in evidence under section 15, and their Lordships held that unless the identity of the writer was established, it was not admissible in evidence. He then referred to the judgment of Mr. Justice Fletcher and said that there was no difference between the Indian Law and the English Law of sedition, and, therefore, if he could satisfy their Lordships that section 4 of the Press Act, taken with the Explanation where the Explanation applied, brought in the law which was contained in section 124A, it came to this that so far as those matters were concerned,

(8) 22 B. 112.

(9) 8 Ind. Cas 531; 38 C. 253; 15 C. W. N. 141; 11 Cr. L. J. 66.

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sections 4 (c) of the Press Act and 124A of the Penal Code and the English Law were all the same. After reading the judgment, Counsell said that Mr. Justice Fletcher there was following the principle laid down by Justice Fisher in the *Sullivan's case* (1), namely, that they must acquit the accused if they could. If they could put the necessary meaning on those words, they must do so. It was only when they could not do so that the question of seditious intent arose. In this case their Lordships in effect had accepted the interpretation which was put in the *Tilak's case* (8) upon it and quoted the words: "A journalist is not expected to write with the accuracy of a lawyer or with the precision of a man of science," and that the general tone was to be considered and not isolated passages from here and there.

There were various questions of law that arose in this case. The first was that section 4 was to be construed as laying down the same law of sedition found in section 124A and the English Act. So far as that was concerned, the view taken in 41 Calcutta [*Mahomed Ali's case* (1)] was not the same as that taken in the Madras case [*Mrs. Besant's case* (2)]. The next was that in order that any article might come under section 4, clause (c), there must be what was called seditious intent.

[WOODROFFE, J.—I suppose your argument is this. If we take into account intention then the tendency of the articles to bring into hatred and contempt the Government will not bring them within the operation of section 4, if there is no seditious intent.]

If there is no other evidence and your Lordships come to the conclusion that the articles have that tendency, there would be that intention.

[WOODROFFE, J.—You mean the seditious intent will be implied from the tendency?]

Yes.

[WOODROFFE, J.—If the Court came to a positive conclusion upon your arguments that there was no seditious intent, then the fact that the articles had a particular tendency would not bring them under this section?]

That is so.

[WOODROFFE, J.—There might be words which, taken by themselves, have the tendency mentioned in section 4. If the Court

comes to the conclusion that though they had a tendency they had no seditious intent, then they do not come within the operation of section 4?]

Exactly.

Continuing, Mr. Das said that the next point was that in considering these articles their Lordships must take the whole of them and not attach any importance to isolated phrases or instances of strong language. Unless their Lordships found in them absolute hostility to Government, they ought not to find that these articles came under section 4. The next point was, what was "the Government by law established" in British India? With one exception all the other authorities agreed that it was the political system such as it was. Under the Government of India Act, the "Government of India by law established" was the Crown, the Secretary of State and his Council, the Governor General in India and his Council, and then the Provincial Governments. The last point was as to the remedy given to the people by the Press Act of 1910. To hold that that relief, or power that could give one that relief, was illusory, was the most scathing condemnation of the Government of this country. This Government order was a sort of decree, which he wanted their Lordships to set aside because it was not under section 4.

[MOOKERJEE, J.—You are drawing our attention to the terms of the order. You take exception to these words "officers of such Government recruited in England." Suppose the order had said this:—"To bring into hatred and contempt the Government established by law in British India and a section of His Majesty's subjects in British India, namely, the officers of the said Government recruited in England." That would have been quite all right?]

Yes.

[MOOKERJEE, J.—Assume for the moment that this is defective. When we come to section 19, is not the Special Bench bound to consider, irrespective of the form of the order, whether the words, signs or visible representations contained in the newspaper, book, or other documents in respect of which the order was made, are not of the nature prescribed in section 4, sub-section 1?]

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What has been described in the order is not provided for by section 4.

[MOOKERJEE, J.—The order may be defective. I am not expressing an opinion on the point. The Court is bound to examine the words and determine, irrespective of what the Government order may say, whether the words used are of the nature described in section 4, sub-section 1. Therefore, whatever the form of the order may be, when you come before the Special Bench, is not the Special Bench called upon to determine whether the words in the newspaper are or are not of the nature described in section 4, sub-section 1?]

Your Lordships have to take sections 17 and 19 together.

[MOOKERJEE, J.—Apparently the responsibility thrown upon the Special Bench is wider than that assumed by the Government. Before the order can be set aside, the Special Bench must be satisfied that the words used in the newspaper are not of the nature described in section 4, sub-section 1, and not the words in the order itself.]

I submit that if your Lordships leave out the order altogether and merely consider whether or not the words employed come under section 4, sub-section 1, that will not be correct. You see that no reference whatever is made to section 4 in the order. The Government of Bengal has there laid down a crime or offence which is not to be found in section 4 so far as the words are concerned. Section 4 is invoked as giving the Government power to forfeit the security.

Counsel then said that the only other question which remained was the question of onus, which might be considered from two points. The first was the point of view of the right or duty of a party to begin. Looked at from that point of view, undoubtedly the onus was upon him to begin. The question here was not so much of onus as their Lordships' duty. What their Lordships had to investigate was whether these articles did or did not come under section 4. He cited the cases of *Protap Chunder Mukerji v. Empress* (10), *Rohimuddi v. Queen Empress* (11) and *Milan Khan v. Sagai Bepari* (12) and said the ques-

tion was whether these articles disclosed an intent to excite hatred or contempt. Later he would refer to the evidence he relied on.

[WOODRUFFE, J., remarked that it would be more convenient at this stage both to the Court and the other side if Mr. Das indicated what evidence he relied on.]

Mr. Das said that he relied on the general policy of the paper. He would put in certain articles to show the general policy and also other articles which were connected in subject to these. Then he would give documentary evidence of these facts, namely, of their rights contained in charters, proclamations, official despatches and statements made by Ministers of the Crown. That would be from 1833 down to the present year. Next he would give documentary evidence of different reforms which were proposed by the Government from time to time and which were defeated by the activity of the Government officials. He would also give evidence of reforms inaugurated or attempted to be inaugurated by Lord Ripon which failed and the Morley-Minto Reforms, which were substantial reforms when they left England but which proved futile when they got into the hands of the committee here. He would give evidence of the Public Services Commission and the Industrial Commission, the latter to show how the industries of the country were not allowed to be developed by the officials here and how the industrial interest of this country was sacrificed to Manchester. From the Public Services Commission Report which was published in 1917, he would show how the promises made in the various proclamations of sovereigns beginning from 1858 downwards were not allowed to be fulfilled and the question remained practically in the same condition as when that Commission sat. Then he would deal with the present Reform Scheme and show what the proposal was and how it was sought to be killed by the officials here. In constitution the responsibility of Government was to Parliament through the Secretary of State, but in reality Parliament had never exercised any practical control and the Government officials in this country were responsible to nobody. The Provincial officials here were responsible to the Government of

(10) 11 C.L.R. 25 at p. 29.

(11) 20 C. 353 at p. 357.

(12) 28 C. 247 at p. 349.

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Bengal, which was responsible to the Government of India, which was responsible to the Secretary of State, which meant nothing, and the Secretary of State was responsible to no one. That was the practical working, although in theory it sounded well. Further he would give evidence of the different political questions agitating the minds of the people now and the state of public feeling.

[MOOKERJEE, J.—Is that oral?]

Documentary and oral. I shall give evidence of the events which have happened in the Panjab, and the state of feeling of the people in general with reference to that.

[WOODROFFE, J.—With a view to show what?]

To show that it is to the interest of Government that the state of such feeling should be brought to its notice. Further to show that it was with the object of ventilating a real grievance, which negatives any seditious intent. I want also to give evidence by calling several gentlemen to state what effect these articles had on their minds and which is the class of persons who read the *Amrita Bazar Patrika*.

Counsel then dealt with the articles from the point of view of the law questions he had raised and had not concluded when the Court rose for the day.

Mr. Das, on behalf of the Petitioners, continuing his argument the day following, said that in reply to a question asked by Mr. Justice Fletcher the other day with regard to the word "tendency" he would cite before their Lordships the case of *Reg. v. Burns* (5).

[WOODROFFE, J.—Mr. Advocate-General, do you rely upon the decision in *Mahomed Ali's case* (1).]

[The Advocate-General.—I rely upon it so far as clause (c) is concerned.]

[WOODROFFE, J.—Will you develop that argument?]

The Hon'ble Mr. T. O. P. Gibbons, Advocate General (with him Messrs. S. R. Das and B. O. Sen), for the Crown.—What I say shortly on that is this. So far as clause 4, coupled with (c), is concerned, no question of intention arises at all. And to that extent, I rely on *Mahomed Ali, In re* (1).

WOODROFFE, J.—What about the other

clauses? In order to get a comprehensive view of the section, we should like to know how those stand.]

I shall submit the same argument with regard to the clauses from (a) to (f). You have got to look at those words and you have got to see whether there is an offence under clause 4.

[WOODROFFE, J.—And the question of intention is quite immaterial?]

Yes.

[WOODROFFE, J.—We wish to consider if that is your view on the Privy Council case [*Mrs. Besant's case* (3)], whether it can be said that the Privy Council decision in any respect affects the decision in 41 Calcutta [*Mahomed Ali, In re* (1)] or whether the matter should go before a Full Bench.]

With regard to the Privy Council decision, what I say is this. We have no proper record of the Privy Council decision before us. We have obviously an incomplete extract of what the Privy Council is alleged to have said.

[WOODROFFE, J.—What do you say so far as the record of the Privy Council decision is before us? Does it seem to assume that the intention is immaterial? The record is not before us. Taking the report before us as it goes, does it show that the decision in *Mahomed Ali, In re* (1) is defective?]

It looks like that. But I submit that it will be extremely unsatisfactory to act upon that report. Until we get a detailed copy of the judgment of the Privy Council I submit your Lordships should leave out that extract altogether, and we should argue it on the cases of which we have got authoritative reports. We wired to Madras. They have not got a copy of the Privy Council decision. We wired to Simla and they have not got any report there.

[FLETCHER, J.—The Times Law Report comes out in weekly parts. The last mail we have of the 18th June. It ought to be there.]

It is not there.

[Mr. S. R. Das.—I don't think it is reported until it is actually signed by His Majesty.]

FLETCHER, J.—Yes. That is true.]
The Advocate-General.—I don't know how your Lordships are going to deal with

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this matter at all unless you get a full report of the Privy Council judgment?

[MOOKERJI, J.—How soon can we get a copy? We cannot very well ignore what has appeared. Suppose we give a decision and the matter is taken up to the Privy Council, it will be said that our decision is quite contrary to the Privy Council decision.]

I am now told that the Madras High Court has got a copy.

[FLETCHER, J.—Is that official or semi-official?]

The Government Solicitor, Madras, has sent us a wire saying that the High Court has got a copy. We will send a telegram to-day to the Registrar of the Madras High Court. I do not know whether the Court should send a telegram to the Court itself. If we apply, we have got to apply to the Solicitor and he will have to apply to the Court for permission to supply us with a copy.

[WOODROFFE, J.—We will send for the Registrar and see if it is not possible for the Registrar of our Court to communicate with the Registrar of the Madras High Court.]

[FLETCHER, J.—It is *Mrs. Annie Besant v. Advocate General of the Government of Madras* (3). That is how it appears in the *Times*.]

The report is headed in the matter of the Indian Press Act, 1910, section 4 (1), and in the matter of the New India Printing Works.

At this stage the Registrar came and their Lordships communicated to him what he was to do.]

[Mr. Lahiri, who appeared with Mr. Das, said.—The case, I see, is already reported in the *Times Law Report* which came yesterday. It is the last case. Volume 35, page 500.

[FLETCHER, J.—The Weekly Reports and the Solicitors' Journal come every week. The *Times Law Report* comes out every week too. It may be reported in one of them.]

[WOODROFFE, J.—Would you read us that? We have not got another copy. If that decision of the Privy Council does affect 41 Calcutta [*Mahomed Ali, In re* (1)], I suppose we will have to refer the case to the Full Bench.]

The Advocate-General.—The Full Bench will probably have no jurisdiction. We will consider that point afterwards. (The Advocate-General then read the judgment of the Privy Council in the case of *Mrs. Annie Besant v. Advocate General of the Government of Madras* (3) which appeared in the *Times Law Report*, Volume 35, page 506.) The last line of the case runs thus:—"Upon careful perusal of the several judgments, their Lordships found that weight has been properly given to the several sections. They did not find that the section has been misconstrued."

[FLETCHER, J.—It does not get rid of Explanation 2.]

No. It is an attempt to balance the two cases.

[FLETCHER, J.—We must have several copies of the judgment. I think that a few copies of the judgment must be taken by a typewriter. A duplicator machine will make us as many copies as we want.]

But there is the question of copyright.

[FLETCHER, J.—I do not think so.]

I should think that is the best thing. One has not had the opportunity of reading that judgment carefully, but at first blush it comes to this that the view taken by the Madras High Court is the proper view. In so far as section 4 (c) is concerned, there is no question of intention and the only question of intention comes in under Explanation 2, and then my submission is only on the question of attempt—not inciting, but an attempt to incite.

[FLETCHER, J.—Copies of this judgment must have to be made at least for ourselves. We cannot follow without this judgment.]

The Advocate-General said that it was quite clear that when this article came before the Government in the first instance, there was no question of intention there, because the words of section 4 were "whenever it appears to the Local Government." Mr. Das had only dealt with the first article but not with the second. The Advocate-General submitted that the first article came under section 4 (c) and not under the Explanation. All the complaint was with regard to section 4 (c) and the Government had followed strictly the wording of that section and

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said that this article, when carefully read, was brought under those words. Government went further and said that it did not come under the Explanation, which was in two parts, (a) and (b). In both cases the article must consist of comments. As regards (a) comments expressing disapproval of the measures of Government with a view to their alteration by lawful means, that was the only view that must be put forward. Then there was (b), comments, again, expressing disapproval of the administrative or other action of Government without in either case exciting or attempting to excite hatred, contempt or disaffection. On a careful reading of that Explanation the words "without exciting or attempting to excite" governed the whole section.

[WOODROFFE, J.—Do I understand you to say that intention is not material because we have not here to deal with measures or administrative action?]

I do.

[WOODROFFE, J.—What we are dealing with is an attack on the Government and on a class?]

Yes. An attack on that class is clearly not covered by the Explanation at all. They are neither a comment on measures of Government nor on the administrative or other action of Government. That is a *sine qua non*. Unless that is shown, this section does not come into play at all. There is this further difficulty in their way, that if they are comments on the measures of Government, they can only make comments with a view to their alteration by lawful means.

[FLETCHER, J.—Measures clearly means legislation as distinct from administration?]

Yes. As I understand this Explanation, even suppose they are comments expressing disapproval of the measures of Government with a view to their alteration by lawful means or suppose they are comments expressing disapproval of the administrative or other action of Government, they neither of them come under this section if there is an attempt to excite hatred or contempt or disaffection in either case.

[FLETCHER, J.—Your argument is that comments which do not express disapproval of the measures of Government with a view to obtain their alteration by lawful

means and comments which are not upon the administration or other action of Government, do not come within the Explanation at all?]

Yes.

[FLETCHER, J.—All other comments are included in clause (c)?]

Yes. If the question of onus arises the onus surely is on the person who relies on the exception.

The Advocate-General then referred to the other sections of the Act. It must not be forgotten that the proceedings under the Act were against, not the writer of the articles as they would be probably under section 124A of the Penal Code, but the person who was called the keeper of the Press. He quoted section 124A of the Penal Code and said that the word "whoever" there made it personal. If the Government were of opinion that the Press was kept in contravention of the Act, the keeper of the Press was responsible. He then cited sections 17, 18 and 20 of the Press Act and said that the wording of the Act and the sections of the Act themselves seemed to exclude evidence. The whole scope of the Act was that evidence was not permissible. If this Act was like section 124A of the Penal Code—an Act dealing with sedition—there would be no need for this section at all. He had authority to support that proposition, namely, *Queen Empress v. Bal Gangadhar Tilak* (8). The case in *Manmohan Ghose v. Emperor* (9) did not in any way contradict 22 Bombay [*Queen Empress v. Bal Gangadhar Tilak* (8)]. He then read section 21 of the Act and said that in accordance with that section rules had been framed which would be found in Hebble's book, page 424. The whole scheme of the Act showed that it was never intended that evidence should be gone into, except such evidence as was especially admitted under section 20. In none of the reported cases had any evidence been given or attempted to be given.]

[WOODROFFE, J., enquired whether the other side would not be at liberty to put in other issues of the paper to show that there was no such tendency as was alleged?]

That was not contemplated by section 20 at all. The other side must rely on

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argument, on the construction of the written document.

[MOOKERJI, J., remarked that then the Crown was at liberty to supplement that by putting in other issues of the paper.]

According to these rules that was so. Did not section 20, if one read it carefully, seem to apply to the Government only? What had the defendant got to prove? He had got to prove that the words were not of the nature described in section 4.

[MOOKERJI, J., observed that the Crown said that the tendency was so and so, while the applicant said that it was just the reverse. There was only one matter to be proved, namely, the nature or tendency of the words.]

Supposing there is a sign which to the ordinary man in the street means nothing. May not the Government put in other issues of the paper to show how the paper described that sign?

[MOOKERJI, J.—Quite so. Would not the applicant be at liberty to put in other issues of the paper to contradict the evidence given?]

The Advocate General said that there seemed to be two views about the matter and it was difficult to say which was the correct one.

The Advocate-General handed up to the Bench three typed copies of the Privy Council judgment in *Mrs. Besant's case* (3) and cited *Purusottam Narayan Nande v. Chief Secretary to Government of Bihar & Orissa* (13) which followed the judgment in *Mahomed Ali, In re* (1). The Judges there said they were not concerned with what the intention of the writer might have been or what the reasonable interpretation of the leaflet might be and that it was not enough to say that the words were not likely to bring the Government into hatred or contempt, but the writer must show that it was impossible to have that tendency. Counsel then dealt with the Privy Council judgment.

[Referring to the passage "it is not easy to say how Explanation 2 adds to or detracts from the exact words of paragraph (c)," Fletcher, J., remarked that it was inevitable that in different cases different people might come to different conclusions. Some people might

think that some weight should be given to freedom of argument and on the other hand there might be other minds that would pay more attention to the preservation of law and order.]

The Advocate-General said this was not the ultimate conclusion arrived at by the Privy Council. Reading further, he pointed out that the Judge limited "intention" to "attempt." He pointed to the final conclusion come to and went on to say that their Lordships had, therefore, to look for the law on the subject to the Madras case which had been approved by the Privy Council, which said that as the Judges in the Madras case had come to a conclusion on a question of fact they could not interfere. This seemed to exclude the people who had read the article. The Privy Council could rely upon the joint knowledge of the Judges themselves quite apart from any evidence. A fair conclusion to draw from the Privy Council judgment was that they had carefully considered the conclusion which the Madras High Court had come to. The Privy Council had considered for themselves section 4 and the necessary sub clauses and also Explanation 2, and while expressing the opinion that it was not easy to say how Explanation 2 with its qualifications added to or detracted from the language of paragraph (c) and while saying that the English judgments were of considerable assistance in interpreting the language of the Press Act and whilst giving an explanation of clause 2 coupled with Explanation 2, they ended up by saying that they were not going to disagree with the conclusion which the Madras Court had come to. If this Court thought the words in the articles of the *Amrita Bazar Patrika* were an attack on the Government or an attack on a class, it came under section 4 and there was no question, he submitted, of going into evidence at all. There was no question of intent at all, and, therefore, no question of evidence. The only evidence that could be given was under section 20 and no other evidence. He enquired whether their Lordships wished to hear him further or were simply going to decide whether evidence was admissible or not.

[WOODROFFE, J.—We think that we should hear Mr. Das on the question of the

(13) 49 Ind. Cas. 593; 4 P. L. J. 174; (1919) Pat. 65; 20 Cr. L. J. 177 (F. B.).

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interpretation of this section, whether in view of a proper interpretation of the section evidence can be given in the case of these two articles.]

Mr. Das then addressed the Court and submitted that apart from Explanation 2 altogether, the section described something which required a seditious intent. The words in the main section described sedition, which required what was called seditious intent. He submitted that it was clear from the wording of the section itself. It could never have been the intention of the Legislature that they should not look to the intention or purpose of an article, but were only to see if there was some man somewhere upon whom some effect of this kind might possibly be produced. He cited the case reported as *Queen-Empress v. Bal Gangadhar Tilak* (8) to show that the Court must consider the class of persons who read the paper and the time and circumstances of publication.

Mr. Das, continuing his argument the following day, said that there were two questions which arose, so far as the evidence was concerned, on the consideration of the sections. The first was, was the evidence admissible at all, and, secondly, what would be the relevant evidence? He submitted that on the interpretation of the sections themselves, apart from any judicial authority, it was clear that to constitute an article or the paper published of the description which was mentioned in section 4, certain intent was necessary, which Counsel described as seditious intent. He placed before their Lordships the words used in the sections, namely, "purpose," "likely," "tendency," "directly," "indirectly," for their consideration, and said that all those implied intention. They found the same words used in the judgments of eminent Judges. The contention of the other side was that the word "intention" did not appear in the governing clause—section 4—itsself and, therefore, "intention" did not come in. His answer was, "look at section 124A of the Penal Code." If one matter was settled beyond any possibility of argument to the contrary, it was this, that under section 124A they did require seditious intent. Every case which had been decided on this point laid down that there was a question of intention under section 124A.

He relied on the decision of the Privy Council to show that intent was necessary even apart from Explanation 2.

Counsel then said that it was clear that whether they had got the Explanation or positive enactment, the question of intention was necessary and evidence had to be given. What was relevant evidence in cases of this description? First, evidence as to the time, the place, the circumstances, and the intention of the article was admissible. That was supported by *Reg. v. Sullivan* (4), *Queen-Empress v. Bal Gangadhar Tilak* (8) and *Mrs. Annie Besant v. Government of Madras* (2). Second, evidence as to the existing state of public feeling in the country. That was important, and the Bench would find that in *Queen-Empress v. Bal Gangadhar Tilak* (8) and *Reg. v. Sullivan* (4). Third, evidence as to the character and description of that part of the public who might be expected to read the articles. That was based on the Privy Council decision. Fourth, evidence showing the general policy of the paper. Fifth, evidence of the nature and tendency of the words used in the articles in the light of previous articles in the same paper. Sixth, evidence from other sources as to the meaning of the words used. His authority for that was *Queen-Empress v. Bal Gangadhar Tilak* (8). For instance, a word might be used from the Queen's Proclamation and it might be necessary to explain that word.

[FLETCHER, J.—I suppose the King's language has the same meaning in Calcutta as in London.]

For instance, one of the articles begins by referring to a compact. I am entitled to show what that compact is and how it is understood in this country, otherwise your Lordships will not understand the compact. Or reference is made to a particular agitation in this country. Your Lordships are not aware of that particular agitation. I am entitled to show how it is understood by the people here.

Mr. Das then referred to section 20 of the Press Act, and contended that it only dealt with such evidence as was not admissible under the general law. In support of his contention he cited the Full Bench case of *Queen-Empress v. Amba Prasad* (14), and (14) 20 A. 55 at p. 69; A. W. N. (1898).

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said that he could give evidence as to habits of speech. It was admitted on all hands that if there was a question of intent evidence was necessary. He then turned to the second article and said that it referred to the employment by the executive of the military to shoot down people. That was an attack on the administration.

[WOODROFFE, J.—Suppose it was. Would that justify the writer of the article to say that the executive were shooting down people at their own sweet will?]

The question is what is my intention? If I have overstepped my limits, the question of intention comes in. I am not asking your Lordships to hold that this is legitimate but to show you what my intention was. What is the duty of a journalist? If he finds that throughout the country there is a feeling because of the employment of troops, if he finds that there is a general feeling of alarm and apprehension that the reign of law has gone, is it or is it not his duty to point that out? I should have thought that in every civilised country it must be a poor sort of journalist who cannot do that. If it is not the duty of a journalist to do that, I don't know what is.

Counsel then stated that the second article was a criticism of the administrative action taken at Delhi and also in the Punjab and was also criticism of the Rowlatt Act. It pointed out the state of public feeling on information received. The expression in the second article "shot down like cats and dogs" referred to the fact that while in England the military fired at the legs of a mob, that was not the case in the Punjab riots. He submitted that with regard to both articles he was entitled to call evidence.

[WOODROFFE, J.—For reasons which we will give later on in our judgment, the evidence which the applicant proposes to give upon the question of intention is, in our opinion in this case inadmissible. Nor is such evidence, in our opinion, in so far as it is covered by section 20 of the Press Act, admissible in proof of tendency. In so far as such evidence may be covered by section 20 of the Press Act, that is, in so far as it consists of copies of the newspaper published after the commence-

ment of the Act, we will deal with the matter if and where such evidence is tendered.]

I intended to tender copies of the newspaper.

[WOODROFFE, J.—Do you intend to tender them now?]

Yes, one by one. There are about twenty of them. They are those of 15th February 1917; 7th April 1917; 18th April 1917; 28th April 1917; 24th May 1917; 4th June 1917; 25th September 1917; 27th September 1917; 23rd September 1917; 23rd August 1918; 16th August 1918; 8th January 1919; 10th January 1919; 18th January 1919; 8th February 1919; 19th February 1919; 25th March 1919; 10th July 1917; 13th July 1917; 14th July 1917; 3rd August 1917; 18th August 1919; 7th August 1917; 17th August 1917; 24th August 1917; 17th April 1919; 5th June 1919; 15th June 1919; 21st December 1918; 22nd August 1919; 7th February 1919; 2nd May 1919 and 5th May 1919. This is what I have got now, but having regard to your Lordships' order some more issues will have to be put in.

[FLETCHER, J.—Have these any connection with the articles in question?]

They show the policy of the paper and bear upon the words of the section. They are tendered under section 20 on the nature and tendency of the articles.

[FLETCHER, J.—There must be some limit. There must be some connected article or series of articles.]

Mr. Das referred to Ratan Lal's Law of Crimes, 11th Edition, page 1186, as showing that evidence might be put in to illustrate the general policy of the paper; and, secondly, evidence which had connection with the articles complained of. He tendered those newspapers on both those grounds.

[WOODROFFE, J.—The Madras High Court dealt with the question of policy as a question of intention and admitted papers in those cases where, in the opinion of the Court, the question of intention was relevant.]

[FLETCHER, J.—Under section 20 you are entitled to give some form of articles in evidence and we shall have to go through those articles as you tendered them and see which are relevant. We have not

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seen them and do not know whether they are connected or not.]

Mr. Das.—As I understand you, you will only allow such articles as are connected.

[FLETCHER, J.—I think the Madras case said that there must be some connection. It is another matter as to what kind of connection is required. Of course we cannot say that they are connected until we see them.]

[MOOKERJEE, J.—Apart from the question of intention and policy it will be admissible in aid of proof of the nature and tendency.]

Mr. Das.—I claim to put them in under both these grounds.

[WOODROFFE, J.—Any article that you rely upon merely to show the policy of the paper is inadmissible.]

[After some discussion the Court directed Mr. Das to give a complete copy of each issue he intended to put forward to the Advocate-General, and as regards the Court it would be sufficient if extracts from the papers were made into three sets and handed to the Court.]

Mr. Das said that before he proceeded to place before their Lordships the different articles which appeared in the previous issues of the *Amrita Bazar Patrika*, he desired to place before them a passage from "Odger on Libel and Slander," page 484, 4th Edition. After reading the passage, Counsel said that he desired in the light of those observations to place some of the articles in the previous issues of the paper, to show the nature and tendency of the articles in question. He then read the article of the 13th February 1917, headed "For God, King and the Country." He tendered that article for the expressions used in the article of the 10th April, which dealt with the Empire, and which showed how the Empire was hurt and how the Empire was saved. It showed the real meaning of the word "Empire" used by the *Amrita Bazar Patrika*. The article of the 7th April 1917 was headed "India and the Empire—The eternal motto of Hindu social life." This again explained the empire ideal. The article of the 1st April 1917 was headed "India and the Empire," while "Home Rule Movement and Sir Michael O'Dwyer" was the headline of

the article of the 28th April 1917. Counsel read those articles.

[The Advocate General.—There is a much more interesting article than that—the next one of the 28th April.]

I will put in the whole paper. You can use that.

Continuing, Mr. Das said that the central idea of that article was that the prosperity of the Empire meant the prosperity of India and that the prosperity of India could not be achieved without the prosperity of the Empire. The object of this article was to have a radical change in the system of administration, and that change was to be consistent with the idea of the federal empire, which had been expressed in the articles of the *Amrita Bazar Patrika* and also by different speeches of statesmen in England. In fact it was based on the announcement which was made on the 20th of August 1917. He then read the article of the 24th May 1917, which was headed "The Empire."

The Advocate General.—There is a great deal more in that article. Please read from "the ideal of the real Empire.")

Mr. Das, after reading the article, said that brought out the meaning of the article very prominently. They wanted a radical change in the administration, which would bring in the real empire of which they had heard in the Proclamation of the 20th August 1917.

[The Advocate General.—Read the next: "This is the saddest tragedy of the present situation."]

So indeed it is.

After reading the portion, Mr. Das said that it carried out the same idea. If that was seditious, of course, they were guilty of sedition. How could a journalist deal with politics without pointing that out—that the idea which they were pursuing was wrong and was not in accordance with the pronouncement of the Secretary of State and the Viceroy? That was not true imperialism. Counsel then read the article of the 4th June 1917 which was headed "The King-Emperor's Birthday," and read the announcements made by the Secretary of State from the issue of the 23rd August 1917, the proceedings of the Imperial Legislative Council of the 20th September, containing Sir Hugh Bray's speech, which

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appeared in the issue of the 22nd September 1917, and the proceedings of the European Association meeting held at the Dalhousie Institute, Calcutta, on the 26th September, which appeared in the issue of the 27th September 1917, and read the article of the 25th September 1917, headed "The Threat of White Revolt," and that of the 27th September, headed "The Situation in Anglo India." He said that the point taken in those articles was that whenever a reform was proposed, it was the officials who opposed it always, and they had done it along with the European mercantile community. There was the following sentence in the article of the 27th September: "This administration and exploitation has been fatal to our economic advancement." Counsel said that the words "administration and exploitation" were used by Lord Curzon.

[FLETCHER, J.—Are those the actual words used by Lord Curzon?]

Yes. Of course Lord Curzon explained it afterwards that he did not use the word "exploitation" in that sense. Each sentence used in this article can be supported from the declaration of responsible Ministers from 1870 downwards.

Counsel then read articles of the 23rd August 1918, headed "Practical Proofs;" 16th August 1918, "The Extremists, the Moderates and the Anglo-Indian Press;" 25th January 1919 "Indian Nationalism and the British Crown;" 10th January 1919, "Sir William Duke's Reply to Extremists;" and the 18th January 1919 "The Peace Conference."

At this stage Mr. Das said that he was very tired and that with the permission of the Court his junior, Mr. I. B. Sen, would read the remaining articles.

Mr. I. B. Sen then read the article of the 8th February 1919, headed, "The Viceroy's Speech," and tendered His Excellency the Viceroy's speech itself made at the meeting of the Imperial Legislative Council and which appeared in the same issue of the paper.

[FLETCHER, J.—There is no proof that it is His Excellency the Viceroy's speech.]

[The Advocate General.—The fact that it appears in this paper is *prima facie* that it is not His Excellency the Viceroy's speech.]

[WOODROFFE, J.—What has this got to do with the case before us?]

Mr. Sen.—In the first article there is an attack upon certain officers recruited in England and upon the British mercantile community.

[WOODROFFE, J.—We are dealing with section 20 of the Press Act.]

This is only for the purpose of understanding the article which this paper had written upon this speech.

[WOODROFFE, J.—What is there to understand? We cannot understand the article unless we have the speech before us. We are of opinion that this speech is not relevant.]

Counsel then read the article of the 19th February 1919, "European Association's Latest Effusion," in which occurred the words "the people of this country will no longer submit to be ruled by every Tom, Dick and Harry."

[FLETCHER, J.—Is it worth reading that stuff?]

[The Advocate-General.—There is a great deal of vulgar abuse in the earlier part of the article.]

Counsel next read articles of the 26th March 1919, "Passive Resistance;" 10th July 1917, "Self-Government and Home Rule I;" 13th July 1917, "Self-Government and Home Rule II;" 14th July 1917, "Lord Rinaldis's Word of Caution No. 2;" 3rd August 1917, "The Test of Leaders;" 18th August 1917, 7th August 1917, 17th August 1917, "Home Rule and Passive Politics;" 23rd August 1917 and 1st April 1919, "The Satyagraha Day at Delhi." That was the report upon which the second article was based—the report of what took place at Delhi, Lahore and Amritsar. He commenced to read a telegram from the President of the Satyagrah Sabha, Delhi.

[FLETCHER, J., enquired what proof there was of that telegram and how it was relevant.]

In addition to that telegram there was also published a telegram in the Associated Press and the article commented upon those telegrams.

[WOODROFFE, J., remarked that the telegram was rejected, but Mr. Sen could read the comment.]

[Mr. Das then read the remaining articles, practically all of which were rejected.]

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[WOODROFFE, J.—All the issues of the *Amrita Bazar Patrika* and extracts from those issues which have not already been rejected, are now rejected and will be marked as such.]

Mr. Das then asked permission to refer to different legislative enactments, proclamations of sovereigns and utterances of ministers and statesmen as part of his argument.

[WOODROFFE, J.—To prove what?]

To explain the articles.

[WOODROFFE, J.—What passages can those articles do you say these documents explain?]

The whole of the articles.

[WOODROFFE, J.—Then we hold that we cannot allow it.]

Then that is my case.

[WOODROFFE, J.—We don't wish to hear you, Mr. Advocate-General, unless you wish to say anything.]

The Advocate General.—I don't wish to say anything further.

[WOODROFFE, J.—We reserve our judgment.]
JUDGMENT.

WOODROFFE, J.—This is an application by the Keeper of the *Amrita Bazar Patrika* Press and of the *Amrita Bazar Patrika* Co., Ltd., under section 17 of the Press Act I of 1910 asking that this Court may, under section 19, set aside the order of forfeiture which was passed by the Government of Bengal in respect and in consequence of two articles * published in the *Amrita Bazar Patrika* newspaper on the 10th and 12th April 1919, which are reproduced as annexures to the petition. The grounds of the forfeiture are that the first article was, in the opinion of the Governor in Council, likely and has a tendency, directly or indirectly, by inference, suggestion, implication, or otherwise, to bring into hatred and contempt the Government established by law in India and the officers of the said Government, recruited in England, and to excite disaffection towards the said Government, and that the second was likely and had a tendency, directly or indirectly, by inference, suggestion, implication, or otherwise, to bring into hatred the Government established in British India and to excite disaffection towards the said Government. The Government, therefore, acted under the provisions of section 4, clause (c).

I will deal at once with a contention of

Mr. C. R. Das, Counsel for the applicant, that the order was bad in so far as it does not state that the "officers of the said Government recruited in England" were in India. It would have been more formally correct if this had been expressly stated. It is, however, obvious that the reference is to officers in India and not, as suggested, to officers in Mesopotamia, England or elsewhere. Further, whatever the order may say, we have, (as pointed out by my brother Mookerjee J., during the argument), in disposing of the application, to see whether the article is not obnoxious to the provisions of section 4 which include, amongst others, attacks upon any class or section of His Majesty's subjects in British India. Further again under section 22 of the Press Act the only ground upon which the Court can set aside a forfeiture is that the matter which is the subject of it does not contain words of the nature described in section 4, sub section 1. No objection can be taken against the forfeiture itself, but it may be set aside under section 19. I hold, therefore, that this objection fails.

The substantial question is, whether the articles or either of them fall within the provisions of section 4, clause (c), or are excluded therefrom, on the ground that they are comments expressing disapproval of the measures of Government with a view to obtain their alteration by lawful means, or of the administrative or other action of the Government established in British India without exciting or attempting to excite hatred, contempt or disaffection towards the said Government or hatred and contempt towards a class or section of His Majesty's subjects in British India, viz, the officers of the said Government in India recruited in England.

No one, I think, reading these articles could come to the conclusion that they were not likely and had not a tendency to excite hatred and contempt towards the Government and class against whom they were directed. But it is urged for the applicant that even if, standing by themselves, the articles have this effect, it is open to the applicant to show, and he offers by evidence to show, that they were written without seditious intent. He then says that if he can show this alleged absence of seditious intent the forfeiture must be set aside. The argument involves the following considerations:—

* See Appendix—Ed.

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Is the question of intention immaterial in any, or is it material in every, case coming under section 4? If the answer is in the negative to both propositions, then as regards what provision of section 4 is intention to be investigated, and do the articles in question come under that provision or not?

If I were dealing with the matter as *res integra* and without reference to two of the decisions to which I later refer, I should have been disposed to hold that the intention of the Legislature was that the Court should look at the articles and say whether the meaning of them was such that they were likely or had a tendency to have the effect mentioned in clauses (a) to (f) of section 4, and that, upon a consideration of this question, the enquiry into what was the intention of the writer or publisher was not material, though in judging the nature or tendency of the words used, evidence of the particular character mentioned in section 2) might, if it were necessary, be admissible.

Here I may interpose to point out that the word "intention" is often loosely used. Thus we hear the expression "intention of a document." A document cannot have an intention nor a motive, nor can it "attempt" to do anything. Intention, motive, attempt have reference to persons and denote psychological facts of which a document may be evidence. The so called "intention of a document," as distinguished from the state of mind of its author, is nothing but its meaning. So far as the document is concerned, its so-called "intention" is its meaning. The Press Act in my opinion was framed to enable the Government and the Court to deal with the meaning of documents and not with the intentions of their authors and publishers. It is the criminal law of sedition which deals with the latter. So on an application to set aside a forfeiture it was intended, I believe, that the Court should (apart from section 20) look at the document and ascertain on a fair reading what was its meaning and should then say whether the words used, when properly understood, were of the nature or tendency mentioned in clauses (a) to (f) of section 4. If it is not shown that they are not of this character then the forfeiture is upheld. If, however, on the true construction of a document the Court is of opinion that it is a disapproving comment on the measures or actions of Government, or

the administration of justice which is not likely and has no tendency to excite the hatred, contempt or disaffection referred to in clause (c), that is, if it is a temperate and allowable criticism of such measures or actions, then the forfeiture is to be set aside. The Court in every case is, in this view, concerned with the meaning of the writing and not with the intentions of the writer. Intention is in this view the subject of criminal proceedings for direct sedition against persons under section 124A, or indirect sedition under section 153A, of the Penal Code and not of forfeiture of security given and document issued by a printing press.

It is true, however, that the wording of Explanation II of section 4 does raise a difficulty, for it uses words which have been relied on, and have been held, to show that the question of intention is, in certain cases, material; that is, the applicant may in the case of disapproving comments on the measures (which, in my opinion, means legislative measures) or administrative or other action of Government, or the administration of justice, show that in the making of such comments there was no attempt (which implies intention) to excite the hatred, contempt or disaffection mentioned in clause (c) of the section. Not improbably, the wording of this Explanation is due to careless drafting, the draughtsman overlooking the fact that he was importing into a section dealing with documents of a particular nature or tendency an explanation taken from section 124A of the Penal Code, which deals with an offence by individuals for the establishment of which a seditious intention is necessary. This was pointed out by Abdur Rahim, C. J., [*Mrs. Annie Besant v. Government of Madras* (2)] in his observation that the Explanation imported the question of intention, while clause (c) of section 4, to which the Explanation is attached, is not concerned with the intention of the writer of the words charged. It may be as was argued on behalf of the Crown in *Mrs. Besant's case* (2), that "attempting to incite" is a loosely worded equivalent of "tending to excite," but this construction was overruled and we must, as Abdur Rahim, J., says, read Explanation 2 as we find it.

However this be, this view of the section is no longer open, for it has been held by the Madras High Court in the case cited

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that whilst intention is immaterial so far as clauses (a) to (f) of section 4 are concerned, it is material if the case falls within Explanation II, when the Court is judging whether there was an attempt to excite hatred and contempt by comments coming under that section. It follows, therefore, that intention is only material if we have to deal with comments on the measures or actions of Government or the administration of justice, and it is not otherwise material. These comments again are not protected if they in fact excite or attempt to excite hatred, contempt and disaffection, but are protected if the disapproving comments on the measures of Government are made with a view to obtain their alteration by lawful means, or if they are made on the actions of Government or administration of justice, and if in both these cases there is no attempt to excite hatred, contempt or disaffection. As "attempt" implies intention, an inquiry whether there has or has not been such an attempt involves, it has been held, a consideration of the question of intention.

This view must be taken to have been approved by the Privy Council, which in the appeal from the decision of the Madras High Court observed as follows:—"Upon careful perusal of the several judgments their Lordships find that weight has been properly given to the several portions of the section. They do not find that the section has been misconstrued" [*Mrs. Annie Besant v. Advocate General of the Government of Madras* (3)].

Mr. C. R. Das has argued that the Privy Council overruled the distinction which the Madras High Court drew between the operative part of section 4 and the Explanation to clause (c). I am unable to accept this contention. It is true that their Lordships say that it is not easy to see how Explanation II adds to, or detracts from, the direct language of clause (c), but it does not, therefore, follow that the question of intention, which is material in the particular cases mentioned in the Explanation, is thereby made material as regards either other cases under clause (c), or all other clauses of section 4. I think, however, a legitimate argument may be raised as regards the subsequent passage

of the judgment of the Judicial Committee which commences with "In substance the question under clause (c) of section 4" and which is relied on by the applicant to show that the Privy Council did not draw any distinction between an attack on the Government as such and comments on its measures and actions, and that it treated an attack on a class as involving intention though no mention is made of a class in Explanation II, and though, as the Judicial Committee later point out the words in clause (c) which refer to the hatred or contempt of a class or section are not limited by Explanation II. On the other hand the judgment of the Madras High Court, which is affirmed, clearly holds (page 1120*) that section 4 allows less scope to criticisms of the measures of Government, and that (as already stated) the operative portion of section 4 does not make the intention of the writer material when considering whether the words are not of the nature described in section 4. Attacks on a class or section are not mentioned in Explanation II, and the Judicial Committee pointed out that the words in clause (c), which refer to the hatred or contempt of a class or section, are not limited by Explanation II. Finally they say that "the section has not been misconstrued" by the High Court of Madras, which very clearly distinguishes between the cases where intention is, and is not, material. Mr. C. R. Das has suggested that the Judicial Committee in making the last observation was referring to the manner in which the Madras High Court had applied the section, but this is not so, as the Judicial Committee then go on to deal with the application in detail of the principles of the law to the language of the various articles then before the Court.

These observations are sufficient to dispose of the argument that the question of seditious intent is material in every case coming under clauses (a) to (f) of the body of the section. But as the point is of importance and has been argued at great length, I will further examine it.

Put in the most condensed form, the contention of the applicant's Counsel is, that before the Press Act can be put into operation in any case, it must be shown

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that the offence of sedition has been committed, or to put the matter more accurately with reference to the terms of sections 17 and 19, the forfeiture must be set aside if the applicant shows that no sedition has been committed through the matter which is the ground of the forfeiture. In this view of the case the Act would mean that the Government may judge whether the offence of sedition has been committed, and if it thinks that there has been such an offence, then it may make an order of forfeiture. Then the applicant may come in and show that there has been no sedition, and the hearing of the application would take the form of a criminal trial, with this difference that the burden of proving that an offence had been committed would lie not on the Crown, but on the party whose property was forfeited, and the penalty would not be imprisonment of any person, but forfeiture of security and copies of the newspaper. In such a trial all evidence would be admissible which was admissible in a criminal trial.

I do not think that such was the intention of the Legislature. It may be said that proceedings under the Press Act partake of a criminal character in so far as they involve forfeiture. It may also be that the matter forfeited might make the party responsible for it, liable to a criminal charge of sedition or a charge under section 153A of the Penal Code, but the Act itself was not enacted for the punishment of such offences, but as its title and preamble show for the better control of the Press. It is essentially a preventive measure: a measure with the view to prevent crime, that is crime imperilling the existence of the State, the safety of its officers, public order and the like. It is to be observed that under section 21 the procedure, until the framing of rules by the High Court, is ordered to be that of the practice of the Court in proceedings other than suits and appeals. The only evidence for which direct provision is made by the Act is the admission of other copies of the newspaper in aid of the proof of the nature and tendency (section 20), and section 21 states that nothing contained in the Act shall be deemed to prevent any person from being prosecuted under any other law for

any act or omission which constitutes an offence under this Act. An offence under this Act is not sedition as such, but the printing or publishing of matter of the nature and tendency mentioned in section 4, which attracts to itself the penalty of forfeiture. If the Crown is desirous in any case of proceeding against any party for sedition, it will doubtless do so under the provisions of the Penal Code and according to the ordinary criminal procedure. Something may be said for Mr. C. R. Das's contention on the ground of thoroughness, for it may be argued either that intention is material in every case or in no case, but the other circumstances I have mentioned are in my opinion against it and the question is concluded by precedent.

We must then, in my opinion, follow the decision as to the interpretation of the section given by the Madras High Court and affirmed, as I understand it, by the Judicial Committee.

The question then is, are the articles before us merely disapproving comments on the measures or actions of Government? If they are not that, that is, if they are not such comments at all, or if besides being in part such comments, they are also an attack on the Government itself, or on a class, then in so far as they are not such comments no question of intention arises. For it is to be observed that a writing may in part constitute an attack on the Government itself and in another part be a comment on its measures and actions. If it is the former and of the nature specified in clause (c) or if it is an attack on a class, then it is not covered by the Explanation, which alone, according to the Madras decision [*Mrs. Annie Besant v. Government of Madras* (2)], imports the consideration of intention.

The first article in the order of forfeiture is alleged to be likely or to have a tendency to bring into hatred and contempt the Government established by law in British India and the officers of the said Government recruited in England and to excite disaffection against the said Government. I am unable to hold that this article does not contain words of the nature described, seeing that it alleges, amongst other things, that England in breach of her pledges farmed this country out to English officers, who govern the people of India according to their own sweet will on principles which

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are absolutely despotic and some of them un-British and barbarous, who serve themselves first and then only their mother country and increase their own pay looking down upon the people as mere human sheep created only to minister to their (the officers') own comforts and material prosperity, the officers fattening themselves out of the country, whilst the Indians decay, the officers again governing India as their own property in such a way that from being one of the richest of countries it has become the permanent abode of famine, plague and malaria.

The second article is alleged in the order of forfeiture to be likely and to have the tendency to bring into hatred, and to excite disaffection towards, the Government. This article may be said to be in part a comment on the action of Government with respect to the proceedings taken with reference to the recent riots, and there is a reference to the so called Rowlatt Act "which has robbed the people of many of the elementary rights of human beings." But it is more than this, as it is an attack upon the Government itself which is described as a "common enemy." It suggests that the people were provoked to violence, that on some pretence or another the Police picked up a quarrel, that the people were shot at like cats and dogs. The article then speaks of unprovoked aggression and says "we believe the Government of India will treat this awful incident with the same apathy as they have done with regard to the outrage at Delhi." Towards its close it says that as a result of what is said in the article, "the masses have at last been roused to realise that the reign of law is gone and people can be shot down at the sweet will of the Executive." I am unable to hold that this article does not contain words which are of the nature above described.

On this part of the case dealing with "nature or tendency" (corresponding to the words "are likely or may have a tendency" in section 4), certain evidence was tendered under section 20 of the Act. It may be a question whether the provisions of that section are equally available to the Crown and the accused. It speaks only of evidence in aid of the proof, and not disproof, of the nature and tendency of the words complained of. But this contention was overruled by the Madras High Court, and in the absence

of any words of direct exclusion of evidence, it is fairer to assume that if an article is ambiguous or doubtful and, therefore, the Crown requires to supplement it by the evidence of other articles from the same newspaper, the person against whom the order of forfeiture is passed should have the right to give evidence in rebuttal. I am, however, of opinion that the section only applies where, if the article stood alone, there may be doubt or ambiguity as to the character, nature, or tendency of the words used and not when the meaning of the article is apparent on its face, as is the case here.

Besides other leading articles in the newspaper extending from the year 1917 to 1919, a number of extracts from the newspaper were tendered which, in my opinion, do not in any case come within the scope of the section, namely, reports of events from press or private correspondents, proceedings in Council, His Excellency the Viceroy's speech, the Bishop of Calcutta's sermon, Mr. Jinnah's (former member of Council) letter on his resignation, the Right Hon'ble Mr. Montagu's speech in introducing the Reform Bill and on the Mesopotamian Commission, Message of His Majesty the King-Emperor, letter of resignation of Moulvi Mazharul Haq, dissentient minute of Sir Sankaran Nair on a Government despatch, a speech of Mr. B. Chakravarti and the dissentient minute on the Industrial Commission. All such matters we rejected, whether it is claimed that they are admissible under section 20 of the Press Act or otherwise. We also rejected (after first fully reading them) the various leading articles tendered. In my opinion they do not aid in proof of the nature or tendency of the words used, which are quite intelligible on their face. Nor are they admissible as evidence of policy of the paper, for policy is a matter of intention and for the reasons given such evidence is not admissible. Nor if they were admitted, would they, in my opinion, have helped the plaintiff's case or affected my judgment as to the nature and tendency of the articles which have been selected by the applicant as supporting his case.

The articles tendered are many and lengthy and I give only their essential gist. Issues tendered in connection with the first

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article, the subject of these proceedings, profess the following sentiments:—In the first place there are expressions of loyalty to the Throne sacred as the symbol of the collective life and of loyalty to the true or ideal empire, wholly different from the reality, namely, the present British Empire which is the product of the conscious pursuit of lower ends and a determined effort to repudiate the true ideal of empire (24th May 1917). At present there is only a "white imperialism", a confederacy of white men for the exploitation of the non-white members of the present empire (*ibid.*). Independence is not sought but Home Rule within the Empire, that is, a combination of national freedom with imperial subjection. Many passages insist on the fact and this is the general tenor of the articles as a whole, that the obstacle in the way of Indian political well-being is the self-interested hostility of the bureaucracy or Indian Civil Service, which one issue (20th January 1919) says means the Government of India. All this is the "psychology of selfishness" (27th September 1917), which the writer says has produced a dangerous discontent in the masses (*ibid.*). The Viceroy, it is said, has protected the interests of the foreign bureaucracy and foreign exploiters (19th February 1919). In one issue (26th March 1919) it is even suggested that the Government is provoking some sort of physical conflict. The foreign bureaucracy which governs India is striving to retain their powers (3rd August 1917). This absolute power of the alien official must be broken (14th July 1917) in order that there may be a transfer of power from the alien bureaucracy to the people. But loyalty to the Crown and the "Ideal Empire" is professed and anything but constitutional methods of agitation are discouraged.

There is no allegation in the order of forfeiture of disloyalty to His Majesty the King-Emperor. What is alleged is that the articles are likely, and have a tendency, to bring into hatred and contempt the Government established by law in British India and to excite disaffection towards the said Government, and, as regards the first article, that it contains words which are likely or have the tendency to bring into hatred and contempt the officers of the said Government recruited in England. It has been held

that the words "Government established by law in India" in section 4 are not to be construed as indicating only the supremacy of the British Crown in India and the British connection with it, as opposed to independence: *Mrs. Annie Besant v. Government of Madras* (2). For the rest the articles tendered do not assist the applicant, or disprove the alleged nature or tendency of the words used, the meaning of which is plain on their face. Because on previous occasions language has been used which was either not obnoxious to the section or was, under the circumstances, passed over by the Government, does not in any sense disprove the nature or tendency alleged in this case. What, however, they do show is that for about two years previous to the first article in question, the paper has been writing against the so-called bureaucracy, which it speaks of as being the Government and which that article has now attacked in terms which have led the Government to make the forfeiture, although there was according to one of the previous issues (27th September 1917) a deep, wide spread, and dangerous discontent in the masses in this country which should have led the paper to be careful of what it said and published.

Some further articles tendered deal with the recent grave riots in this country. The "Delhi outrage" is described (2nd April 1919) as a wanton outrage. It speaks of the enormity of the Police action in shooting unarmed people like sparrows: of the hecatombs in which "natives" were victims, of the resultant disappearance of "natives" from the arena of their unfortunate "native" land. It points out that the unarmed people of this country are neither Germans nor Turks. Mr. C. R. Das says as to this that no enquiry was held and that this explains the reference to the "apathy" of the Government of India in the second article in question. An article on the "Delhi Tragedy" (4th April 1919) speaks of grave provocation. The issue, however, of the 11th April 1919 exhorts the public to behave with composure, which the writer is sure that they will do. There is nothing in all this which disproves the alleged nature and tendency of the words of the second article in question. What they do show is that for two years the paper has been

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strongly criticising the so-called bureaucracy and for a short time previous to the second article also the action taken as regards the recent riots without any intervention by Government. When, however, violent and inflammatory language was used at a time which, owing to the late riots, was one of public danger, then the Government felt itself compelled to take action under the Press Act with a view to prevent the spread of further disorder.

These findings dispose of the application, but I will now deal with the case on the assumption that evidence of intention was (as argued by the applicant) relevant and will record and deal with the evidence tendered on his behalf on this part of the case. The argument was that, over and above the nature and tendency of the words used, the Court must be satisfied that there was a particular seditious intention, otherwise the order of forfeiture must be set aside.

Evidence was tendered of "time, place, circumstances and occasion of the article." On this head we were invited to enter into an extensive historical enquiry from the year 1833 to the present time with a view to show the rights of the Indians as set forth in charters, proclamations, official despatches and statements made by ministers of the Crown, that from time to time various reforms had been proposed by the Government such as Lord Ripon's Local Self Government Act and the Minto-Morley proposals substantially as they left England, which are said to have been defeated or obstructed by the activity of Government officials in this country. It was proposed to tender the Public Services and Industrial Commissions reports to show that the development of the country had been prevented by Government officials and the industrial interests of India had been sacrificed to Manchester. Promises made had thus, it is said, not been allowed to be fulfilled. We were invited to receive evidence of the question agitating the mind of the public and of the general "political environment." Secondly, evidence was offered of the state of the country and of public feeling. It was argued that evidence, oral and documentary, of political questions agitating the people and their feelings in general and of recent events in the Punjab

was relevant to show that it was necessary in the interests of Government itself that such an alleged state of things should be brought to its notice. It was argued that the object being to ventilate a grievance a seditious intention was negatived. Thirdly, evidence was offered of the character and description of that part of the public who might be expected to read the article. Mr. Das proposed to call evidence to show what effect the reading of the articles in question had upon the readers and then to show the class of persons who read the *Amrita Bazar Patrika*. These are said to be (and evidence was offered to show it) the politically minded class amongst educated persons, who were all engaged in bringing about a lawful change in the administration, which change had been practically promised. Fourthly, evidence of the previous general policy of the newspaper. Fifthly, evidence from other sources of the meaning of the whole articles. To explain the articles applicant's Counsel desired to refer to various legislative enactments, Government resolutions and utterances of ministers of the Crown and other statesmen. Mr. C. R. Das, in response to the question of the Court—"What were the passages in the articles, the subject of these proceedings, which he said that these documents explain," replied that they were tendered to explain the whole of the articles, and any point made in them, and on the rejection of the above-mentioned evidence closed his case.

In the first place, it is to be observed that the truth of the facts alleged is no answer. Even if there were the "compact" and promises alleged, and even if they were broken, and even if this was due to the alleged self interested hostility of the class to which the first article refers, this would be no answer.

We must then distinguish between the meaning of an article and the intention of its writer. The construction of a document is a question of law to be determined by grammar or logic, the primary organs of interpretation, aided when necessary by evidence to make the words which are used fit the external things to which the words are appropriate [Evidence Act, section 92, proviso (6)], and by evidence of the character mentioned in sections 95-98 of the Evidence Act. Where

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the words of the document are (as in my opinion is the case here) plain and unambiguous, we must look to the document alone. Extrinsic evidence to explain a document is not admissible because not needed in such a case. In my opinion there is no ground in this case for the admission of explanatory evidence. Passing then to evidence of intention, this should be gathered from the language employed. When the meaning of a document has been truly ascertained, that document itself is evidence of the intention of the writer. Intention is a psychological fact and can be proved under section 14 of the Evidence Act when the existence of intention is in issue or relevant, provided that the collateral fact is not too remote. If then intention was rightly in issue in this case, that is, if for instance the existence of intention were relevant in the case of an attack on a class under clause (c) of section 4, though under that clause intention is not material, and though the Explanation to that clause which imports intention has no reference to words directed against a class, then speaking generally evidence of intention would be, according to the Madras decision, admissible. Seshagiri Ayyar, J., there said, *Mrs. Annie Besant v. Government of Madras* (2) "It is true that in the vast majority of cases the intention must be gathered from the language employed, but it is possible to show that what *prima facie* appears objectionable should not be given the meaning attributable to the words employed. The difference is very thin, no doubt; but I think that the Legislature was contemplating in Explanation II, the possibility of proof by the person proceeded against that the intention to create disaffection was not in the mind of the writer." *Mrs. Annie Besant v. Government of Madras* (2). If, then, it be assumed, for the purpose of this judgment, that evidence of intention was relevant, then in my opinion such evidence as has been offered to us and tendered would not, if admissible and if admitted, have established the applicant's claim to relief. Let it be assumed (without adjudging it to be so) that the political promises have not been kept, but have been thwarted by either the Indian Government or its officials or both, and that the motive of the writer or writers of the articles was,

as alleged, to carry out the reforms said to have been promised, and to change the present political system, thus putting an end to the power of the Indian Civil Service, even then that would not justify the use of language likely or tending to create hatred, contempt or disaffection. Whether, notwithstanding such likelihood or tendency, there was or was not an actual intention to create hatred, contempt or disaffection must be primarily determined upon a perusal of the writings themselves. As the Judicial Committee say, "in judging the question of intention the publisher must be deemed to intend that which is the natural result of the words used." The words used in these articles are in my opinion likely to produce hatred, contempt and disaffection. This must then be presumed to have been intended until the contrary is shown. If the words upon their true construction do not show the nature or tendency alleged, then there is no need to enquire into the existence of seditious intention which the true construction of the words negatives. If, on the other hand, the words used naturally, clearly and indubitably have such tendency, then it must be presumed that the publisher intended that which is the natural result of the words used, and no other evidence is (to say the least) likely to rebut the existence of such intention. If, however, the words used leave the nature and tendency in doubt, it is not likely that Government action would be taken thereon, but if it did, it is not likely again that the Court would uphold the forfeiture, or that it would do so, at any rate, in the absence of strong evidence of seditious intent. Once, therefore, seditious intent is clearly inferred from the language used, other evidence on the question of actual intention becomes in practice of little moment. As suggested by the passage cited from the judgment of Seshagiri Ayyar, J., the distinction between intention inferred from the document and as otherwise existing is there. However this may be, and dealing with the particular facts of this case, nothing of the political history and argument and other matter which have been offered to us and proffered as evidence in this case would, if accepted as evidence, have shown that if the existence of the particular intention was necessary

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that intention was not present. If intention is necessary, then I think it is shown to exist.

To sum up:—In my opinion whatever else there is in the articles we are also dealing with a case outside Explanation 2, which it has been held imports intention. For there is here in both cases an attack on the Government itself, and not merely a comment on the measures or actions of Government, and in the first article there is also an attack on a class which is not covered by Explanation II. An enquiry into intention is, therefore, not material and it cannot be said that the words used are not of the nature described in section 4, sub-section (1), clause (c). If, however, intention were material, then some of the evidence tendered is inadmissible and even if all that was offered to us and proffered in evidence had been admitted, it would not have rebutted the intention to be gathered from the articles themselves. The writer or writers must be deemed to have intended that which is the natural result of the words used, namely, the hatred, contempt and disaffection alleged.

The application, therefore, must be dismissed. As I see no reason in this case for departing from the usual rule that an unsuccessful party shall pay the costs, the order will be that the applicant do pay the Government's costs of these proceedings as of a hearing on scale No. 2.

MOOKERJEE, J.—On the 10th April 1919 the "Amrita Bazar Patrika," published an article headed "To whom does India belong." Two days later, the paper published another article headed "Arrest of Mr. Gandhi—More outrages." On the 15th April, the Governor of Bengal in Council took action under section 4, sub-section (1) of the Indian Press Act, 1910, and the Keeper of the Printing Press where the paper was printed was thereupon served with a notice in the following terms:—

"Whereas it appears to the Governor in Council that the printing press known as the Amrita Bazar Patrika Press, Limited, located at Nos. 19 and 20, Baghbazar Street, Calcutta, in respect of which security to the amount of Rs. 5,000 has been deposited in accordance with the provisions of section 3 (2) of the Indian Press Act, 1910, has been used for printing and publishing the

issues of the newspaper called the 'Amrita Bazar Patrika' bearing date April 10th, 1919, and April 12th, 1919, and whereas the said issue of the said newspaper, dated April 10th, 1919, contains an article entitled 'To whom does India belong,' the whole tenor of which article and in particular the passage from the words 'England having acquired India' to the words 'they increased their own pay' are in the opinion of the Governor in Council likely and have a tendency directly or indirectly by inference, suggestion, implication or otherwise to bring into hatred and contempt the Government established by law in British India and the officers of the said Government recruited in England and to excite disaffection towards the said Government and whereas the said issue of the said newspaper, dated April 12th, 1919, contains an article entitled 'Arrest of Mr. Gandhi—More outrages,' the whole tenor of which article and in particular the passage 'The masses have at last been roused to realise that the reign of law is gone and people can be shot down at the sweet will of the executive' are in the opinion of the Governor in Council likely and have a tendency directly or indirectly by inference, suggestion, implication or otherwise to bring into hatred the Government established in British India and excite disaffection towards the said Government.

"Now, therefore, take notice that the Governor in Council in pursuance of section 4 (1) of the Indian Press Act, 1910, declare the security of Rs. 5,000 deposited in respect of the Amrita Bazar Patrika Press, Limited, Calcutta, and all copies of the issues of the newspaper called the 'Amrita Bazar Patrika' having date of April 10th and 12th, 1919, wherever found to be forfeited to His Majesty."

The security thus forfeited had been deposited pursuant to a notice issued on the 29th May 1913 under section 3, sub-section (2), in respect of an article which appeared in the paper on the 12th April 1913. On the 13th June 1919 the Keeper of the Press applied to this Court to set aside the order of forfeiture made on the 15th April. The application was heard by a Special Bench constituted under section 18 and we have now to determine the matter in controversy. Under section 19, sub-section (1),

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the High Court is competent to set aside the order of forfeiture on one ground and one ground alone, namely, that the words contained in the newspaper in respect of which the order in question was made were not of the nature described in section 4, sub-section (1). In view of the elaborate arguments addressed to the Court, it is necessary to examine the scope of the relevant sections of the Indian Press Act.

The preamble states that the provisions were enacted, because it was necessary to provide for the better control of the press, and section 1, sub-section (2), makes it clear that in the opinion of the Legislature such necessity extended to the whole of British India. Section 2 contains the interpretation clause and defines a newspaper as a periodical work containing public news or comments on public news. Section 3 provides for the deposit of security by Keepers of Printing Presses. The first sub-section refers to deposits to be made at the time of the declaration under section 4 of the Press and Registration of Books Act, 1867. The second sub-section refers to presses in respect of which a declaration had been made prior to the commencement of the Act; in this class of cases, a deposit may be demanded only if it appears to the Local Government that the press is used for any of the purposes described in section 4, sub-section (1). It was under this provision that security to the maximum amount (Rs. 5,000) was exacted from the Amrita Bazar Patrika Press in 1913. We now come to section 4, which invests the Local Government with authority to declare the security as also copies of the offending newspaper forfeited in certain cases. The section is in these terms:—

"(1) Whenever it appears to the Local Government that any printing press in respect of which any security has been deposited as required by section 3 is used for the purpose of printing or publishing any newspaper, book or other document containing any words, signs or visible representations which are likely or may have a tendency, directly or indirectly, whether by inference, suggestion allusion, metaphor, implication or otherwise—

(a) to incite to murder or to any offence under the Explosive Substances Act, 1908, or to any act of violence, or

(b) to seduce any officer, soldier or sailor in the Army or Navy of His Majesty from his allegiance or his duty, or

(c) to bring into hatred or contempt His Majesty or the Government established by law in British India or the administration of justice in British India or any Native Prince or Chief under the suzerainty of His Majesty, or any class or section of His Majesty's subjects in British India, or to excite disaffection towards His Majesty or the said Government or any such Prince or Chief, or

(d) to put any person in fear or to cause annoyance to him and thereby induce him to deliver to any person any property or valuable security, or to do any act which he is not legally bound to do, or to omit to do any act which he is legally entitled to do, or

(e) to encourage or incite any person to interfere with the administration of the law or with the maintenance of law and order, or

(f) to convey any threat of injury to a public servant, or to any person in whom that public servant is believed to be interested, with a view to inducing that public servant to do any act or to forbear or delay to do any act connected with the exercise of his public functions.

The Local Government may, by notice in writing to the keeper of such printing press, stating or describing the words, signs or visible representations which in its opinion are of the nature described above, declare the security deposited in respect of such press and all copies of such newspaper, book or other document wherever found to be forfeited to His Majesty.

Explanation I—In clause (c) the expression 'disaffection' includes disloyalty and all feelings of enmity.

Explanation II—Comments expressing disapproval of the measures of the Government or of any such Native Prince or Chief as aforesaid with a view to obtain their alteration by lawful means, or of the administrative or other action of the Government or of any such Native Prince or Chief or of the administration of justice in British India without exciting or attempting to excite hatred, contempt or disaffection do not come within the scope of clause (c).

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(2) After the expiry of ten days from the date of the issue of a notice under sub section (1), the declaration made in respect of such press under section 4 of the Press and Registration of Books Act, 1867, shall be deemed to be annulled."

It is plain that the power to declare the security forfeited can be exercised only with regard to a press in respect of which security has been deposited under either of the two subsections of section 3. In respect of such presses, the provisions of the section may be utilized, when it appears to the Local Government that the press is used for the purpose of printing or publishing any newspaper, book or other document which contains any words, signs or visible representations which are likely to produce the effects mentioned in clauses (a) to (f) or which may have a tendency, directly or indirectly whether by inference, suggestion, allusion, metaphor, implication or otherwise (that is, in any other way or by any other process) to produce any of the effects mentioned in the six clauses. Notwithstanding the able argument of Mr. Das, I am not convinced that a question of intention at all arises with regard to that portion of sub-section (1) of section 4 which precedes the six clauses. A faint attempt was, indeed, made to deduce intention as a material element from the use of the word "purpose," but there was obviously no force in that contention. The press is used for the purpose of printing and publication; that clearly does not indicate that intention is a material factor in the determination of the question of the legal effect of the words, signs or visible representations contained in the newspaper, book or other document. Reliance was next placed upon the expression "tendency," but clearly intention and tendency are entirely different things. Intention has reference to the state of the mind of the actor; tendency, on the other hand, has reference to the possible result of the act. The "tendency" of an act may, in fact, be exactly the reverse of the result which the actor intended should follow from the measure taken by him. Intention is one of the decisive elements in determining the moral character of an act and is an essential element in many a criminal offence. The tendency of an act implies that the act may

tend to cause a particular result, but may or may not actually lead to that effect. I can discover no solid ground for the contention that the use of the word "tendency" shows that intention is an essential element in the determination of the true character of the words, signs or representations. We have next to consider the six clauses but before we proceed to them, we may note that in the introductory words of this clause, the Legislature has used every conceivable expression which could widen its scope. Thus the Legislature was not content with the word "likely," but used as an alternative the expression "may have a tendency, directly or indirectly, whether by inference, suggestion, allusion metaphor, implication or otherwise." Of the six clauses, we are concerned primarily with clause (c) in the case before us. This clause contemplates five classes of possible effect:—

(i) To bring into hatred or contempt or to excite disaffection towards His Majesty.

(ii) To bring into hatred or contempt or to excite disaffection towards the Government established by law in British India.

(iii) To bring into hatred or contempt the administration of justice in British India.

(iv) To bring into hatred or contempt or to excite disaffection towards any Native Prince or Chief under the suzerainty of His Majesty.

(v) To bring into hatred or contempt any class or section of His Majesty's subjects in British India.

If the words, signs or visible representations contained in a newspaper, book or other document are likely to produce any of these effects or may have a tendency to produce any of these effects, the question of intention is immaterial. We are concerned, not with the intention of the author, but with the effect which they tend to produce or are likely to produce. In my opinion, if the section had stopped with the first paragraph of what is now sub-section (1), the question of interpretation would thus have been fairly simple; the sub-section includes, however, two explanations which must be taken into

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account; the second of these has formed the subject of much discussion and comment.

The object of the second explanation is to exclude from the scope of clause (c) comments of certain classes which may be enumerated in three groups as follows:—

(i) Comments expressing disapproval of the measures of the Government or of any Native Prince or Chief under the suzerainty of His Majesty:

Provided that such comments are made with a view to obtain their alteration by lawful means:

Provided also that such comments are made without exciting or attempting to excite hatred, contempt or disaffection;

(ii) Comments expressing disapproval of the administrative or other action of the Government or of any Native Prince or Chief under the suzerainty of His Majesty:

Provided that such comments are made without exciting or attempting to excite hatred, contempt or disaffection;

(iii) Comments expressing disapproval of the administration of justice in British India:

Provided that such comments are made without exciting or attempting to excite hatred, contempt or disaffection.

In each of these cases, the question of intention is material; in the first case, we have to ascertain the purpose with which the comments have been made, and in all the three cases, we have to determine whether an attempt has been made to excite hatred, contempt or disaffection. In the language of Stephen (Digest of Criminal Law, article 50), an attempt to commit a crime is an act done with an intent to commit that crime and forming part of a series of acts which would constitute its actual commission if it were not interrupted. To put the matter differently, attempt is an act done in part execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and, possessing, except for failure to consummate, all the elements of the substantive crime; in other words, an attempt consists in the intent to commit a crime, combined with the doing of some act adapted to but falling short of its actual commission; it may consequently be

defined as that which if not prevented would have resulted in the full consummation of the act attempted; *Reg. v. Collins* (14). The effect of the second explanation thus is to exclude from the operation of clause (c) three classes of comments, subject to the qualifications formulated above. Consequently, where a case is alleged to fall within the scope of the second explanation, it is incumbent on the Court to examine the question of intention. But even though the question of intention is found in favour of the person whose security has been forfeited, he cannot obtain the benefit of the explanation, if the comments do in fact excite or constitute an attempt to excite hatred, contempt or disaffection. The stringent provisions of the substantive portion of the sub-section are consequently relaxed only to a very limited extent; comments of the character mentioned in the second explanation may be permissible, even though they are likely or may have a tendency to produce the corresponding result mentioned in clause (c), but they must not excite or constitute an attempt to excite hatred, contempt or disaffection. The difference between the clause and its explanation thus consists, in the main, of the recognition of the distinction between likelihood and tendency on the one hand and realisation or attempt on the other hand; this, though appreciable in theory, is likely to be valueless in practice to the person concerned. The exception to the all comprehensive general rule, contained in the so called explanation, still further loses its effect, when it is borne in mind that comments may in one portion be protected by the second explanation, but may, in another portion, fall within the scope of clause (c). In such an event the passage as a whole must plainly be deemed obnoxious.

Section 17 authorises the person against whom an order of forfeiture has been made under section 4 to apply to the High Court within two months from the date thereof to set it aside on the ground that the newspaper, book, or other document in respect of which it was made did not contain any words, signs or visible representations of the nature described in

(14) (1864) L. & C. 47; 9 Cox C. C. 497; 33 L. J. M. C. 177; 10 Jur. (N. S.) 686; 10 L. T. 581; 12 W. R. 836.

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section 4, sub-section (1). Section 18 provides for the hearing of the application by a Special Bench of the Court. Section 19, sub-section (1), provides that the Special Bench shall set aside the order of forfeiture if it appears to the Bench that the words, signs or visible representations contained in the newspaper, book or other document in respect of which the order in question was made were not of the nature described in section 4, sub-section (1). Two propositions indisputably result from these provisions, namely, first, that the validity of the order of forfeiture can be questioned only on the ground, namely, that the words, signs or visible representations in question are not of the nature described in section 4, sub-section (1), and, secondly, that although the order may have been made by the Local Government on the ground that the words, signs or visible representations were of the nature described in one or other of the six clauses of section 4, sub-section (1), the High Court can set aside the order of forfeiture only if satisfied that they do not fall within any of those clauses. In this connection, a question of burden of proof was raised in the course of argument, and reference was made to the decisions in *Protap Chunder Mukerji v. Empress* (10), *Rohimuddi v. Queen-Empress* (11), *Milan Khan v. Sagai Bepari* (12) to show the true functions of a Court of Criminal Appeal. These cases affirm the doctrine that a Court of Criminal Appeal should approach the case before it with a view to determine whether the conviction can be sustained on the materials on the record. That principle clearly has no application to a hearing under section 18 of the Indian Press Act. An order is made by the Local Government in exercise of the powers conferred by the Statute. The person affected thereupon applies to the High Court to set aside the order on the allegation that the words, signs or visible representations are not of the nature described in section 4, sub-section (1). It is manifest that the Court does not approach the case with the presumption that the order is erroneous; the burden lies upon the petitioner to establish the validity of his contention. If he fails to satisfy the Court that the words, signs or visible representations are not of the nature des-

cribed in section 4, sub-section (1), the application must be dismissed. There is no force in the contention that this interpretation compels the petitioner to prove a negative; the argument is based on a superficial view of what must take place at the trial. The Court is invited by the petitioner to examine the true nature of the words, signs or visible representations: he expounds his version before the Court; if he is able to persuade the Court to accept his exposition as the correct interpretation, the construction adopted by the Local Government stands displaced, with the result that the order of forfeiture is cancelled. The burden of proof thus clearly lies upon the petitioner.

We have next to consider section 20, which is in these terms: "On the hearing of any such application with reference to any newspaper, any copy of such newspaper published after the commencement of this Act may be given in evidence in aid of the proof of the nature or tendency of the words, signs or visible representations contained in such newspaper which are alleged to be of the nature described in section 4, sub-section (1)." There has been considerable discussion at the Bar as to the object and meaning of this section. In my opinion the object of the section was to widen, for a specified purpose, the rule of evidence embodied in section 14 of the Indian Evidence Act. Illustration (e) to that section shows that when A is accused of defaming B by publishing an imputation intended to harm the reputation of B, the fact of previous publications by A respecting B showing ill-will on the part of A towards B is relevant as proving A's intention to harm B's reputation by the particular publication in question. Section 20 of the Indian Press Act lays down a more comprehensive rule in the case of newspapers, inasmuch as it allows any copy of the newspaper, published after the commencement of the Act, to be given in evidence in aid of the proof of the nature or tendency of the words, signs or visible representations. Section 14 of the Indian Evidence Act, on the other hand, would not make the evidence relevant, unless the existence of a state of mind or state of body or bodily feeling was in controversy. It must be observed, however,

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that the wider rule embodied in section 20 of the Indian Press Act does not apply to publications other than newspapers; in other words, if a question arises as to the nature or tendency of the words contained in a book, previous books by the author cannot be given in evidence under section 20. But it has been argued, that section 20 has, at the same time, a restrictive effect in two directions, namely, first that evidence of the type contemplated by section 20 can be adduced only on behalf of the Crown, and, secondly, no evidence other than what is admissible under section 20 can be adduced at the trial either by the petitioner or by the Crown. I am convinced that these propositions are not well founded. The first contention is based on a very narrow interpretation of the expression "in aid of the proof of the nature or tendency." In my opinion, the matter before the Court is the determination of the question of the nature or tendency of the words, signs or visible representations. The parties come forward with counter allegations, and each side relies upon copies of previous issues of the newspaper in support of the construction favoured by it. If the copies produced are relevant, plainly the language of the section is not unduly strained when we hold that the materials produced, whether by the one side or by the other, constitute evidence "in aid of the proof of the nature or tendency." Besides, this is a manifestly just interpretation. The contrary view, which seeks to confine the privilege of production of evidence under the section to the Crown alone, would lead to a position so obviously unjust that I cannot persuade myself to believe that such a departure could really have ever been intended by the Legislature to be achieved indirectly by the disguise, as it were, of section 20. I hold accordingly that section 20 may be utilised by the person affected by the order of forfeiture precisely in the same manner as by the Crown: *Amar Singh v. Emperor* (15), *Ghulam Qadir Khan v. Emperor* (16). The second contention is equally groundless. If the Legislature had intended that no

evidence of any description whatever, other than what is contemplated by section 20, should be admissible at the trial, an express provision to that effect might no doubt have been easily framed. Besides, cases can be imagined without difficulty, where evidence other than what is admissible under section 20 might be indispensable to enable the Court to discharge the duty imposed upon it by section 19. To take one instance: if the order of forfeiture relates to signs or visible representations, evidence may be essential to enable the Court to determine their meaning before their tendency could be adjudged. Again, where the order of forfeiture relates to words, they may, it is not inconceivable, belong to a language not known to the members of the Special Bench; or their tendency to produce a specified effect may be by suggestion, allusion or implication which may stand in need of exposition, by evidence. It is not necessary for our present purpose to attempt an exhaustive enumeration of the classes of evidence which might be admissible; but what appears to me to be clear is that section 20 was not enacted with a view to exclude all evidence other than what is rendered admissible thereby.

Section 21 requires the High Court to frame rules to regulate the procedure in the case of applications under section 17, the amount of the costs thereof and the execution of orders passed thereon; until such rules are framed, the practice of the Court in proceedings other than suits and appeals is to apply so far as may be practicable. The requisite rules have been framed by this Court and are set out in the volume of Rules and Orders edited by Mr. Hechle.

Section 22 provides that every declaration of forfeiture, purporting to be made under the Act, shall, as against all persons, be conclusive evidence that the forfeiture therein referred to has taken place, and no proceeding purporting to be taken under the Act shall be called in question by any Court except the High Court on such application as aforesaid, that is, the application mentioned in section 17. This section makes the declaration of forfeiture conclusive evidence of the factum of forfeiture; section 1, apart from the second Explan-

(15) 29 Ind. Cas. 827; 15 P. R. 1915 Cr.; 16 Cr. L. J. 555; 33 P. W. R. 1915 Cr.

(16) 24 Ind. Cas. 572; 210 P. L. B. 1914; 36 P. W. R. 1914 Cr.; 15 Cr. L. J. 490; 27 P. R. 1914 Cr.

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further, the legality of the forfeiture can be questioned, only by the method mentioned in section 17 and to the extent provided thereby. To take one illustration: when an order of forfeiture has been made in respect of a book, the order, if not set aside in a proceeding under section 17, is conclusive evidence of the fact in a civil suit between the publisher and the author. Section 26 provides that nothing contained in the Act shall be deemed to prevent any person from being prosecuted under any other law for any act or omission which constitutes an offence against the Act. Consequently, the fact that an order of forfeiture has been made under the Indian Press Act, does not stand in the way of a possible prosecution for sedition under the Indian Penal Code, in respect of the selfsame writing.

I have so far analysed the relevant provisions of the Indian Press Act without the aid of judicial decisions. The object of the legislation was to secure control over presses, publishers and means of publication, as also the suppression of seditious or objectionable newspapers, books or other documents wherever found. It might legitimately have been expected that the provisions in a Statute of this character, so comprehensive in its application and so far-reaching in its consequences, would be carefully couched in language which could leave no possible room for doubt as to their meaning and legal effect. The fact, however, is otherwise, and reference has consequently been made to judicial pronouncements on the subject, which themselves are not always easy to reconcile: *Muhammad Ali, In re* (1), *Furusottam Narayan Nande v. Chief Secretary to Government of Bihar and Orissa* (13), *Mrs. Annie Besant v. Government of Madras* (2) and *Mrs. Annie Besant v. Advocate-General of the Government of Madras* (3). The views expressed in *Mahomed Ali, In re* (1) were, on many vital points, not accepted by the Madras High Court in *Mrs. Annie Besant v. Government of Madras* (2), and as the latter decision has now been approved by the Judicial Committee, the decision in *Mahomed Ali, In re* (1) can no longer be treated as binding in so far as it is inconsistent with the decision of the Judicial Committee. I do not wish to examine minutely the

judgment of the Judicial Committee as if it were a Statute, but it is worthy of note that there are passages in it, which are, in appearance at least, of contradictory import. One of the controverted questions is, whether the second explanation covers the whole of clause (c) and thereby makes intention an essential factor in all cases comprised in the clause. There are four passages in the judgment of the Judicial Committee which bear directly on this point:—

(i) "It is perhaps not easy to see how Explanation II, with its qualifications adds to or detracts from the direct language of clause (c). A similar observation might be made upon section 124A of the Penal Code. The utmost that can be said is that the addition of the explanation with its apparent repetition of the positive enactment, in the guise of a qualification of the explanation, shows an almost meticulous care by the Legislature to balance the two considerations." (Consideration of freedom of argument and consideration of the preservation of law and order or of harmony.)

(ii) "In substance the question under clause (c) of section 4, sub-section (1), comes to this: Are the passages such as in fact to excite or do they disclose an attempt (which implies intention) to excite hatred, contempt or disaffection towards the Government or of any class or section of His Majesty's subjects in India."

(iii) "It must be remembered that those words in clause (c) which refer to the hatred or contempt of a class or section are not limited by Explanation II, and that there has been, in this respect, some departure from the policy of the Penal Code, which superadded a qualifying explanation which has not found place in the Press Act."

(iv) "All the (Madras) Judges thought that several passages were calculated to bring the Government in hatred and contempt, and this after giving due weight to Explanation II."

Nothing would be gained by an endeavour to harmonise these passages, but taken together and read with the judgments of the Madras High Court, in which, according to their Lordships, they do not find that the section has been misconstrued, the Judicial Committee may be taken to have affirmed the view that no question of intention arises under section 4, sub.

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tion, which does not cover all the cases comprehended in clause (c). In this view, I find myself unable to accept the contention, pressed by Mr. Das with much learning and ingenuity, that we should interpret section 4 as if it were a re-enactment of the Indian and English Law of Sedition. I do not overlook that, towards the conclusion of their judgment, their Lordships of the Judicial Committee describe the proceedings as a "criminal case," nor am I unmindful that in an earlier passage, they refer to the cases of *Queen-Empress v. Bal Gangadhar Tilak* (8), *Queen-Empress v. Ramchandra* (17) and *Queen-Empress v. Amba Prasad* (13), wherein section 124A of the Indian Penal Code was construed, and proceed to observe that these judgments are of considerable assistance towards the construction of section 4; but they also point out, in that very passage, that the language of section 124A is not precisely the same as the language in the Press Act, and in another passage they add that there has been in the Press Act some departure from the policy of the Penal Code. It may be pointed out further that, in the Indian Penal Code the provision in respect of sedition is contained in section 124A, which finds a place in the sixth Chapter of the Code, devoted to offences against the State, whereas section 153A, which relates to cases of promoting enmity between classes, finds a place in the eighth Chapter devoted to offences against private tranquillity. In the Press Act, on the other hand, what corresponds to but is not identical with the Law of Sedition is contained in section 4, sub section (1), but what might have corresponded to section 153A does not at all find a place in clause (c); as a matter of fact the provision was in the Bill as first published, but was omitted from the final version. We cannot also overlook, what indeed is obvious on a comparison of the terms of section 124A of the Penal Code and section 4 of the Press Act, that the two provisions cannot be completely assimilated, far less can they be treated as identical. The scope and purposes of the two legislations are fundamentally different, and, however, helpful the decisions on section 124A of the Penal Code may be, we cannot import into section (17) 22 B. 152.

2 of the Press Act a meaning not justified by its language. No useful purpose would thus be served by an examination of the principles enunciated in the cases of *Reg. v. Duffy* (18), *Reg. v. Sullivan* (4), *O'Brien Ex parte* (19), *Reg. v. Burnas* (5), *Reg. v. Freeman Journal* (20), *Reg. v. Aldred* (6), which were relied upon by Mr. Das with a view to enumerate the elements of a seditious intention under the Law of England (Stephen's Digest of Criminal Law, 6th edition, article 98). It would indeed be against all recognised canons of interpretation to import into the Press Act the provisions of the Law of Sedition as enacted in the Indian Penal Code or as administered in England. If the Legislature had intended to make section 4 an exact reproduction of the Law of Sedition, the section might have been materially shortened; the purpose would have been served if a simple provision had been framed to the effect that an order of forfeiture might be made wherever a newspaper, book, or other document was found to contain matter such as would justify a conviction under section 124A or section 153A. I cannot consequently accede to the contention that the test of the validity of an order of forfeiture under section 4 is, whether the offending article justifies a conviction under section 124A.

A preliminary point must next be noticed before the subject-matter of the offending articles is scrutinised. It has been argued that the terms of the notice of forfeiture are defective, inasmuch as section 4, sub-section (1), clause (c), refers to "hatred or contempt of any class or section of His Majesty's subjects in *British India*," whereas the notice mentions "the officers of the Government recruited in England." It cannot be disputed that this variance between the language of the Statute and the terms of the order should have been avoided, and there is no reason why the notice should not have adhered to the exact language of the section. This variance, however, even if it were treated as material, cannot be made a ground for cancellation of the order of forfeiture. There is one ground and one ground alone on which the validity of the order can be attacked

(18) (1843) 2 Cox. C. C. 45; 9 Ir. L. R. 329.

(19) (1833) 15 Cox C. C. 150; 12 Ir. L. R. 29.

(20) (1902) 2 Ir. R. 82; 6 Ir. L. R. 628.

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under section 17 which can be set aside only under section 19; a defect in the form of the notice under section 4, sub-section (1), is not included in such ground. The articles must consequently be now examined with a view to determine, whether the words are not of the nature described in section 4 sub-section (1).

It is necessary to keep before us the precise issue which requires investigation, because the question of the admissibility of the evidence tendered under section 2) or under the general law must be decided from the point of view of its relevancy. The questions, then, are as follows:—

(i) Are the words contained in the newspaper likely to produce or have they a tendency to produce any of the five categories of consequences mentioned in clause (c) as analysed above?

(ii) If the answer is in the affirmative, do the articles fall within one or more of the three classes of comments enumerated in the second explanation as analysed above?

As regards the first question, the opinion I have formed is that both the articles, read without elucidation, have a tendency to bring into hatred or contempt or to excite disaffection towards the Government established by law in British India. Besides this, the first article has also a tendency to bring into hatred or contempt a class or section of His Majesty's subjects in British India, namely, the officers of that Government recruited in England. The language of the articles is plain and unambiguous and does not stand in need of, possibly does not admit of, a commentary and exposition. There is in both the articles an open and incisive attack, of the most direct and straightforward character imaginable, on the Government established by law in British India; in addition to this, the Anglo Indian officers are described in the first article as the lease-holders of India who serve themselves first, then their mother country, and next the three hundred and fifteen millions in India, who are governed by them at their sweet will on principles which are absolutely despotic and some of them un-British and barbarous. I shall not attempt a summary or an analysis, because in the process of condensation many a choice phrase and expression would be

left out; to appreciate fully the articles,* they must be read in their entirety. In my judgment, when they are so read, there can be no doubt as to their tendency. But Mr. Das has made an ingenious attempt to adduce evidence to elucidate their probable effect and to prove that their real tendency is the reverse of their apparent tendency. He foreshadowed the classes of evidence he would tender for this purpose:—

(1). Documentary evidence contained in charters, proclamations, official despatches, pronouncements by Ministers of the Crown, from 1833 to 1919 on the subject of the methods of administration of India;

(2). Documentary evidence to prove that various reforms in the mode of administration proposed or inaugurated from time to time by the Government have not been realised or have been delayed or restricted by reason of the activity of Government officials in India, such as the Local Self-Government scheme of the Marquis of Ripon, the Morley Minto reforms, and the Montague-Chelmsford plan for responsible Government;

(3). Reports of Royal Commissions inclusive of dissentient minutes, such as the Industrial Commission and the Public Service Commission, in order to show how the development of Indian industries has been retarded, if not sacrificed, and how the pledges of successive Sovereigns for the good government of India have remained unfulfilled;

(4). Documentary evidence to show that the British Parliament has exercised little effective control over the affairs of the Indian Government, with the result that officials in this country have been responsible neither to the Parliament nor to the people;

(5). Oral and documentary evidence of events in the Panjab mentioned in the second article and the public feeling created thereby;

(6). Oral evidence to prove the actual effect produced on the minds of those who have read the offending articles;

(7). Evidence as to the general policy of the paper.

The ostensible object with which this evidence was tendered was to establish the tendency of the articles in question, but the real purpose was two-fold, namely, first, to

*See Appendix—Ed.

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prove the absence of seditious intent, and, secondly, to establish the truth of the allegations made in the articles. Now, as I have already explained, the absence of seditious intent is not a material factor in the determination of the very specific issue we are called upon to try; an article may well be beyond the bounds of the Indian Penal Code, but may yet be drawn into the net of the Indian Press Act. We are thus concerned here with the tendency of these articles. That tendency is manifest to every reader of ordinary intelligence. The evidence of witnesses on either side stating the impression produced on their minds by a perusal of the articles would, even if it were admissible, be of little assistance; the Court has to determine for itself, in a case like the present where there is no doubt or ambiguity as to the meaning of the words, what effect they are, by their nature, likely to produce on the normal average reader understanding them in their plain natural meaning. Nor would it be useful, even if it were permissible, to investigate what class of people subscribe to the newspaper, for the actual readers may well be assumed to be far more varied and numerous than the subscribers themselves. The evidence to prove the truth of the allegations made in the articles is equally irrelevant. Justification cannot be pleaded to take the case out of the operation of section 4, sub-section (1); and in one of the numerous cases cited by Mr. Das himself—*Reg. v. M'Hugh* (7), an eminent Irish Judge, Lord O'Brien, L. C. J., pointed out that there were cases where the maxim prevailed "the greater the truth, the greater the libel." Consequently, the historical documents, formidably arrayed, which Mr. Das offered to put in evidence (and which, by the way, are familiar to all students of British Indian history), were inadmissible, for the simple reason that they were irrelevant for the determination of the question of tendency of the two articles. Nor was evidence of intention admissible on this part of the case, for as already explained, the question of intention does not arise in relation to that portion of section 4, sub-section (1), which precedes the Explanation. We are thus left with the evidence tendered by Mr. Das under section 20, namely, copies of the "Amrita Bazar Patrika" published after the commencement of the

Indian Press Act. Such evidence could be given only in aid of the proof of the nature or tendency of the words which are alleged to be of the nature described in section 4. Here, again, the evidence must be tested from the standpoint of relevancy. Some *prima facie* connection must be made out between the offending articles and the matter contained in the copies of the newspaper tendered in evidence; if no such connection is established, the evidence must be rejected. On this ground, we rejected forthwith extracts which embodied a sermon by the late Bishop of Calcutta, speeches by the Secretary of State on the Reform Bill and the Mesopotamia Commission, Minutes of dissent by Pandit Madan Mohan Malaviya and Sir Sankaran Nair, letters of resignation of the additional Members of the Imperial Legislative Council, such as Mr. Mazharul Huq and Mr. Jinnah, speeches by His Excellency the Viceroy, reports of public meetings and speeches delivered there, reports from press correspondents and like matters. They had no relevancy whatever to the definite question under investigation, namely, the true nature and tendency of the two articles. The same remark is applicable to the other numerous articles published in the paper during the last two years on a variety of political topics. They had no bearing on the question of nature or tendency of the articles under consideration; some of them might have been of assistance, if the question of seditious intent had been material, but it must not be assumed that all of them would have tended in favour of the newspaper. The position thus is that although evidence of the kind contemplated by section 20 was admissible in aid of the proof of the nature and tendency of the articles, and other evidence, if available, might conceivably have been used for the same purpose, the evidence actually tendered was wholly irrelevant for the determination of the question of nature and tendency. I hold accordingly that apart from the second explanation, the words contained in both the articles have a tendency to bring into hatred or contempt or to excite disaffection towards the Government established by law in British India and the words used in the first article also tend to bring into hatred or

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contempt a class or section of His Majesty's subjects in British India, namely, the officers of the Government recruited in England. This leads us on to the next question.

The second question raises the issue, whether the articles in their entirety fall within the scope of the second explanation and are thus excluded from the operation of clause (c). It must be stated at the outset that in so far as the first article has a tendency to bring into hatred or contempt a class or section of His Majesty's subjects in British India, it cannot be rendered immune by the operation of the second explanation. A comparison of the five categories included in clause (c) with the three comprised in the explanation makes it abundantly clear that the fifth category in clause (c) has no counterpart in the explanation. With regard to this aspect of the first article, then, no question of intention can possibly arise, and this by itself would be sufficient to justify the refusal of the application with regard to that article. We have next to examine whether, apart from this, the two articles can be deemed to consist exclusively of comments of one or more of the three types mentioned in the explanation. The answer must be in the negative. As regards the first class of comments, namely, those expressive of the disapproval of the measures of the Government, it is plain that the term "measures" was intended to apply to legislative measures; the analysis of the explanation set out above shows that the comments were regarded by the Legislature in three aspects, namely, the legislative, the administrative, and the judicial functions of the State. Mr. Das has contended that the articles contained comments expressing disapproval of the legislative measures as also the administrative acts of the Government. If it be assumed that some of the comments may fairly be regarded in this light, it is obvious upon a perusal of the articles that they contain a great deal which cannot possibly be deemed as comments of this description. On this part of the case, according to the Judicial Committee, the question of intention is material. Consequently evidence would be admissible to prove the intention; but the evidence

tendered was irrelevant. No portion of that evidence had any bearing upon the question of intention of the author of the articles. The question of intention comes in, as we have seen, from the use of the expressions "with a view to obtain" and "attempting to excite." These expressions are hardly applicable to "comments," but the explanation is ill-expressed, and in view of the decision of the Judicial Committee as to the materiality of intention in this connection, it would be fruitless to speculate as to the real intention of the framers of the Act. But as the Judicial Committee point out, in judging the question of intent, the publisher must be deemed to intend that which is the natural result of the words used, having regard, among other things, to the character and description of that part of the public who are to be expected to read the articles. From this point of view, there can be little doubt as to the intention. The articles themselves speak of "the seething discontent that prevails from one end of India to the other" and state that "now the whole country is ablaze. It is not the educated Indians alone who are indignant at these gross outrages, but the masses as well." If this be a correct description of the condition of the people—and the writer of the articles is most emphatic in his assertion—the effect of comments of the character contained therein would plainly be to excite hatred, contempt and disaffection. The position then is that even if the two articles had not contained an attack upon Government, and had consisted exclusively of comments expressing disapproval of the measures on the administrative action of the Government, the explanation would have been of no avail, inasmuch as they constitute an attempt to excite, even if they do not actually excite, hatred, contempt and disaffection amongst a people who, on the unimpeachable testimony of the writer, were already in a state of excitement. But as I have stated before, even if some of the passages can be treated as disapproving comments on the legislative measures and administrative actions of the Government, they contain a great deal not comprehended in that description. The result consequently is that the nature and tendency of the

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articles taken as a whole bring them within the operation of section 4, sub-section (1), clause (c), and they cannot be excluded therefrom by the application of the second explanation.

In this view the conclusion follows that the application under section 17 fails and must be dismissed with costs, as directed in the judgment of Woodroffe, J.

FLETCHER, J.—I agree with the judgment of Mr. Justice Woodroffe.

Application dismissed.

APPENDIX.

The following are the articles in the *Amrita Bazar Patrika* dealt with in the above judgment of the Special Bench:—

(1) TO WHOM DOES INDIA BELONG?

India belongs to Indians as of right, as England belongs to Englishmen. Englishmen, however, made a compact with the Indians in which the latter cordially agreed. It was that Indians should accept the rule of Englishmen provided they governed them on righteous principles. The arrangement was that Indians would pay Englishmen handsomely for their labour, but then the former should be treated not as a subject race but as fully the latter's peers.

Not only did a number of England's greatest statesmen agree to such an understanding but their illustrious Queen herself, in the name of God, gave a solemn pledge that her officers would treat her Indian and European subjects exactly in the same manner in every respect, whether it be in regard to self-government or public services, freedom of speech or toleration in religious faiths and practices. In a word Queen Victoria conferred all the political rights of a British citizen upon the Indians. What is more, both Houses of Parliament accepted this Royal Proclamation of 1858 without a dissentient voice.

In one sense the document is more than a Parliamentary Act. It contains not merely the declaration of the greatest sovereign of England, but also the unanimous decision of the entire British nation through its August Representative Assembly. But is India governed by England on those high principles which are embodied in the various Parliamentary Statutes and official Despatches as well as in the Proclamation alluded to above? Nay, is India governed by England herself?

There are two countries in Asia which are governed

on what may be called European principles, viz., Japan and India. In Japan the rulers are but followers of European methods of administration. In India the Europeans themselves carry on the affairs of the country. India has thus a clear advantage over Japan. For the former is ruled by Europeans direct and the latter by the disciples of the Europeans. The Europeans in India, again, have the honour of their nation and sovereign in their keeping for both Parliament and Queen Victoria promised the Indians, before God and man, the same rule that obtained in Great Britain. It should also be noted that India is richer in resources and far more populous than Japan. Besides, India has a more ancient civilisation and literature than Japan. Japan, in fact, is a mere child in this respect.

All the same Japan is almost as great a power as England herself while India is only a "property." The existence of the latter is ignored by all, and three hundred and fifteen millions of Indians are looked down upon as mere human sheep. Though Japan was one of the poorest countries in the world, and though India, when it came into the hands of England, was one of the richest, India is now not only far poorer than Japan but it has become the permanent abode of famine, plague and malaria.

Is it not a strange phenomenon that the foremost Asiatic country, which is under the direct control of the foremost nation in Europe, is the home of starvation and pestilence, and the smallest country in this continent is a power strong enough to crush one of the strongest military nations in the world? Yet, the problem is easy of solution. Japan is the first consideration to a Japanese administrator; not so, however, is India to an Englishman ruling this country. To him India stands third in his estimation, he himself being the first and his country and sovereign being the second.

It is far from correct that England rules India even in the same sense as it rules Ireland. If that had been the case there would have been very little cause for dissatisfaction and India would have grown fast enough under the enlightened rulers of Great Britain. But the source of the seething discontent that prevails from one end of India to the other lies in the peculiar way she is governed.

England having acquired India forgot all her noble and solemn pledges and farmed it out to one thousand British officers headed by the Secretary of State for India. India really belongs to these English officers, and to England in name. The three hundred and fifteen millions in India are governed by them at their sweet will, and on principles which are absolutely despotic and some of them un-British and barbarous. The result is that Indians and the British Empire in India are decaying and India has become the property of a handful of Englishmen.

In short, these Anglo-Indian officers numbering

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a little over one thousand are in the position of lease-holders of India. They serve themselves first, then their mother country. As for the Indians, they were of course, according to these selfless statesmen, created by Heaven only to minister unto their comforts and material prosperity. Thus they expelled the Indians from all offices in the higher services and they increased their own pay. They could have never done it if England herself, and not these lease-holders, directly ruled the country.

In days gone by the landholders of Bengal had to lease out their estates to European indigo planters. The latter never cared for the improvement of the property. Their sole object was to make indigo out of the lands in their temporary possession and their only anxiety was whether or not the property would last the term of their lease.

It then comes to this. The forty millions of British people derive very little benefit from the Empire of India. As for the Indians they are dying fast, and the time is not far distant when the higher classes are likely to disappear altogether if the present mode of administration is not radically changed. A few thousand British officers and merchants to whom India has been farmed out are fattening themselves out of the country. How India is faring under the present system was graphically described, twelve years ago, by one of the Anglo-Indian officers, Mr. Donald Smeaton, a former member of the Viceregal Legislative Council who had entered Parliament, in one of his speeches at Edinburgh. We may refer to this speech in a future issue.

(2) ARREST OF MR. GANDHI.**MORE OUTRAGES.**

In resigning his membership in the Supreme Council Mr. Muzhrul Haque wrote thus to the Viceroy:

"Innocent persons were shot down (in Delhi) because they were holding a peaceful demonstration against an unpopular measure of the Government of India. Your Excellency's Executive Government has thought fit to endorse the version given by the local authorities.....Such action amounts to a negation of all good and orderly government."

And the reply to the above remonstrance is the commission of further horrors at Lahore and Amritsar, where, as in Delhi, the unarmed mob was also fired upon by the armed Police and many innocent men were killed and wounded! And why was this cruel barbarity perpetrated? Did the people take the law in their own hands? Judging from the telegrams of the Associated Press, which is under official control, what the people of Lahore did was

to make a demonstration on receiving the news of Mr. Gandhi's arrest. It was a peaceful demonstration in all conscience and all that its promoters did was to raise shouts of "hai hai" and "Mahatma Gandhi ki jai." There was certainly nothing wrong in it. They then wanted to proceed in a certain direction when the Police obstructed them with fire-arms. The crowd was asked to disperse and go back. It is said that they did not obey this order, and the inevitable followed—they were immediately shot at like cats and dogs. It is not even alleged, as was done in the case of the Delhi outrage, that stones and brickbats were thrown at the Police. It was an unprovoked aggression for which, judging from the version at our disposal, there was absolutely no justification. And we believe the Government of India will treat this awful incident with the same apathy as they have done with regard to the outrage in Delhi. Is this a safe course?

"Nothing like the application of the *lathi*" That is the proverb in this country. The machine gun rule is of course still better. The teeming millions in this country, who have been reduced into a race of sheep, can very easily be cowed down by only a few armoured motor cars with machine guns and made to do anything by the rulers. In this way they can no doubt take possession of the body of the whole nation, but it has also a soul. That ethereal thing is always free, and beyond their power. Their machine guns and aeroplane bombs cannot touch it. On the other hand the more you oppress the more you develop its latent powers. So, though the authorities may get some immediate advantage by firing upon innocent and unarmed mob and killing and wounding some innocent people, they are mistaken in supposing that they are thereby strengthening themselves. Brutal violence never pays in the long run. It makes the whole nation united against a common enemy.

Look to the result of these outrages. Mr. Gandhi was proceeding to Delhi on a peaceful and high mission. His object was not to fight the authorities there but to preach to the people a noble aspect of the Satyagraha movement, namely, to learn self-restraint and not to retaliate even when wantonly oppressed by the Police. The Governments of the Punjab and Delhi should have thus welcomed him as a friend. Instead of that they prevented his entering into the Punjab, knowing full well that according to his Satyagraha vow, he could not obey their order asking him not to proceed to the Punjab. They were also aware that if there was just now an individual who was the beloved of the whole of India it was this Gujrati saint and any outrage committed on him would be deeply resented by tens of millions of men. Though they knew this fact full well yet they took him in custody and dragged him back to Bombay. And the inevitable followed. The arrest of Mr. Gandhi produced an upheaval in cities like Delhi, Lahore, Amritsar and other places.

This thoughtless action of the authorities was thus responsible for the popular demonstrations

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which took place at Lahore and Amritsar. It was their special duty to see that further provocations were not given to the people. What they did, however, was to let loose armed Police among the demonstrators. A better mode of provoking them to violence could not have been conceived. All the same, beyond roaming in the streets with bare heads and feet, shouting the mournful cry "hai hai" they are reported to have done nothing else. On some pretence or other, however, the Police picked up a quarrel and showed their bravery by shooting down men who were not armed even with walking sticks.

And now the whole country is ablaze. It is not the educated Indians alone who are indignant at these gross outrages but the masses as well. What the "agitators" failed to do, the Rowlatt Act and the pitiless policy of the Punjab and Delhi Governments have accomplished. The masses have at last been roused to realise that the reign of law is gone and people can be shot down at the sweet will of the executive. They have further come to know that the Rowlatt Act is a most dangerous measure which has robbed British subjects in India of many of the elementary rights of human beings. And further, the Hindus and Mussalmans have forgotten their communal differences and become one united body. The bureaucracy will thus find that, instead of strengthening their position, they have weakened it very much by their high-handed proceedings in the Punjab and passing such a relentless law as the Rowlatt Act.

CALCUTTA HIGH COURT.

CRIMINAL REVISIONAL CASE No. 862 OF 1919.

November 26, 1919.

Present:—Mr. Justice Chondhuri and Mr. Justice Newbould.

**JHARU KHAN AND OTHERS—2ND PARTY—
PETITIONERS**
versus

**SARADA CHARAN SIKDAR AND OTHERS
—1ST PARTY—OPPOSITE PARTY,**

Criminal Procedure Code (Act V of 1898), ss. 107, 145, 439—Proceedings under s. 145—Order dropping proceedings under s. 145 and directing proceedings under s. 107—Revision—High Court, interference by.

Where by an order of a Magistrate proceedings under section 145, Criminal Procedure Code, are dropped, because proceedings under section 107 would meet the case, and proceedings under the latter section are actually pending, the High Court

will not interfere in revision with the order dropping proceedings under section 145. [p. 616, col. 1.]

FACTS appear from the judgment.

Babu *Dasarathi Sanyal* (with him Babu *Debendra Narain Bhattacharjee*), for the Petitioners.—Proceedings under section 145 of the Code of Criminal Procedure were initiated upon a Police report of an imminent fear of a breach of the peace regarding a large area of land. The first party consisted of two tenants and eight agents of the Teota Raja and the second party consisted of six persons who were said to be old tenants. The whole of the lands was attached by the Sub-Divisional Officer, who took cognisance of the matter and directed the Police to sell the standing grass. A petition against the order for the sale of grass was presented before the District Magistrate, who thereupon called for the record of the section 145 proceedings. The Police thereafter made other reports to the District Magistrate, suggesting that a breach of the peace would be prevented if certain persons were bound down under section 107 of the Criminal Procedure Code. The first party also presented a petition before the Sub-Divisional Officer, praying that the section 145 proceedings might be dropped as a breach of the peace had been prevented by a proceeding under section 107 of the Criminal Procedure Code against the persons named by the Police. The proceedings under section 145 were consequently dropped.

I submit that the way in which the District Magistrate intervened is wholly illegal. Refers to *Tara Charan Sarkar v. Bengal Coal Co.* (1), and *Jagmohan Pal v. Ram Kumar Gope* (2). Under section 435 of the Criminal Procedure Code the District Magistrate has no power to interfere. In a proceeding under section 145 of the Criminal Procedure Code only the High Court can interfere under section 15 of the Charter (new section 107 of the Government of India Act). In dropping section 145 proceedings the Sub-Divisional Officer acted without jurisdiction. The Magistrate could drop the proceedings only under sub-section (5) of section 145

(1) 4 Ind. Cas. 354; 13 C. W. N. 125; 10 Cr. L. J. 560.

(2) 28 C. 416.

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of the Criminal Procedure Code. Refers to *Tara Charan Sarkar v. Bengal Coal Co.* (1)

A Police report could be acted upon only for the initiation of proceedings under section 145, but the subsequent Police report should not have been acted upon. The Police should not be allowed to become the arbiter of the situation when once the matter was before the Court for judicial determination.

Babu Manmatha Nath Mukherjee, (with him Babus Madhab Gobinda Roy and Ramani Mohan Chatterjee), for the Opposite Party.—I shall make my submissions on the assumption that your Lordships have got power to interfere in the present case, but I may be permitted to submit that the Sub-Divisional Officer not having acted without jurisdiction in dropping the proceedings, your Lordships cannot interfere under section 15 of the Charter.

The District Magistrate, as a matter of fact, did not interfere with section 145 proceedings. He simply passed an order on the petition which was before him (*viz.*, on the petition against the order for the sale of the standing grass).

Sub-section (5) of section 145 of the Criminal Procedure Code does not lay down the only mode in which the proceedings can be dropped. Refers to *Manindra Chandra Nandi v. Barada Kanta Chowdhury* (3).

Babu Dasarathi Sanyal replied.

JUDGMENT.—Proceedings under section 145 of the Code of Criminal Procedure were initiated upon a Police report dated the 15th August 1919. The area was not stated in the report, but it appears from a map which is annexed to it that 4,000 *bighas* were covered within the boundaries given. The first party consists of two tenants and eight agents of the Teota Raja and the second party consists of six persons who are said to be old tenants. Then there is a vague reference to others. As it mentioned an "imminent fear of a breach of the peace", the whole of this land was attached and the Police was directed to sell the standing grass by the Sub-Divisional

Officer who took cognisance of the matter. Both parties objected to the sale of the grass. The petition of the 2nd party was rejected by the Sub-Divisional Officer on the 19th August 1919. On the 20th the first party filed a petition before the District Magistrate against that order. That petition, so far as we can make out, was one complaining of the order for the sale of the grass and it is not quite clear from it whether any reference to the proceedings under section 145, Criminal Procedure Code, was made in it. The District Magistrate called for the record and directed that if there was no likelihood of a breach of the peace, the order for cutting the grass might be kept in abeyance till the motion was disposed of.

Thereafter the Police made a further report and asked for proceedings to be taken against 22 persons under section 107, Criminal Procedure Code. Those reports were placed before the District Magistrate. The report was to this effect; that a breach of the peace was apprehended because certain outsiders were setting up one set of tenants against another, and the Police submitted that if those persons were bound down there would be no breach of the peace. They made a further report that after a conference held amongst Police officers they were of opinion that there was no reason for binding down all the 22 persons, but if six persons who were the ringleaders were bound down a breach of the peace would be prevented. After that there were proceedings against those six. The proceedings under section 145 thereafter came to be dealt with by the Sub-Divisional Officer; and on the 9th September a petition was put in by the first party tenants, stating that as proceedings were being taken against the ringleaders who were setting up one set of tenants against another and as there was no chance of a breach of the peace between the tenants themselves, the proceedings under section 145 should be dropped. The matter was fully heard by the Sub-Divisional Officer and upon a consideration of the materials then before him he came to the conclusion that the proceedings under section 145 ought to be dropped, inasmuch as proceedings under section 107 would meet the requirements of the case.

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We do not think we can interfere with the order made, in the circumstances. The Sub-Divisional Officer is responsible for the peace of his sub-division and he has dropped those proceedings after having carefully considered the matter; and even if we had jurisdiction to deal with an order of this character, a point which we do not decide at present, we would have been loath to make an order interfering with the order which the Magistrate had made in the exercise of his discretion. We do not think we ought to interfere with the order made. The report upon which the order was originally made was vague and unsatisfactory. The Rule is discharged.

Having regard to what we have said we cannot interfere with the proceedings under section 107 of the Criminal Procedure Code. The present petitioners are not concerned with these proceedings. The Rule so far as it relates to them is also discharged.

Rule discharged.

PATNA HIGH COURT.

MISCELLANEOUS CASE No. 54 OF 1919.

October 15, 1919.

Present:—Mr. Justice Das.

RAM PARSAD SAHU AND OTHERS—

PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 145—Evidence, order of taking of—Procedure—Title, question of, whether can be investigated.

Although there is nothing in section 145, Criminal Procedure Code, to suggest which party should begin the case, it is unusual for the second party to begin his evidence. [p. 616, col. 2.]

In a proceeding under section 145 the Court is in no way concerned with the question of title, it has merely to consider and investigate the question of possession. [p. 617, col. 1.]

Rule calling upon the District Magistrate, Bhagalpur, to show cause why the proceedings under section 145, Criminal

Procedure Code, pending in the Court of the Deputy Magistrate, Bhagalpore, should not be transferred to the Court of some other Magistrates or, in the alternative, why the learned Deputy Magistrate's order dated the 23rd of August 1919, directing the second party to begin with his evidence first, be not set aside.

Mr. Gour Chandra Pal, for the Petitioners.

Mr. H. L. Nandkeolyar, for the Opposite Party.

JUDGMENT.—The learned Vakil does not press his application so far as it relates to the transfer of the case. But he does ask me to direct the Magistrate to adopt the procedure prescribed by law and sanctioned by practice which has become a rule of law.

The complaint against the learned Magistrate is that he has directed the second party to begin to adduce evidence in the case. The learned Vakil says that this is against the letter and also the spirit of section 145, as in civil proceedings or criminal proceedings the first party ought always to begin.

So far as the section itself is concerned, I do not find that it supports the learned Vakil. He relies specially upon the words "received the evidence produced by them respectively," and he lays stress on the word "respectively." In my opinion, all that it means is that he will receive the evidence produced by the parties one after the other. I do not think that the order in which the evidence ought to be received by the Court is dealt with in the section at all. So far as civil causes are concerned sometimes, in our experience, the defendant has to begin, specially when the onus is on the defendant. So far as the procedure laid down in summons cases is concerned, no doubt, the plaintiff must begin but in the absence of any express provision in section 145, I do not think that I can entertain the application, specially as the case has not come to an end and it is now pending before the learned Deputy Magistrate. While I do not interfere with the order passed by him on the 23rd August 1919, I do ask him to re-consider the matter. It is certainly unusual for the second party to begin his evidence in a case under section 145 of the Criminal Procedure Code.

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The learned Counsel for the opposite party tells me that when the facts and circumstances of the case are considered, the order passed by the learned Deputy Magistrate becomes perfectly intelligible, and he states the facts to be as follows: namely, that the first party claims title to the land under a usufructuary mortgage alleged to have been executed in his favour by the owner who, I understand, is now an insolvent. The second party claims title through a purchase from the Official Assignee in whom the property of the insolvent vested. The learned Counsel for the first party states that the second party does not dispute his title but claims a title through the Official Assignee, and he says that the view that has been taken by the learned Deputy Magistrate is, if you prove your title you succeed in these proceedings and, therefore, it is wholly unnecessary for the first party to adduce its evidence in the case. In my view, there is some fallacy in this argument. The Criminal Courts are not in any way concerned with the title of the parties. All that it has got to consider and investigate is the question of possession and nothing else. I do not think that there is or can be any admission on the part of the second party that the first party was in possession on the date when proceedings were drawn up under section 145. They may not have disputed the fact that there is a mortgage document in favour of the first party, but there is no admission by implication that the first party is in those circumstances necessarily in possession of the land. In my view the question of possession is the vital question between the parties in these proceedings and I do not think that that question can be shirked. While, therefore, I do not set aside the order passed by the learned Deputy Magistrate on the 23rd August 1919, I invite him to re-consider the matter again.

Petition dismissed.

MADRAS HIGH COURT.
CRIMINAL REVISION CASE No. 441 OF 1919.
CRIMINAL REVISION PETITION No. 378
OF 1919.

November 4, 1919.

Present:—Mr. Justice Seshagiri Aiyar and
Mr. Justice Moore.

KULLAPPA NAICKER—ACCUSED
—PETITIONER

versus

PALANIAMMALL—COMPLAINANT—
RESPONDENT.

*Penal Code (Act XLV of 1860), ss. 425, 40—
Mischief, what constitutes—Cutting bund and causing
diminution of water supply—Offence—Bona fide belief
of right, effect of.*

To constitute the offence of mischief under section 425 of the Penal Code it is the destroyed property that must have lost its utility or value. [p. 618, col. 2]

The accused was charged with causing diminution of water supply to the complainant by destroying a bund at a particular place. It was not proved that the bund belonged to the complainant or that its destruction caused any diminution in its utility or value. It was proved, however, that the accused was in the habit of taking the water from this opening to his fields under a permit and that on this occasion, he cut open the bund anticipating the grant of the permit:

Held, that accused could not be convicted of mischief, inasmuch as (1) he acted in the *bona fide* belief that he would get the permit; [p. 618, col. 1.]

Kondi Chetti, In re, 8 Ind. Cas. 123; 8 M. L. T. 385; 11 Cr. L. J. 563, followed.

(2) by the mere diminution of water supply there was no destruction or diminution in value or utility of the property on which the injurious act was committed. [p. 618, col. 2.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Subordinate District Magistrate, Salem, in Criminal Appeal No. 46 of 1919, praying against the order of the Stationary 2nd Class Magistrate, Attur, in Calendar Case No. 4 of 1919.

FACTS appear from the judgment.

Mr. T. M. Krishnaswami Aiyar, for the Petitioner.—The conviction is based solely on the fact that accused's act in cutting open the bund caused a diminution of water supply to the complainant. There is no finding on the question of the ownership of the bund. Proof of mere diminution of water supply is not enough. To constitute the offence of mischief it must be shown that the destroyed thing lost its utility or value. This fact has

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not been established. As a matter of fact the accused has not been charged with the destruction of the bund.

Secondly, it has been proved that accused was in the habit of getting a permit to take the water from this opening. This time he had applied for the permit and cut the bund in anticipation of getting it. His action was thoroughly *bona fide* and does not amount to mischief.

Mr. S. S. Ramachandra Aiyar, for the Complainant — The accused must have known that his act would cause damage to the complainant. He had no business to cut open the bund without authority. The offence of mischief is made out.

The Public Prosecutor, for the Crown.

ORDER. — The accused in this case has been convicted of an offence under section 430 of the Indian Penal Code and sentenced to pay a fine. P. W. No. 1 complained to the Magistrate that the accused cut open the bank of a channel belonging to her and diverted the water, thereby causing a diminution of water supply to her fields. The Sub-Magistrate and Appellate Magistrate gave no opinion on the question of law whether the bund in question belonged to the complainant. They based the conviction upon the fact that the cutting of the bund resulted in the diminution of water supply to the complainant's fields. The question in these circumstances is whether the conviction is right. It appears from the evidence of P. W. No. 5 that in previous years the accused was in the habit of obtaining a permit to take water from this opening to his fields and that in this year also he applied to the Village Munsif for a permit and that anticipating the grant of the permit, he cut open the bund. The first question on these facts is whether the accused committed an act with the intention of causing damage to the complainant. Apparently the accused had *bona fide* belief that he would obtain permit and proceeded to water his fields without waiting for its actual receipt. This action will be covered by the principle enunciated by Ayling, J., in *Kondi Ohetti, In re* (1). We think that the accused was justified in believing

that the Village Munsif would grant him the permit, as was done in previous years.

It was also argued by the learned Vakil for the petitioner that the accused not having been charged with having destroyed the bund, the mere cutting open of the bund at the particular place which resulted in the diminution of water supply to the complainant would not amount to mischief under section 430 of the Indian Penal Code. The definition of mischief in section 425 requires that it is the destroyed property that must have lost its utility or value. Here assuming that the bund did not belong to the complainant, by the mere diminution of water supply there has been no destruction or diminution in value or utility of the property on which the injurious act was committed by the accused. It was pointed out in *Appellate Side Proceedings 22nd October 1868* (2) that unless the property itself was injured, the mere putting up of a dam at a particular place which resulted in depriving the complainant of the water supply would not amount to mischief under section 430. This decision was followed in *Appellate Side Proceedings 12th November 1874* (3). These decisions have stood unchallenged for a long time. Following them we hold that the mere deprivation of water supply to the complainant is not an offence which comes under section 430 of the Indian Penal Code. We, therefore, set aside the conviction and direct that the fine, if paid, be refunded.

M. C. P.

Conviction quashed.

(2) 4 M. H. C. R. 15.

(3) 7 M. H. C. R. 39.

(1) 8 Ind. Cas. 128; 8 M. L. T. 385; 11 Cr. L. J. 566.

GANESH RAM v. GYAN CHAND.

PATNA HIGH COURT.
CRIMINAL REVISION No. 342 OF 1919.
October 22, 1919.

Present:—Mr. Justice Das.
GANESH RAM—PETITIONER

versus

GYAN CHAND—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 498—Enticing away married woman—Connivance of husband, effect of—Criminal Procedure Code (Act V of 1898), s. 421—Appeal, summary dismissal of—Judgment, contents of—Appellate Court, duty of.

A conviction under section 498, Penal Code, is not bad merely because the husband connived at the taking away or concealing of the wife. [p. 619, col. 2.]

It is the duty of an Appellate Court in dealing with an appeal under section 421, Criminal Procedure Code, to record reasons for dismissing it summarily, and its judgment should show that the evidence and arguments advanced have been considered. [p. 620, col. 1.]

Criminal revision against the order of the District Magistrate, Shahabad, dated the 26th August 1919, summarily rejecting the appeal of the petitioner against the order of the Honorary Magistrate with 2nd class powers of Shahabad, dated the 11th August 1919, convicting the petitioner under section 498, Indian Penal Code.

FACTS.—The complainant, about five days after his wife's elopement, came to his native village Bihia and learnt of the enticement from his brother-in-law, P. W. No. 3. The complainant went to the accused and asked him to let the girl go with him. The accused promised to send her back but did not do so. The complainant then convened a meeting of the castemen, where the accused refused to give back the girl.

On these facts the accused was placed on his trial before A. Gafoor, Esquire, Honorary Magistrate of Shahabad with 2nd class powers, who by his order dated the 11th August 1919 sentenced him to a fine of Rs. 100 or in default two months' rigorous imprisonment under section 498, Indian Penal Code.

There was an appeal to the District Magistrate, A. P. Middleton, Esquire, I. C. S., but he rejected it summarily by his order dated the 26th August 1919, as under:—"I have heard the Mukhtear for the appellant. The judgment is convincing and I can see

no reason for believing that the case is false. The appeal is summarily dismissed."

Mr. Parmeshwar Dayal, for the Petitioner.

Mr. H. L. Nandkeolyar, for the Opposite Party.

JUDGMENT.—The petitioner has been convicted under section 498, Indian Penal Code, and has been sentenced to pay a fine of Rs. 100.

The first point that has been argued before me by Mr. Parmeshwar Dayal on behalf of the petitioner is that the facts disclose that the husband connived at the whole incident and that, therefore, the petitioner cannot be convicted under section 498, Indian Penal Code. It is sufficient to say that in deciding this matter I must be guided by the section itself. It is, in my opinion, impossible to escape from the clear provision of the section. It provides that the offence under section 498 is committed when there is a taking or enticing away or concealing or detaining the wife of another man from that man or from any person having the care of her on behalf of that man, and secondly, such taking, enticing, concealing or detaining must be with intent that she may have illicit intercourse with any person.

In this case it has been found that these two ingredients exist. In my view the argument advanced by the learned Vakil is inadmissible, having regard to the clear provision of the section itself. It is, in my opinion, unnecessary to consider what the English Law on the subject is. We are guided, so far as this matter is concerned, by the Indian Penal Code and the Indian Penal Code does not exonerate a man merely because there is connivance by the husband.

It was next argued by Mr. Parmeshwar Dayal that the Appellate Court should have given some reasons for dismissing the appeal summarily. The Appellate Court disposed of the appeal in these words: "I have heard the Mukhtear for the appellant. The judgment is convincing and I can see no reason for believing that the case is false. The appeal is summarily dismissed." Stopping for a moment, I must say that judgments of this nature do not give much assistance to this Court at all. It is necessary for the Appellate Courts to

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remember that they are the final Courts of facts and that, therefore, their judgments should show that they have considered all the arguments that have been advanced before them and the evidence in the case. I may draw the attention of the learned Magistrate to the weighty words of Sharfudin and Roe, JJ., in the case of *Gurubari Behera v. Emperor* (1). There the learned Judges say as follows: "At the same time it has been so frequently held that it is desirable that in dealing with an appeal under section 421 the Court should give some reasons for dismissing an appeal summarily, that we feel it necessary to impress upon Sessions Courts the obvious advantages of recording reasons for summary action. The omission to do so gives this Court a large amount of unnecessary trouble and occupies a considerable amount of public time, if the Court finds it necessary to send for a record and go through it to see if there has been any injustice done. ...There is nothing which can be construed into a hardship upon Sessions Courts to require them to record at least so much as will satisfy us, when an application for revision is made, that they have fully considered all the questions in issue and have appreciated the simplicity or gravity of the case."

Having regard to the argument that was advanced before me by Mr. Parmeshwar Dayal, I have examined the evidence of the lady with great care and I cannot say that the Court of first instance has taken a wrong view of the facts. In that view it is unnecessary to remand the case to the Appellate Court for writing out a proper judgment.

I dismiss this application.

Application dismissed.

(1) 43 Ind. Cas. 439; 2 P. L. J. 695; 4 P. L. W. 153; 19 Cr. L. J. 151.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 53 OF 1915.

May 5, 1915.

Present :—Sir Henry Drake-Brockman, J. C.
PIRBAX AND ANOTHER—ACCUSED—APPLICANTS
versus

Musammatt BAJI—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 441—Criminal trespass—Intent of accused, proof of—Criminal Procedure Code (Act V of 1898), ss. 367, 437—Judgment of Criminal Court, contents of—Failure to examine prosecution evidence, effect of—Revision—High Court, interference by.

An unlawful entry upon property does not amount to criminal trespass unless one of the intents mentioned in section 441, Penal Code, is made out by the prosecution or found by the Magistrate. [p. 622, col. 2.]

Where the judgment of a Magistrate makes no attempt to scrutinise the oral evidence of the complainant but summarily accepts that evidence, the judgment cannot be upheld in revision. [p. 621, col. 2.]

Application for revision of the order of the 1st Class Honorary Magistrate, Nagpur, convicting the applicants under sections 447 and 352, Indian Penal Code.

Mr. W. H. Dhabe, for the Applicants.

ORDER.—This application for revision arises out of a case in which three persons, Nago Mali, Pirkakhsh Musalman and Madan Gopal Bania, were convicted by Rao Bahadur H.S. Bhawe, an Honorary Magistrate exercising 1st class powers and empowered to sit alone, under sections 352 and 447, Indian Penal Code. Each was sentenced to pay Rs. 30 for the criminal trespass and Rs. 10 for the assault and was further ordered to give security for keeping the peace during a period of two years. The present application was preferred by Nago and Pirkakhsh only. A similar one (No. 54 of 1915) has been put in by Madan Gopal, and both are disposed of by this order.

The complainant is one Baji Telin, whose husband Ramji was an ordinary tenant of field No. 6 in Mauza Hurkeshwar till his death in the year 1909. The village papers for 1909-11 show Ramji's minor sons Gania and Bhaddu as his successors, and in the latter year Ganu Kunbi appears as sub-tenant. Settlement operations began in 1912 and in that year or the following one Gania and Bhaddu through Baji, their guardian, received a *parcha* recognising

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them as ordinary tenants. On the 15th April 1912, the applicant Madan Gopal, who is *malguzar* of Hurkeshwar, gave a lease of the field in dispute and another to the applicant Nago, who on the 26th September 1913 moved the Sub-Divisional Magistrate to act under section 145, Criminal Procedure Code, naming Baji and six other persons as likely to disturb the peace. The Police were called on to report and written statements were put in by all concerned, but eventually the proceedings were filed on the 19th May 1914, the Magistrate noting in his order-sheet as under :—

"Nago and Baji are present. I have seen the Police report and the settlement *parcha* in favour of Gania minor guardian Baji. The applicant says that he would sue the *malguzar* for the recovery of his money."

On 14th July 1914 Nago sued Baji and her two sons for cancellation of the settlement *parcha*, alleging himself to be in possession. In that suit (No. 170 in the Court of the Junior Munsif, Nagpur) issues have already been framed and some evidence recorded. Baji's complaint was filed on the 11th August 1914. No suit has been instituted by Nago against Madan Gopal.

All the facts above set out are admitted by all concerned. The trespass and assault complained of by Baji are said to have been committed on Tuesday the 21st July 1914, i. e., 8 days before she was served with summons in Suit No. 170 aforesaid. Her story in brief is that while on her way home to Nagpur from Narsala, the village adjoining Hurkeshwar where too Ramji had a field, she learnt that the *jawari* she had sown in the Hurkeshwar field was being ploughed up; that she went at once to the spot, where she found the three applicants with four servants and four ploughs at work; and that when she interfered Pirkabhsh held her and Nago slapped her at Madan Gopal's instigation. The accused, when examined, denied that they went to the field on the 21st July. There is nothing on the record to show that any particulars of the offences of which they were accused were stated to them as required by section 242, Criminal Procedure Code, and the record of their examinations indicates that they were not properly questioned regarding what is the backbone of

their defence apart from the *alibis*, namely, an implied, if not an express, surrender of the holding by Baji. Madan Gopal was not questioned at all about the payments of rent alleged by Baji or as to the title under which Gania Kunbi cultivated in 1910-11.

In the judgment no attempt was made to scrutinize the oral evidence of the complainant and her witnesses. The story told by Baji is briefly reproduced and that of her witnesses is dismissed with the following remark:—

"The complainant examined four witnesses, Shankar, Sakharam, Sujat Ali and Kashi-nath for prosecution. Their statements corroborated the statement of complainant in the main points."

The evidence for the defence was then discussed in detail and eventually rejected as untrue, with the result that the *alibis* set up were held not to be established. The next point for determination was then stated to be:—

"Whether Baji was in constant possession of the field and cultivated it herself; whether she impliedly surrendered the field; and whether the surrender was a *bona fide* one."

The question of possession was settled in favour of Baji on the strength of the *jama bandis* for 1908-10 and 1913-14 taken with Nago's withdrawal from the proceedings under section 145, Criminal Procedure Code. The fact that Gania is shown as sub-tenant in 1910-11 was not referred to. The implied surrender was then dealt with in a manner which shows conclusively that the nature of such an implication is not understood by the Magistrate; his words are:—

"Accused Nos. 1, 2 and 3 have not filed a single document to show that the complainant made an implied surrender of the field and that the surrender was a *bona fide* one; excepting a *patta* (Exhibit D-1) given by accused Madan Gopal to accused Nago. But it (*patta*) has not been proved at all and as such it does not affect the right of Musammal Baji complainant and her sons, which clearly proves a *mala fide* transfer of the field in dispute in order to harass the original tenant."

After a further reference to the village papers as negating Madan Gopal's case that he was in possession through Gania

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in 1910-11 and 1911-12, the Magistrate summed up thus :—

"Considering the prosecution evidence supported by documentary evidence and the manufactured defence evidence, I think all the accused did commit an offence under sections 447 and 352, Indian Penal Code, and I, therefore, convict them."

The direction to furnish security was then justified as follows :—

"From the application, dated 6th January 1915 (i. e., 2 days before the Magistrate delivered judgment), filed by the complainant it appears that the accused are still threatening her and say that they would dispossess her from the field after the decision is given in this case. They appear to be turbulent men and require to be punished severely."

The Magistrate evidently took it for granted that he could convict accused if their *alibis* and Nago's possession were not made out to his satisfaction. The necessity of finding expressly that all the ingredients required to make up an offence of criminal trespass were proved was overlooked. The Rule issued by this Court on the applications of the convicted persons accordingly set out that none of the intentions mentioned in section 441, Indian Penal Code, has been made out by the prosecution or found by the Magistrate. His explanation addressed, to the District Magistrate, states that the intention of the applicants was to dispossess Baji forcibly and to assault her. That this could not have been their intention, however, seems clear from the fact that she was not in the field when entry was effected. The explanation is further inaccurate in assuming that when closing the proceedings under section 145, Criminal Procedure Code, the Sub-Divisional Magistrate gave an order to Nago which he disobeyed by entering the field.

With regard to the finding that the applicants used and ordered the use of violence to Baji, the Magistrate in his judgment failed to notice that Shankar and Sakharam do not support this part of her story, though at the trial she deposed that one of them told the accused "not to fight". Shankar, moreover, said he did not see Madan Gopal. That three men found it in them to slap a woman is not easy

to believe, and the delay of three weeks in filing the complaint is further indication that at most a quarrel of words took place in the field. A minor matter is that when examined on her complaint and again at the trial Baji did not give identical accounts of what Nago did to her. None of those points have even been noticed by the Magistrate, whose summary acceptance of all the evidence for the complainant I have already commented upon. The convictions under section 352, Indian Penal Code, are, therefore, set aside and the corresponding fines, if paid, will be refunded.

With regard to the convictions under section 447, Indian Penal Code, I am clearly of opinion that in the present state of the record the finding that Baji kept the tenancy alive throughout 1910-1911 and 1911-12 is not sound. She produced no receipts for the rent of those years and her Pleader in this Court admits that the money orders she sent were for the rent of 1912-13. Gania, examined as D. W. No. 3, supported Madan Gopal, and Baji did not mention him as the person who was her *bataidar* in the two years succeeding her husband's death. There are other indications also, such as the sale of her *kotha* and bullocks at Harkeshwar and the regular sub-letting of the Narsala field, that Baji had good reason for abandoning the field in dispute and that inquiries made by the Settlement Authorities led to a resuscitation of her son's claim. I would also observe that there is no satisfactory corroboration of her claim to have sown the field in dispute in July 1914: she did not call either the person (Harbagurao) from whom she professes to have borrowed the seed grain or the labourers who sowed. If there was no crop visible on the 21st July, it could not be said in the present state of the evidence that the applicants knew they would do any damage by ploughing. Moreover, it is well settled that even if an entry is unlawful, it does not amount to criminal trespass unless one of the intents mentioned in section 441, Indian Penal Code, is made out, see *Gobind Prasad, In the matter of* (1), *Queen Empress v. Rayapadayachi* (2);

(1) 2 A. 465.

(2) 19 M. 240; 1 Weir 537.

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Emperor v. Jangi Singh (3) and *Ramchandra v. Ratho* (4).

The omissions I have noticed might be made good in a further inquiry or a retrial. But looking to all the circumstances and particularly to the fact that the question of title is now being tried in a Civil Court, I think that the criminal charge is one which, given a more careful preliminary examination of the complainant, would never have come to trial at all. In this view I set aside the convictions and sentences under section 447, Indian Penal Code, also and acquitting the applicants, direct that the fines (if paid) be refunded.

The orders to furnish security and the bonds executed thereunder necessarily become void. But in connection with those orders I desire to point out in conclusion that to inflict petty fines on well-to-do persons but at the same time to bind them over for so long a period as 2 years has all the appearance of inflicting substantial punishment while deliberately barring an appeal. I would further invite the District Magistrate's attention to paragraph 2 of the Registrar's letter No. 143 of the 15th January 1915, in which I suggested that for the future offences of a quasi-civil nature, such as criminal trespass and breach of trust, should be tried by stipendiary Magistrate only.

Conviction set aside.

(3) 26 A. 194; A. W. N. (1903) 230.

(4) 2 Ind. Cas. 240; 9 Cr. L. J. 561; 5 N. L. R. 69.

PATNA HIGH COURT.

CRIMINAL APPEAL No. 199 OF 1919.

October 21, 1919.

Present:—Mr. Justice Das.

SHEIKH CHAMMAN—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 75—Enhanced sentence, when to be passed—Interpretation of Statutes—Marginal note, value of.

Section 75 of the Penal Code enables a Court to pass a sentence commensurate with the nature of the offence on the accused person; it does not empower a Court to pass a sentence disproportionate to the nature of the actual offence. [p. 624, col. 1.]

Recourse should not be had to the provisions of section 75 of the Penal Code if the punishment provided for the offence is sufficient. [p. 624, col. 1.]

The marginal note to a section forms no part of the Statute itself and is not binding as an explanation or construction of the section. [p. 623, col. 2.]

Appeal against the judgment of the Sessions Judge, Purneah, dated the 20th August 1919.

JUDGMENT.—The appellant has been convicted of cheating one Paharia Nepali to the extent of Rs. 2, and has been sentenced to transportation for nine years. It appears that there are previous convictions against the appellant, but only one is referred to by the learned Judge.

I have no doubt at all that the appellant has been rightly convicted under section 420, Indian Penal Code, but I have also no doubt that the sentence passed on him is too severe. In connection with the question of sentence, the learned Sessions Judge says that the appellant "is liable to receive enhanced sentence," inasmuch as there are previous convictions against him.

In my opinion, there is much misapprehension as to the scope and meaning of section 75, Indian Penal Code. The view which seems to have found favour with the Courts is that, as soon as it can be shown that there is a previous conviction within the terms of section 75 against the accused person, the Court is bound to pass an enhanced sentence on him, that is to say, a sentence wholly disproportionate to the actual offence under investigation. In my judgment, there is no justification for this view in the section itself. The words "enhanced sentence" find no place in the section, though they do occur in the marginal note to the section. But the marginal note forms no part of the Statute itself and is not binding as an explanation or construction of the section: *Olaydon v. Green* (1). I must be guided by the section itself, and, in my judgment, the section does not empower a Court to pass "an enhanced sentence" (to adopt the expression commonly used by the Criminal Courts) merely because there are previous convictions against the accused person, although it enables the Court to sentence a person to transportation for life or to imprisonment up to 10 years. The distinction, in my view, is important. In the one case, the Court would be at liberty to inflict a punishment out of all

(1) (1863) 3 C. P. 511; 47 L. J. C. P. 226; 18 L. T. 607; 16 L. W. 1126.

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proportion to the offence committed. In the other case, the Court would be able to pass a sentence commensurate with the gravity of the offence, a power which, but for section 75, Indian Penal Code, the Court would be powerless to exercise. It is the experience of most Criminal Courts that they have at times felt handicapped by the sections of the Code providing for the punishment, with the result that they have been at times unable to pass adequate sentences on accused persons. Section 75 removes that disability, but it imposes as an essential condition for the exercise of the power that there must be previous conviction against the accused person. I will illustrate my meaning at once. Take, for instance, a case of theft. The maximum punishment which a Court is empowered to inflict on a person convicted of theft is three years' rigorous imprisonment. Now I do not think that a Court is at liberty to pass a sentence of seven years' imprisonment on a person convicted of theft, merely because there are previous convictions against him, if the offence itself does not call for a severe punishment. But the offence may be of sufficient gravity calling for a severer punishment than that permitted by section 379. If there are no previous convictions, the Court is helpless in the matter. If there are previous convictions, the Court is able to pass an appropriate sentence on the accused person. In other words, section 75 enables a Court to pass a sentence commensurate with the nature of the offence on the accused person; it does not empower a Court to pass a sentence disproportionate to the nature of the actual offence. This view is considerably strengthened by the decision of the Calcutta High Court in the case of *Sheo Saran Tato v. Empress* (2), where the learned Judges said that recourse should not be had to section 75, if the punishment provided for the offence is sufficient.

I consider that, in this case, the punishment provided for the offence is sufficient. I maintain the conviction of the appellant under section 420, Indian Penal Code, and reduce the sentence to six months' rigorous imprisonment.

(2) 9 C. 877.

Sentence reduced.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 1046 OF 1919.

November 12, 1919.

Present:—Mr. Justice Ryves.

BHANWAR *alias* CHIRANJI—APPELLANT
versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 75—Previous conviction in Native State, effect of—Enhanced punishment, whether can be inflicted.

A previous conviction in a Native State is outside the scope of section 75 of the Penal Code. Where, therefore, a person admits such a previous conviction, it ought not to be considered.

Criminal appeal against the order of the Additional Sessions Judge, Muttra, dated the 30th August 1919.

The Government Pleader, for the Crown.

JUDGMENT.—Bhanwar has been convicted by the learned Sessions Judge of Agra under section 454, Indian Penal Code, and under the provisions of that section, read with section 75, Indian Penal Code, has been sentenced to five years' rigorous imprisonment. There can be no doubt whatever on the evidence, which was believed by both the Assessors and the learned Judge, that the accused did commit the offence with which he was charged; but with regard to the application of section 75 I have great doubt. The accused admits two previous convictions, one under section 411, Indian Penal Code, and another under section 407. Both these convictions were made by the Dig Nizamat in the Bharatpur State. I have no information as to the nature or constitution of this Court. The question is whether section 75, as amended by Act III of 1910, contemplates a conviction by a Court of this kind. The point was considered in *Bahawal v. Emperor* (1) and it was held that a previous conviction held by a Criminal Court in Bikanir could not come within the scope of the section. Under the circumstances I think section 75 is not shown to be applicable in this case. Having regard to all the circumstances of the case, a sentence of three years' rigorous imprisonment will meet the ends of justice. With this modification I dismiss the appeal.

Sentence reduced.

(1) 20 Ind. Cas. 1007; 17 P. R. 1913 Cr.; 14 Or. L. J. 527; 42 P. W. R. 1913 Cr.; 329 P. L. R. 1913.

MADAN MONDAL GOCHI v. TARINI CHANDRA BANERJEE.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 510
OF 1918.

May 29, 1919.

Present:—Mr. Justice Newbould.

MADAN MONDAL GOCHI AND OTHERS—
DEFENDANTS—APPELLANTS

versus

TARINI CHANDRA BANERJEE AND
OTHERS—RESPONDENTS.

*Bengal Tenancy Act (VIII B. C. of 1885), s. 85
(2)—Sub-lease exceeding nine years, whether can be
registered—Consent of landlord, effect of—Registra-
tion, validity of—Sub-lease, admissibility of.*

Section 85 (2) of the Bengal Tenancy Act operates as a statutory bar to the registration of a sub-lease by a *raiyat* which creates a term exceeding nine years; the consent of the landlord cannot validate the registration and if such a lease is registered, it is inadmissible in evidence. [p. 625, col. 2.]

Appeal against the decree of the Subordinate Judge, Jessore, dated the 28th of November 1917, reversing that of the Munsif, 3rd Court at Narail, dated the 25th of September 1916.

Babu Satish Chandra Ghatak, for the Appellants.

Babu Satyendranath Mitter, for the Respondents.

JUDGMENT.—This appeal arises out of a suit to recover possession of certain land on establishment of the plaintiff's title. The plaintiff claimed by virtue of a sub-lease for an indefinite period granted by a person having a right of occupancy in the land. The Munsif dismissed the suit, holding that the lease to the plaintiff, in contravention of section 85 of the Bengal Tenancy Act, was void. On appeal the learned Subordinate Judge of Jessore granted the plaintiff a decree. In my opinion, the learned Munsif was right. The questions as to the validity of a lease granted by a *raiyat* in contravention of the provisions of section 85, clause (2), of the Bengal Tenancy Act are discussed at length in the judgment of my learned brother Mr. Justice Beachcroft in the case of *Ohandi Oharan Nath v. Samla Bibi* (1). That was a Letters Patent appeal from a decision of my own.

It is contended on behalf of the respondents that this case can be distinguished, because there was a finding in the first

(1) 44 Ind. Cas. 254; 22 C. W. N. 173; 23 C. L. J. 91.

Court that the plaintiff had proved the consent to the sub-lease of the superior landlord. The lower Appellate Court having decided in favour of the respondents came to no decision on this point. But even assuming that the landlord consented, the plaintiff's position is not improved. Clause (2), section 85, is a statutory bar to the registration of a sub-lease by a *raiyat* which purports to create a term exceeding nine years. The consent of the landlord cannot empower the registration authorities to register certain leases in contravention of the statutory provisions. If such a lease is registered contrary to the provisions of the Statute, it must be regarded as unregistered and is inadmissible in evidence; consequently the plaintiff is not in a position to prove the lease. In the present case it is found by the lower Appellate Court that the plaintiff was never in possession, so no question arises as to the validity of the plaintiff's tenancy independent of his lease. I cannot accept the contention on behalf of the respondents that the consent of the landlord makes this case distinguishable from the case cited above. It is also contended on behalf of the appellants that this suit is barred by the special law of limitation. As the plaintiff was never in possession, it seems doubtful whether Article 3 of Schedule III of the Bengal Tenancy Act can apply to the present case. It is contended that the expression "dispossession" in the 3rd column of the schedule must be taken to have the same meaning as keeping out of possession. As, however, the appellant succeeds on his first point, it is not necessary to decide this point. The appeal is accordingly decreed with costs in this and the lower Appellate Court. The decree of the Munsif dismissing the suit is restored.

It was also argued that though the document was inadmissible in evidence, it was admissible for collateral purposes. But in this case, it being a suit for ejectment, there is no question on which the lease can be relevant for a collateral purpose.

The plaintiff has no title under the lease and being out of possession he can have no title apart from the lease.

Appeal allowed.

NIAZ HUSAIN v. TIKARAM.

COURT OF THE BOARD OF REVENUE,
UNITED PROVINCES.

SECOND APPEAL No. 30 OF 1918-19.

August 29, 1919.

Present:—Mr. Ferard, S. M., and
Mr. Harrison, J. M.NIAZ HUSAIN AND OTHERS—DEFENDANTS—
APPELLANTS

versus

TIKARAM—PLAINTIFF—RESPONDENT.

*Agra Tenancy Act (II of 1901), ss. 34, 58—Grove,
whether altered to agricultural holding by sowing
fodder—Ejectment.*

The character of a recorded grove is not altered to that of an agricultural holding by the mere fact of a fodder crop being sown among the trees so as to render the occupier liable to ejectment under section 53 read with section 34 of the Agra Tenancy Act.

Second appeal from the order of the Commissioner of the Allahabad Division, dated the 30th of October 1918, in the case of ejectment.

JUDGMENT.

FERARD, S. M.—(August 23, 1919).—The suit was to eject the defendant-appellant Niyaz Husain from No. 390.1, 4 *bighas*, 12 *biswas*, 10 *biswansis*. It has been the recorded rent free grove of him and his predecessors ever since the 1281 Settlement. The evidence in the case is that of the *patwari* and a report of a Naib-Tahsildar who was deputed to make local inspection as to whether it was still grove or not. He was not put into the witness-box, but it is not seriously contested that his report should not be taken as evidence and I am told that the Acting Chief Justice recently held that reports of Government officers could be accepted without their attendance.

His report and the *patwari's* evidence shew that for the last 17 years *bajra* has been grown under and between the trees as a fodder crop and for the purpose of protecting the trees. The Naib-Tahsildar found 65 mango trees, 2 to 4 years old, and 33 old trees, namely, 4 mangoes, 3 *jamuns*, 2 *tars*, 19 *nims*, 1 *gular*, 1 *chisham*, 1 plum; also 2 new trees. The *wajib-ul-arz* allows the planting of new trees to replace the old. There is no justification in assuming that the new mango trees were hurriedly put in *ad hoc* when the suit was impending. The Naib-Tahsildar pertinently points out that there would

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have been some rotation of crops if cultivation were the primary use of the land and *bajra chari* would not have been put in year after year for 17 years. The view has always been taken that sowing a fodder crop among trees does not *ipso facto* change the character of a recorded grove to an agricultural holding, rendering the occupier liable to ejectment under section 58 read with section 34, Tenancy Act, and, in holding that it does, the Commissioner has, I consider, made a mistake of law. Interference with the Assistant Collector's finding that the plot still maintained the character of a grove was not, in my opinion, warranted. The plot in suit, No. 390.1, 4 *bighas*, 12 *biswas*, adjoins Nos. 390.2 and 390.3, the total area of the two 4 *biswas*, 10 *biswansis*, the area of the whole *muafi* plot No. 390 being 4 *bighas*, 17 *biswas*. Nos. 390.2 and 390.3 form a grave-yard. Considering the large number of trees, new and old, on the portion No. 390.1 in suit, I would hold that it still retains the character of a grove and the Commissioner's inference from the fact of fodder crop being grown among the trees is incorrect.

I would allow the appeal, set aside the Commissioner's appellate order and restore the decision of the Assistant Collector with costs to the appellant throughout.

HARRISON, J. M.—(August 29, 1919).—I concur.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1340
OF 1918.

August 19, 1919.

Present:—Mr. Justice Chatterjea and
Mr. Justice Duval.MANINDRA NATH MITTRA—DEFENDANT
—APPELLANT

versus

HARI MONDAL—PLAINTIFF—
RESPONDENT.

*Fraud, decree obtained by, suit to set aside—Court,
duty of—Suit, whether maintainable where no steps
were taken to set aside ex parte decree.*

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In a suit to set aside an *ex parte* decree on the ground that it was obtained by fraud, the Court has no jurisdiction to decide on the merits of the former judgment: its function is to decide whether that judgment is vitiated by fraud [p. 60, col. 1.]

Where a defendant allows a suit to be decided against himself in his absence and takes no steps to have the *ex parte* decree set aside, a suit by him to have that decree set aside on the ground of fraud is not maintainable [p. 629, col. 1.]

Appeal against the decree of the Officiating Subordinate Judge, 3rd Court, Midnapore, dated the 26th of March 1918, affirming that of the Munsif, 3rd Court at Tamuk, dated the 22nd of September 1916.

Babu Amarendra Nath Bose, for the Appellant.

Babu Jyotish Chandra Hajra, for the Respondent.

JUDGMENT.

CHATTERJEA, J.—This appeal arises out of a suit to set aside a decree on the ground of fraud. The plaintiff alleged that he held the land in dispute as an occupancy *raiyat* under the defendant for a long time, but that the latter by inducement, threat and misrepresentation obtained two *kabuliyats* for a term of 3 years from the plaintiff in the year 1911, and then brought a suit in the year 1914 for ejectment of the plaintiff on the ground that the term of the *kabuliyat* had expired; that the plaintiff filed his written statement in the said suit, but on the adjourned date of hearing could not appear owing to his illness, and the defendant obtained a decree for ejectment by fraud, in execution of which he dispossessed the plaintiff. The plaintiff thereupon brought the present suit on the 3rd December 1915 for setting aside the decree and for possession.

The Courts below found that the plaintiff was an occupancy *raiyat* and that the *kabuliyats* were obtained from him by the defendant to defeat his rights, that the claim was false to his knowledge and on this ground set aside the decree. The defendant has appealed to this Court.

With respect to the question as to what constitutes fraud for which a decree can be set aside, two propositions appear to be well established. The first is that although it is not permitted to show that the Court (in the former suit) was mistaken, it may be shown that it was misled, in other words, where the Court has been inten-

tionally misled by the fraud of a party and a fraud has been committed upon the Court with the intention to procure its judgment, it will vitiate its judgment. The second is that a decree cannot be set aside merely on the ground that it has been procured by perjured evidence. See *Baker v. Wadsworth* (1), *Mahomed Golab v. Mahomed Sulliman* (2) at page 619 (where, however, the observations were *obiter*), *Abdul Haq Ohowiherry v. Abdul Hafez* (3), *Munshi Moruful Haq v. Surendra Nath Roy* (4) and *Nanda Kumar v. Ramjiban* (5).

The actual decision in the case of *Lakshmi Oharan Shaha v. Nur Ali* (6) (to which one of the members of the present Bench was a party) is really not in conflict with the above cases. It was no doubt observed in that case that the proposition of law as laid down in *Mahomed Golab's case* (2) had the effect of restricting within too narrow limits the remedy of a man against whom a fraudulent decree has been obtained. It was pointed out that the opinion expressed by Petharam, C. J., was *obiter dictum*, and that opinion again was based on an *obiter dictum* of James and Thesiger, L. JJ., and that Bagallay, L. J., reserved his opinion on the point. Reliance was placed on the cases of *Abouloff v. Oppenheimer* (7), *Priestman v. Thomas* (8) and *Vadala v. Luwes* (9), as showing that the authority on which the opinion of Sir Comer Petharam, C. J., was based had not been recognized in England, and it was laid down: "It is quite clear from the cases quoted above that the jurisdiction of the Court trying a suit of this kind is not limited to an investigation merely as to whether the plaintiff was prevented from placing his case at the prior trial by the fraud of the defendant. The Court can

(1) (1898) 67 L. J. Q. B. 301.

(2) 21 C. 612 at p. 619.

(3) 5 Ind. Cas. 643; 14 C. W. N. 695; 11 C. L. J. 636.

(4) 15 Ind. Cas. 893; 16 C. W. N. 1002.

(5) 23 Ind. Cas. 337; 18 C. W. N. 681; 41 C. 990; 19 C. L. J. 457.

(6) 11 Ind. Cas. 626; 15 C. W. N. 1010; 38 C. 936.

(7) (1882) 10 Q. B. D. 295 at p. 307; 52 L. J. Q. B. 1; 47 L. T. 325; 31 W. R. 57.

(8) 1884 9 P. D. 210; 53 L. J. P. 109; 51 L. T. 843; 32 W. R. 842.

(9) (1890) 25 Q. B. D. 310; 63 L. T. 128; 38 W. R. 594.

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and must rip up the whole matter for determining whether there has been fraud in the procurement of the decree."

The case was dissented from in the case of *Munshi Moruful Huq v. Surendra Nath Roy* (4) by Carnduff and Chapman, JJ., who reviewed the cases on the point and followed the cases of *Flower v. Lloyd* (10), *Patch v. Ward* (11), *Baker v. Wadsworth* (1). The learned Judges doubted the finality of the decisions in *Abouloff v. Oppenheimer* (7) and *Vadala v. Lawes* (9) even in England, and pointed out that the judgment impeached in each of those cases was a foreign judgment, and "foreign judgments unquestionably stand on a different footing of their own."

There is, however, as stated above, no real conflict, so far as the actual decision goes, between the cases of *Lakshmi Charan Shaha v. Nur Ali* (6) and *Munshi Moruful Huq v. Surendra Nath Roy* (4), although different views were taken as to the grounds upon which a decree can be set aside in such cases and as to the authorities upon the point. In that case the decree sought to be set aside was an *ex parte* decree obtained upon a promissory note in the Akyab Court. It was found in the subsequent suit that the plaintiff (defendant in the former suit) never went to Akyab, never received any money from the defendant, and never executed the promissory note, so that the whole proceeding was fraudulent. That case was, therefore, one in which the claim was totally false and false to the knowledge of the defendant, and there was fraud practised upon the Court in the procurement of the decree. In the case of *Munshi Moruful Huq v. Surendra Nath Roy* (4), on the other hand, the only fraud alleged was that the previous decree was obtained by perjured evidence, and that was also the case in *Abdul Huq Chowdhury v. Abdul Hafez* (3) and *Nanda Kumar v. Ram Jiban* (5). In *Kedar Nath Das v. Hemanta Kumari Dasi* (12) it was found that the fact of the previous suit was not known to the plaintiff (in the second suit) and that the said suit was in fact a false suit. The *ex parte* decree was

accordingly set aside, and the decision of the Courts below was affirmed by this Court. Fletcher, J., (one of the members of the present Bench concurring) observed that the decisions in *Lakshmi Charan Shaha v. Nur Ali* (6) and *Munshi Moruful Huq v. Surendra Nath Roy* (4) can be reconciled in the same way as the English decisions which were cited. It was pointed out that in the first case the plaintiff knew that the case which was put forward before the Court was in fact a false one. It was not a case where an application was made to set aside a judgment on the ground that it was obtained by perjury; but it was a case of a party to the suit practising fraud on the Court by putting forward before the Court a case which was a false one, while the second case only decided that a decree obtained in a suit cannot be set aside in a subsequent suit brought for the purpose on the mere proof that the previous decree was obtained by perjured evidence. The cases of *Abouloff v. Oppenheimer* (7) and *Vadala v. Lawes* (9) show that if the case which was placed before the Court was a false one, the Court has jurisdiction in a subsequent suit to set aside the decree which was obtained by fraud practised on the Court.

It is contended on behalf of the appellant that in order to set aside a decree on the ground of fraud, it must be shown that the fraud was practised in relation to proceedings in Court, and the decree must be shown to have been procured by practising fraud upon the Court, that in *Abouloff v. Oppenheimer* (7), *Vadala v. Lawes* (9), *Lakshmi Charan Shaha v. Nur Ali* (6) and *Kedar Nath Dasi v. Hemanta Kumari Dasi* (12) the fraud was committed in relation to proceedings in Court, while in *Nanda Kumar v. Ramjiban* (5) the fraud, if any, was committed out of Court (there was an entry in the Record of Rights followed by a rent decree) and that that is the true ground of distinction in such cases. Now, in order that a decree may be said to have been procured by practising fraud upon the Court, the fraud must be in relation to proceedings in Court. It is unnecessary, however, to decide in the present case what is the precise ground of distinction in the cases cited above or to discuss the authorities on the point, because

(10) (1879) 10 Ch. D. 327; 39 L. T. 613; 27 W. R. 498.

(11) (1867) 3 Ch. App. 203; 18 L. T. 134; 16 W. R. 441.

(12) 22 Ind. Cas. 709; 18 C. W. N. 447.

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we think that in any view of the case the present suit fails.

The previous suit was based upon a *kabuliyat* for a term of 3 years. The plaintiff admittedly executed the *kabuliyat*, but his case is that plaintiff in order to defeat his rights obtained the *kabuliyat* from him by inducement, threat and misrepresentation. The plaintiff, however, never took steps to avoid the *kabuliyat*, and the suit was brought 3 years after the execution of the *kabuliyat*, on the ground that the term (of 3 years) had expired. The plaintiff (defendant in the previous suit) filed his written statement, and raised the very same defence as that raised in the present case and one of the issues raised was: "Is the *kabuliyat* executed by the defendant in favour of plaintiff a valid and *bona fide* document?" On the date finally fixed for the hearing of the case, however, he could not appear and the evidence adduced by the defendant (plaintiff in the previous suit) was as follows:— "Defendant executed *kabuliyats* Exhibits I and II. He is not giving up possession. His term expired in Chait 1321." That was the whole of the evidence and an *ex parte* decree was passed in his favour.

Now, there was no contrivance by which the present plaintiff was prevented from placing his case before the Court in the previous suit, and it cannot be said that any fraud was practised on the Court in procuring the decree, or that the claim was false, though there might have been fraud in obtaining the *kabuliyat* several years before the suit. That the defendant did execute the *kabuliyat* the term of which had expired and that he was not giving up possession cannot be said to be false. Unless, therefore, we hold that the present defendant was bound to state the circumstances under which the *kabuliyats* were executed several years before the suit according to the case of the opposite party, *viz.*, that the *kabuliyats* were obtained by coercion, misrepresentation or inducement which formed the subject matter of an issue in that suit, the decree obtained in the suit cannot be said to have been procured by fraud. To hold otherwise would be to hold that if a party to a suit does not disclose all the circumstances connected with the case of the opposite

party and obtains a decree, it is open to the opposite party to bring another suit to prove his case and get the decree in the first suit set aside on the ground of fraud. But in that case there would be no end to litigation. We are of opinion that whatever may be the precise nature of fraud for which a decree may be set aside, the plaintiff in the present suit cannot get the decree in the previous suit set aside.

The appeal must, therefore, be allowed and the suit dismissed, but we direct that each party will bear his own costs in all Courts.

DJYAL, J.—I agree with the judgment of my learned brother.

The fraud alleged is the obtaining of two *miadi kabuliyats* from the present plaintiff, who was at the time an occupancy *raiyat* under him, by the defendant who is the landlord and on the expiration of the term mentioned in those *kabuliyats* suing the plaintiff for ejectment. The present plaintiff contested the suit brought by the present defendant for ejectment on expiry of the terms set out in the two *kabuliyats*. Issues were framed, but at the time of hearing, the present plaintiff did not appear before the Court. *Ex parte* evidence was taken and a decree for ejectment was given to the present defendant *ex parte*. As to that decree, it does not appear that the present plaintiff ever applied to have it set aside or that he ever made an appeal.

The present suit is to set aside that *ex parte* decree on the ground of fraud. But the first question is, was there any fraud perpetrated by the present defendant in the course of the suit?

To my mind there is no such fraud proved. There was certainly no suppression of service of process. The present plaintiff himself appeared and issues were framed. He then took a large number of adjournments and finally let the suit be decided in his absence. The evidence given by the present defendant was to the effect that the *kabuliyats* were executed and the fact that there was such a *kabuliyat* executed is even now not in issue. In fact, in the words of a late Chief Justice in the case of *Nanda Kumar v. Ram Jibin* (5): "In effect, when analysed,

MAHESH KANT CHOUDHURY v. RAM PRASAD RAI.

the judgment of the lower Appellate Court is no more than a re-trial on the merits of the original suit and a determination that the Judge who decided that suit was mistaken. But the Court in this suit has no jurisdiction to decide on the merits of the former judgment; its function was to decide whether that judgment was vitiated by fraud."

There has been no evidence of any fraud in the proceedings in the ejectment suit, though there may have been fraud in obtaining the *kabuliyat* originally and I must hold that the present suit cannot lie and the appeal must, therefore, be allowed.

Appeal allowed.

PATNA HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL NO. 327
OF 1919.

December 11, 1919.

Present:—Mr. Justice Das and

Mr. Justice Foster.

MAHESH KANT CHOUDHURY—

APPELLANT

versus

Oh. RAM PRASAD RAI AND OTHERS—

RESPONDENTS.

Limitation Act (IX of 1908), s. 12—Decree, preparation of, not necessary—Time spent in obtaining copy, of decree, whether can be excluded.

In a case in which it is not necessary to prepare a decree but one is actually prepared, the time occupied in obtaining a copy of the decree should under section 12 of the Limitation Act be excluded in computing the period of limitation for appeal. [p. 620, col. 2; p. 631, col. 1.]

Appeal against the order of the District Judge, Darbhanga.

Messrs. Saroshi Charan Mitra and Sudhanshu Kumar Mitra for the Appellants.

JUDGMENT.

DAS, J.—It is conceded that if the time requisite for obtaining a copy of the decree be excluded, the appeal is amply within time; but the argument against the appellants is that the order in a miscellaneous case itself operates as a decree and that it was not necessary to file a copy of the decree and that, therefore, the appellants are not entitled

to deduct the time taken for obtaining a copy of the same. It is undisputed that in this case a formal decree was drawn up, and I am of opinion that the appellants were entitled to obtain a copy of the decree in order that they may have, as the Full Bench of the Allahabad High Court said, "full opportunity of considering the terms of the decree or order or judgment." *Wajid Ali Shah v. Nawal Kishore* (1).

The case cited against the appellants is the case of *Khirode Sundari Dabi v. Jnanendra Nath Pal Ohauduri* (2). That case merely decided that an order determining any question referred to in section 244, Civil Procedure Code, is a decree under section 2, Civil Procedure Code, and that, therefore when an appeal is preferred against such an order, it is sufficient to attach to the memorandum of appeal a copy of the order itself and that it is not necessary to attach to the memorandum a copy of the decree, even though such a decree may have been drawn up. This proposition may be accepted as correct, but the question which we have to decide is, whether the appellants, if they choose to obtain a copy of the decree, are entitled to the period taken for obtaining such copy. The identical point was decided in the case of *Kamala Dasi v. Tarapada Mukerji* (3). In an exhaustive judgment, dealing elaborately with the point under consideration, Mookerjee and Teunon, JJ., came to the conclusion that where a separate order is actually drawn up, copies of both the judgment and the order ought to be attached to the memorandum and that the appellant is entitled to a deduction of time taken in obtaining copies thereof. The reason for the rule, of course, is that the appellant is entitled to have full opportunity of considering the terms of the order or decree before he makes up his mind to appeal therefrom. It seems to me that it is impossible to escape from the clear provision of section 12 of the Limitation Act. That section provides "that the time requisite for obtaining a copy of the decree, sentence or order appealed from...shall be excluded." It will be noticed that the section is without

(1) 17 A. 213 at p. 216 (F. B.; A. W. N. (1895) 61.

(2) 6 C. W. N. 283.

(3) 14 Ind. Cas. 1006, 15 C. L. J. 496.

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limitation or exception of any kind, and I am wholly unable to see how we can read into the section exceptions which are not to be found there.

We have been referred to the case of *Narbadeswar v. Nirmal Kumar* (4) decided by this Court on 2nd December 1918. That case is an authority for the proposition that the memorandum of costs forms no part of the decree. I agree with that view. It is no authority for the proposition that if a decree is actually drawn up in a case under section 47, Civil Procedure Code, the appellant is not entitled to a deduction of time for obtaining a copy of such decree.

I hold that, where a decree is actually drawn up, as in this case, the appellants are entitled to a deduction of time for obtaining copy of such decree. Let the case now be disposed of by the Registrar according to law.

FOSTER, J.—I agree. I think that where a formal decree is actually framed by the Court it cannot but be looked upon as the final adjudication, and the case is quite different from one where the Court ends with an order after its judgment. If the Court makes a formal decree, it seems only reasonable that the appellant should regard that as the final adjudication from which the appeal is to be preferred.

Order accordingly.

(4) M. J. C. No. 128 of 1918.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2359
OF 1916.

July 2, 1919.

Present:—Justice Sir Ernest Fletcher, Kt.,
and Mr. Justice Cuming.

SASADHAR BHATTACHARJEE AND
OTHERS—DEFENDANTS—APPELLANTS

versus

ARUN KUMAR (ARUN CHANDRA IN
vakalatnamah) BHATTACHARJEE AND
OTHERS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XLI, r. 1,
O. XLVII, r. 1—Appeal, dismissal of—Review, admis-
sion of appeal on—Grounds not taken in original memo-
randum of appeal, whether can be urged at hearing.*

Grounds taken in an application for review of an order dismissing an appeal, which were not urged in the memorandum of appeal as originally filed, cannot be urged in support of the appeal after its re-admission upon the application for review.
[p. 631, col. 2.]

Appeal against the decree of the Additional District Judge, Faridpore, dated the 20th of July 1916, affirming that of the Munsif, 3rd Court at Bhanga, dated the 25th of May 1914.

Babus Sarat Chandra Roy Choudhury and Nakuleswar Mukerjee, for the Appellants.

Babus Broendra Nath Chatterjee and Banku Behari Mullick Chaudhuri, for the Respondents.

JUDGMENT.

FLETCHER, J.—This appeal must fail for the following reasons: The appellants filed a memo. of appeal, dated the 16th November 1916, against the judgment of the learned Judge in the lower Appellate Court which was pronounced on the 6th July 1916. The appeal, of which the grounds of appeal were properly certified, came on for hearing before a Bench of this Court and was summarily dismissed under the provisions of Order XLI, rule 11, Code of Civil Procedure, on the 24th January 1917. It is quite clear that the matters raised in the grounds of appeal filed on the 16th November 1916 do not cover the matters that have been attempted to be urged at the hearing of the present appeal. The text of the proceedings was a document that is No. 6 in the printed paper book, which is called the memo. of appeal presented on the 1st March 1917. As a matter of fact it is nothing of the sort. When we look at the document itself, we find that it is a memo. of application for review under Order XLVII, rule 1, Code of Civil Procedure, with regard to an order of dismissal passed on the 24th June 1917 under Order XLI, rule 11. This memo. of review contained certain grounds which are not the grounds of appeal but were given as grounds for review and these grounds for review were sufficient to impress the learned Judges composing the Bench which summarily dismissed the appeal to review their order and admit the appeal. That does not entitle the appellants to urge these grounds of review as grounds of appeal for reversing the decision appealed against. I think this is a procedure that we ought not to assent to. In a case like this we ought not to allow grounds of appeal to be raised which apparently were not suggested until the learned gentleman who now

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appears for the appellants was called in at a somewhat late stage of the case and suggested further and important points which were matters that ought to have been urged at the preliminary hearing of the appeal. The appellants ought to have got the services of this learned gentleman at the earliest stage of the case. Then the grounds of appeal could have been properly framed before the hearing and disposal of the appeal under Order XLI, rule 11, Code of Civil Procedure. I do not think in this case we ought to allow these grounds to be urged before us. In my opinion the present appeal fails and ought to be dismissed with costs.

CUMING, J.—I agree.

Appeal dismissed.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 417 OF 1918.

July 31, 1919.

Present:—Pandit Kanhaiya Lal, J. C.

KANIZ ZOHRA AND OTHERS—

DEFENDANTS—APPELLANTS

versus

NEPAL AND ANOTHER—PLAINTIFFS AND SHEO DAYAL—DEFENDANT—RESPONDENTS.

Pre-emption—Vendee co-sharer in shamilat but not in patti, effect of—Shamilat land, nature of.

A vendee, who is not a co-sharer in the subdivision in which the share sought to be pre-empted is situated, does not become a co-sharer in the subdivision because some of the land appertaining to the village has been lumped together as belonging to all the *pattis* instead of being imperfectly divided. Within the *shamilat patti* itself each *patti*, to which the *shamilat* land appertains, exists as if it were in miniature and no right of pre-emption can be claimed in respect of such *shamilat* land. In the eyes of the law, the position of the *shamilat* land appertaining to each *patti* follows or forms a part of the *patti* to which it appertains. [p. 633, col. 1.]

Appeal against the decree of the District Judge, Lucknow, dated the 31st August 1918, reversing that of the Subordinate Judge, Bara Banki, dated the 16th March 1918.

Messrs. H. O. Dutt and M. Wasim, for the Appellants.

Mr. Bisheshwar Nath Srivastava, for Respondent No. 1.

JUDGMENT.—This appeal arises out of a suit for pre-emption, and the question for consideration is whether the plaintiffs are co-sharers in the sub division in which the property sold is situated and are entitled to claim pre-emption, as against the defendants-vendees. The Court of first instance found against the plaintiffs and dismissed their claim, but the lower Appellate Court held otherwise.

It appears that Mohammad Abid, Ali Yusuf and Mohammad Yahia were the owners of a 4 annas share in Mahal Mohammad Azam. On the 8th June 1888, they sold some specific plots of land, measuring 42 *bighas*, 8 *biswas*, to Madho (Exhibit 4). The sale deed was subsequently confined, by virtue of a litigation to which Madho was a party, to 37 *bighas*, 15 *biswas*, 16 *biswansis* of land and certain specific plots which were the subject of that litigation were excluded (Exhibit A18).

Madho was, however, entered at the time of the settlement as an under-proprietor of the said land and the superior proprietary right was entered in the name of Tikaram, who had purchased the interest of Mohammad Abid, and in those of Ali Yusuf and Mohammad Yahia *ulais* Mohammad Hashim. Tikaram subsequently acquired the shares of Ali Yusuf and Mohammad Yahia (Exhibit A2). In 1910 the mistake was corrected and a *khata* of 113 *bighas*, 15 *biswas*, 14 *biswansis* of superior proprietary tenure was formed, out of which 75 *bighas*, 19 *biswas*, 18 *biswansis* were entered as held by Tikaram and 37 *bighas*, 15 *biswas*, 16 *biswansis* were entered as held by Nepal, Hazari and Ram Ratan, the legal representatives of Madho. The *khata* was called Khata No. 7.

The village was divided at the time into several *Pattis*. One of the *Pattis* was called Patti Tikaram. Khata No. 7 appertained to that Patti. The plaintiffs respondents, Nepal and Hazari, are the owners of some of the plots appertaining to that *khata*. Another Patti was called Patti Mohammad Sadiq. The defendants-vendees are co-sharers in that Patti. There was some *shamilat* land which appertained to all the *Pattis*.

The disputed land forms part of Khata No. 7 in Patti Tikaram. It was sold by

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Tikaram on the 2nd October 1917. The contention of the plaintiffs is that they have a preferential right of pre-emption because they were co-sharers with the vendors in the said *khata* and in the Patti aforesaid. The defendants-vendees urge, on the other hand, that the interests of the vendors were distinct from those of the plaintiffs and the plaintiffs had consequently no preferential right. While it is true that the interests of the vendors and those of the plaintiffs in *Khata* No. 7 were separate and distinct, the *khata* itself formed a subordinate and separate entity in Patti Tikaram in which the defendants-vendees had no share. Patti Mohammed Saleh, in which the defendants-vendees were co-sharers, formed a separate sub-division of the same *mahal*. As co-sharers of the sub-division or persons holding certain specific plots of land in that sub-division, the plaintiffs had a preferential right as against the defendants-vendees who had no interest in that sub-division. The mere fact that the defendants-vendors and the vendees were co-sharers in some *shamilat* land appertaining to all the *pattis* does not invest the defendants-vendees with any better right, for as pointed out in *Durga Singh v. Gaya Singh* (1) and *Tirbhawan Singh v. Raghubar Dayal* (2) a vendee, who is not a co-sharer in the sub-division in which the share sought to be pre-empted is situated, does not become a co-sharer in the sub-division because some of the land appertaining to the village has been lumped together as belonging to all the *Pattis* instead of being imperfectly divided. Within the *shamilat patti* itself each Patti, to which the *shamilat* land appertains, exists as if it were in miniature, and no right of pre-emption can be claimed in respect of such *shamilat* land. In the eyes of law the portion of the *shamilat* land appertaining to each *patti* follows or forms part of the *patti* to which it appertains.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

(1) 26 Ind. Cas. 55; 3 O. L. J. 309.

(2) 38 Ind. Cas. 71; 19 O. C. 394.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No 125 of 1913.

August 4, 1919.

Present:—Mr. Justice Chatterjea and
Mr. Justice Duval.

ABDUL RAHAMAN—PLAINTIFF—
APPELLANT

versus

MOHENDRA CHANDRA GHOSH AND
OTHERS—DEFENDANTS—RESPONDENTS.

Benamidar, suit against—Decree, whether binding on beneficial owner—Mortgage suit against benamidar—Real owner of mortgaged property, whether necessary party.

A proceeding against a *benamidar* in its ultimate result is fully binding on the beneficial owner. In a suit on a *benami* mortgage, therefore, it is not necessary to add the real owner of the mortgaged property as a party. [p. 634, cols. 1 & 2.]

Appeal against the order of the District Judge, Noakhali, dated the 7th of September 1917, reversing that of the *Munsif* Sundwip, dated the 29th of November 1916, and remanding the suit to his Court for re trial.

FACTS appear from the judgment.

Babu D. L. Kastagir, for the Appellant.—The plaintiff is the appellant. This appeal arises out of a suit on a mortgage bond executed by defendants Nos. 1 to 6. The suit was contested only by defendant No. 2, who was merely a *benamdar*. The real owner of the mortgaged property was not made a party. An application was made to make the real owner a party but that was refused by the first Court. Against that order an appeal was preferred before the District Judge, who set aside the order and remanded the case directing that the real owner who was a necessary party should be made a party.

Babu Ram Dayal De, for the Respondent, raised a preliminary objection.—I submit that no appeal lies in this Hon'ble Court because the order was passed under Order I, rule 10, clause (2), read with section 115, Civil Procedure Code.

CHATTERJEA, J. — The Court remanded the case for a re trial. It may be that the suit was contested by a *benamdar*, but that does not vitiate the trial. Can the District Judge remand the case on the ground that the real owner must be made a party?

The Appellate Court has power to

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remand a case under section 107, clause (2).

The objection was disallowed.

Babu D. L. Kastagir, for the Appellant.—My submission is that in view of the recent Privy Council decision reported as *Gur Narayan v. Sheo Lal Singh* (1), the learned District Judge ought not to have remanded the case at all.

The *benamdar* can represent the real owner and the real owner is not a necessary party.

Order XXXIV, rule 1, of the present Civil Procedure Code supports my contention.

The case reported as *Ram Kinkar Biswas v. Akhil Chandra Chaudhuri* (2) shows that an appeal lies to this Hon'ble Court.

Babu Ram Dayal De, for the Respondent.—The Full Bench case in *Ram Kinkar Biswas v. Akhil Chandra Chaudhuri* (2) goes against my learned friend so far as the question of limitation is concerned.

[CHATTERJEA, J.—The question of limitation only arises if Sarada Sundari, the real owner, is a necessary party.]

Under Order XXIV, rule 1, Civil Procedure Code, Sarada Sundari is a necessary party because she is the holder of the equity of redemption.

In the Privy Council case the beneficial owner did not raise any objection and thus it is distinguishable.

My conduct shows that I have disclaimed my interest in favour of Sarada Sundari, the real owner, and thus it has become necessary to make Sarada Sundari a party to the suit.

Babu D. L. Kastagir replied.

JUDGMENT.—We think that the order of remand made by the District Judge must be set aside.

The lower Appellate Court directed the Court of first instance to add Sarada Sundari Dasi, the real owner, to be made a party to the suit because the defendant No. 2, who contested the suit on the mortgage, was merely a *benamdar*.

Having regard to the recent decision of the Privy Council, it appears that a proceeding against a *benamdar* in its ultimate result is fully binding on the beneficial owner. That being so, we do not see that

(1) 49 Ind Cas 1; 23 O. W. N. 521; 17 A. L. J. 66; 36 M. L. J. 68; 9 L. W. 335; 1 O. P. L. R. (P. C.) 1; 46 O. 566 (P. C.).

(2) 35 O. 519; 2 M. L. T. 137; 5 C. L. J. 242; 11 C. W. N. 350 (F. B.).

it is necessary to add Sarada Sundari as a party to the suit which, moreover, would be barred as against her.

Some arguments were advanced on behalf of the appellant that the defendant No. 2 is not a *benamdar* now. But the Court of first instance found that "the defendant No. 2 lived in the same house as Sarada and served her. He took *kabuliyats* in his own name from the tenants in this property, as he himself admits. The tenants also used to pay rents in the house where he as well as Sarada Sundari lived." Admittedly there is no release executed in favour of Sarada Sundari. In these circumstances, we think that the defendant No. 2 still continues to represent Sarada, the real owner.

The result is that the order of remand is set aside and the case sent back to the lower Appellate Court for hearing of the appeal on the merits.

Costs to abide the result. We assess the hearing fee at one gold *mohur*.

Case sent back.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 342 OF 1916.

JANUARY 11, 1917.

Present:—Mr. Mittra, A. J. C.

HARI PRASAD—PLAINTIFF—APPELLANT

versus

GOVINDA RAO—DEFENDANT—RESPONDENT.

Lambardar, powers of, to lease vacant lands, extent of—Consent of co-sharers, whether necessary—Co-sharers, whether can avoid bona fide lease—Wajib-ul-arz, construction of.

Where the *wajib-ul-arz* of a village lays down that before leasing vacant lands, the *lambardar* should consult the wishes of the co-sharers of the village, this does not mean that the consent of the co-sharers should be obtained. The general rule in the Central Provinces is that the *lambardar* leases the vacant lands in the ordinary course of management. The mere fact that the co-sharers are not consulted, does not entitle them to claim on that ground to avoid a bona fide lease [p 335, cols. 1 & 2.]

Second appeal against the appellate decree of the District Judge, Nimar, decided on the 28th March 1915, arising out of the decree of the 2nd Munsif, Burhanpur, dated the 15th of December 1915,

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Mr. J. C. Ghosh, for the Appellants.

Mr. A. O. Roy, for the Respondent.

JUDGMENT.—The plaintiff appellants own eight-annas share in Mouza Daola, the other eight annas being held by the first defendant, who is the Lambardar of the village. The second defendant is a tenant under a lease executed by the Lambardar. The plaintiff sues for the ejectment of the latter on the ground that the lease was executed without the knowledge and consent of the plaintiffs. There is also a prayer for joint possession of the land to the extent of the plaintiffs' half share. The Courts below have dismissed the suit.

The contention on behalf of the plaintiffs is that, under the terms of the *wajib-ul-arz* the Lambardar shall consult the wishes of the co-sharers before leasing the vacant lands of the village. It is urged that, as the plaintiffs were not consulted, as required by the custom, the plaintiffs are entitled to have the lease declared void and to have joint possession of the holding. The terms of the Nimar *wajib-ul-arz* are substantially the same as those of Wardha. In *Kesho Rao v. Nana* (1) Ismay, J. C., held that the co-sharers cannot claim to avoid a *bona fide* lease merely on the ground that their wishes were not consulted before it was given. This was followed in *Bhima Shankar v. Krishna Mali* (2) by the present learned Judicial Commissioner. The same view was taken by Stanyon, A. J. C., in *Poonamchand v. Nandlal* (3).

The custom embodied in the *wajib-ul-arz* does not require the consent of the co-sharers. They are merely to be consulted. What the Lambardar is to do if the proprietors are not agreed, is not stated in the *wajib-ul-arz*. The general rule in these Provinces is that the Lambardar leases the vacant lands in the ordinary course of management. This departure from the general rule embodied in this *wajib-ul-arz* does not appear to have ripened into a local custom with the certainty requisite for valid custom. Probably, as suggested by Ismay, J. C., a Lambardar who persists in ignoring the wishes of his co-proprietors renders himself liable on their application to be removed from office.

(1) Second Appeal No. 228 of 1901.

(2) Second Appeal No. 109 of 1903.

(3) 48 Ind. Cas. 72.

I have already pointed out that the consent of the proprietary body is not required by custom. The land is not required to be let by the proprietary body, but by the Lambardar. In the case of a stranger, such as defendant No. 2 in this case is, he has a right to assume that the person held out as the customary agent of the proprietary body has done what his customary duty required him to do. It will be intolerable if a *bona fide* tenant is called upon to prove that the Lambardar had consulted the wishes of the proprietary body. It is not alleged that the tenant had notice or knowledge of the fact that the Lambardar did not consult the plaintiffs. Under the circumstances the plaintiffs' suit for joint possession has been rightly dismissed. Two cases have been cited before me, which have no material bearing on the point for decision. The first is the case of *Daryao Singh v. Mukund Singh* (4). That case fully recognises the authority of the Lambardar to manage an undivided village according to the ordinary custom. What was held in that case was that the persons put in possession as tenants became ordinary tenants not liable to ejectment, though some of the terms of the lease were held to be not binding upon the co-sharers. In the present case, the plaintiffs do not complain of any of the terms of the lease. They desire to eject the tenant on the sole ground that they had not consented to the lease. The other case cited is *Gopal Ramkrishna v. Govind Pandurang* (5), which lays down that anything which the landlord is required or authorised to do under the Tenancy Act must be done by the whole proprietary body or by an agent acting on their behalf. The judgment of Ismay, J. C. recognises the Lambardar as ordinarily the agent of the co-sharers for the management of the village. I hold that the case has been rightly decided, and the appeal is, therefore, dismissed. There will be no order for costs, as the case proceeded *ex parte* against the tenant, and the respondent Lambardar is not entitled to his costs as he failed to consult the plaintiffs before giving the lease.

Appeal dismissed

(4) 27 P. L. R. 63.

(5) 13 C. P. L. R. 113.

DEBENDRA NARAYAN SINGH v. NARENDRA NARAYAN SINGH.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 205 OF 1916.

August 15, 1919.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Panton.

DEBENDRA NARAYAN SINGH—

DEFENDANT NO. 1—APPELLANT

versus

NARENDRA NARAYAN SINGH AND

OTHERS—PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), s. 114 (g)—Accounts, suit for—Defendant, failure of, to produce account books—Presumption—Costs, liability to pay, how to be determined—Civil Procedure Code (Act V of 1908), O. I, r. 10, O. XLI, rr. 4, 33—Transfer of parties—Court, power of, extent of—Appeal—Appellate Court, power of, to make appropriate order, extent of.

The failure of a defendant in a suit for accounts to produce his account books would justify the Court in raising the presumption, under section 114 (g) of the Evidence Act, that they are being withheld, because, if produced, they would be unfavourable to his case. [p. 639, col. 1.]

Where a defendant is largely responsible for the litigation, and by his obstructive methods hampers the investigation, thereby delaying and lengthening the inquiry, he should be made liable for the whole costs of the suit. [p. 640, col. 2.]

If a suit is instituted for an account between two persons, one alleging that nothing is due from him, and a balance is found to be due from him, that person must pay the costs of the suit and of the account. But the case is different where one party admits a given sum to be due from him and the other claims a much larger sum, and the suit proceeds only for the purpose of ascertaining whether such contested balance is really due or not. In this case, the costs would depend upon the substantial result, that is, if the balance claimed, or a substantial part of it, is shown to be due, the claimant would obtain the costs of the suit; if no part of it is due, he would have to pay them; and if only a portion of it is due, the Court would probably give no costs on either side. But in all these cases the Court would endeavour to see what were the substantial questions and causes of litigation between the parties. [p. 640, cols. 1 & 2.]

May v. Biggenden, 24 Beav. 207; 58 E. R. 337; 116 R. R. 94, followed.

Order I, rule 10, of the Civil Procedure Code authorises the Court to make an order transferring a party from the category of defendants to that of plaintiffs at any stage of the proceedings, not merely after the passing of a preliminary decree, but also after expiry of the period prescribed for an appeal against that decree, so long as the transfer is for the benefit of the parties, or tends to give effect to one of the aims of the law of procedure, viz., the avoidance of a multiplicity of suits with reference to the same subject-matter. [p. 641, col. 1.]

Order XLI, rules 4 and 33, give an Appellate Court ample power to make the appropriate order needed in the interests of justice. Under the former rule, on appeal by one of the parties upon a ground

common to all, the decree may be varied in favour of all; under the latter rule, the Appellate Court has power to make the proper decree, notwithstanding that the appeal is as to a part only of the decree, and such power may be exercised in favour of all or any of the respondents or parties, even though such respondents or parties may not have filed any appeal or objection. [p. 641, col. 2.]

Appeal against the decree of the Subordinate Judge, Nadia, dated the 29th June 1916.

Babus Jogesh Chunder Roy and Upendra Narayan Bagchi, for the Appellant.

Babus Bepin Behary Ghose, Panchanan Ghosh and Gopendra Nath Das, for the Respondents.

JUDGMENT.—The litigation which has culminated in this appeal was commenced by the plaintiff respondent for adjustment of accounts. Tarini Charan Singh, the father of the plaintiff, died on the 5th November 1899. On the 4th March 1881 he had made a testamentary disposition of his properties and had nominated his wife, Rangini Dasi, the sixth defendant in this suit, as executrix to his Will. On the 27th April 1901 the widow obtained probate and took possession of the estate as executrix. Differences arose, however, amongst the members of the family, which consisted of the three sons of the testator (the plaintiff, Narendra Narayan, the first defendant, Debendra Narayan, and Surendra Narayan, the father of defendants Nos. 2—5) and a daughter, Basanta Kumari. The result was that in 1903, the present defendant, Debendra Narayan, instituted a suit for construction of the Will and for administration of the estate. The suit was decreed in the Court of first instance on the 28th July 1905. On appeal by Debendra Narayan a consent decree was made in this Court on the 18th March 1906. Under that decree Debendra Narayan became entitled to recover a sum of Rs. 15,000 from the estate and for that purpose to take possession for a period of five years. The decree further directed that upon the expiry of this period, the estate would be held in equal shares by Debendra Narayan, Narendra Narayan and the sons of Surendra Narayan, who had died meanwhile. Debendra Narayan took possession of the estate under this decree on the 29th October 1906. Narendra Narayan instituted the present suit on the 11th March 1909 for recovery of possession of his one-third share,

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on the allegation that Debendra Narayan had already realised more than his dues under the decree. Debendra Narayan was made the first defendant, the four sons of Surendra Narayan were made defendants Nos. 2 to 5 and Rangini Dasi was joined as defendant No. 6. On the 12th April 1911 the Subordinate Judge decreed the suit in the following terms:—

"It is ordered that the plaintiff's right be declared to one-third of the disputed properties and he be given possession of the one-third share jointly with defendants Nos. 1—5; accounts will be taken to ascertain if the defendant No. 1 has taken more than his own dues during the period of his possession; the plaintiff to get from defendant No. 1 the amount which he may be found to have taken in excess of his one-third share. Order as to costs to be passed after the decree is made final; the first part of the decree to be final and the second part preliminary. Defendant No. 1 to file accounts up to the date of the plaintiff's taking possession of the share decreed to him. It is further decreed that the plaintiff do take possession of the share decreed to him within 15 days from to-day, otherwise the second part of the decree about account to be null and void."

The plaintiff accordingly took possession on the 21st, 22nd and 23rd April 1911. The mode of delivery of possession and the litigation which resulted therefrom will be found narrated in full in the judgment of this Court in *Debendra Narayan Singh v. Narendra Narayan Singh* (1). Debendra Narayan appealed against the preliminary decree for account. That appeal was dismissed by this Court on the 9th May 1913. During the pendency of the appeal in this Court, the work of the Commissioner, who had been appointed by the Subordinate Judge to take the accounts, was suspended. On the 4th December 1913 the Commissioner was directed to resume his work and to investigate the accounts in suit, that is, from the 29th October 1906 (the date when Debendra Narayan took possession under the decree in his suit) to the 20th April 1911 (when Narendra Narayan obtained possession under the decree in this suit). Considerable difficulty was experienced by the Commissioner

(1) 51 Ind. Cas. 976; 29 C. L. J. 504; 23 C. W. N. 900.

in the performance of his duties from the lack of papers. Possession had been delivered in execution to Narendra Narayan, but to no purpose, because Debendra Narayan had locked up the *malghar*. The room was not opened by the Execution Officer and all that Narendra Narayan and his nephews did was to place additional locks on the door. Ultimately, the locks were removed by order of the Court and the doors broken open. But many of the requisite papers could not be found inside the room. The Commissioner took such evidence as was adduced by the parties concerned and examined such papers as were available. On the 11th November 1914 while the matter was still pending before the Commissioner, defendants Nos. 2—5, the sons of Surendra Narayan, filed a petition before the Subordinate Judge, praying that the accounts might be adjusted for their benefit as well. On the 19th November the Subordinate Judge held that although these defendants had not entered appearance until after the preliminary decree had been affirmed by the High Court, they were entitled to have their names transferred from the category of defendants to that of plaintiffs. He accordingly directed the Commissioner to ascertain the dues and liabilities as between the principal and *pro forma* defendants. This order was carried out by the Commissioner, and necessarily widened the scope of the enquiry before him. After much delay and many extensions of time the Commissioner submitted his final report on the 29th February 1916. Objections were lodged by both parties on the 4th May following. Arguments were heard in support of and in answer to the objections and judgment was reserved on the 1st June 1916. On the 6th June, the defendants Nos. 2 to 5 paid the requisite Court-fees on the amount found due to them by the Commissioner from the first defendant. On the 29th June judgment was delivered and the suit was decreed in favour of the original plaintiff and the transferred plaintiffs. On the 5th July defendants Nos. 2—5 deposited the excess Court-fees required. This was accepted on the 15th July and the decree was ultimately signed on the 25th July. The present appeal is directed against this decree, which was in the following terms:—

"The plaintiff No. 1 will get from defend.

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ant No. 1 the sum named by the Commissioner and Rs. 359-4-3, that is, one third of Rs. 1,079 10- $\frac{1}{2}$, in all Rs. 2,845 12- $\frac{3}{4}$. The plaintiffs Nos. 2-5, who were previously defendants in the suit but have been made plaintiffs and have paid the Court fees, will also get from defendant No. 1 the sum of Rs. 2,169-4- $\frac{3}{4}$. Plaintiff No. 1 will get the cost of the suit from defendant No. 1 and defendants Nos. 2-5 will get their share of the cost. The plaintiff No. 1 will get from defendant No. 1 Rs. 2,845 12- $\frac{3}{4}$ as his claim and Rs. 4,712 9-5 as cost, that is, in all Rs. 7,558-1- $\frac{3}{4}$, and the plaintiffs Nos. 2-5 will get Rs. 2,169-4- $\frac{3}{4}$ as their claim and Rs. 361-0-0 as cost, that is, in all Rs. 2,530 12- $\frac{3}{4}$."

This decree has been assailed on behalf of the first defendant appellant on two grounds, namely, first, that the plaintiff should not have been allowed the entire costs of the suit, when his claim has been successful only in respect of a relatively small amount, and, secondly, that no decree should have been made in favour of defendants Nos. 2-5, who applied to be joined as plaintiffs at a very late stage of the litigation. The plaintiff has filed a cross-appeal and has urged that the amounts have not been taken on a correct basis and that he is in reality entitled to a much larger sum than what has been awarded by the Subordinate Judge. The other respondents, the sons of Surendra Narayan, have not preferred a cross-appeal, but they have urged that if at the instance of the plaintiff the amount payable by the first defendant should be increased, they should be allowed to reap the advantage of such finding. The points which emerge for consideration from the arguments addressed to us may accordingly be thus summarised: *first*, have the accounts been taken on a correct basis; *secondly*, is the order for costs erroneous on principle, and *thirdly*, are the sons of Surendra Narayan entitled to the relief they have obtained.

As regards the first point the plaintiff-respondent has urged in support of his cross-appeal that the Subordinate Judge placed a too restricted construction upon the preliminary decree and narrowed its scope unduly, when he held that, according to its terms, "the enquiry was limited to the finding as to what amount the defend-

ant actually received and not what he could have received or in all probability did receive." In our opinion, the contention of the plaintiff is partially well-founded. There is a clear distinction between what the defendant actually received and what he could have realised by exercise of due diligence; but no real distinction can be made between what he actually received and what in all probability he received. The evidence relevant for proof of this matter must be tested in the light of the definition of the term 'proved' given in section 3 of the Indian Evidence Act: "A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists." Now in the case before us, the first defendant went into possession of the joint family estate for a specific purpose, namely, to apply the entire income for payment of Rs. 15,000 due to himself. The plaintiff alleges that the defendant has realised more than Rs. 15,000 and calls upon him to account for the profits of the estate during the period of his possession. The plaintiff places before the Court a statement of what he believes to be the surplus of the income of the estate. Clearly, it is the duty of the defendant to produce the account papers, which were presumably in his possession and would show the receipts and the disbursements. Account papers are produced, except the *rokars* for the Bengali years 1316 and 1317, that is, from April 1909 to April 1911. The Subordinate Judge has expressed the opinion that these books were written up and were most probably in the *malghar* till shortly before it was locked up by the parties and possibly even after that. The defendant started the theory that the plaintiff was responsible for the disappearance of these papers, and the Commissioner apparently favoured this view. The Subordinate Judge however, has arrived at a contrary conclusion. He has held that it was the first defendant who withheld the papers, and he has described as absurd the story that the Civil Court peon helped the plaintiff to remove cartloads of papers in the presence of the officers of the defendant. The

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evidence has been placed before us and we agree with the Subordinate Judge in his conclusion that the defendant is responsible for the disappearance of the papers. But we are unable to accept the conclusion that defendant can, by his misconduct, successfully defeat the claim of the plaintiff. The principle applicable in such circumstances is well established.

In a suit for accounts, the non-production of account books by the party who has custody of them justifies the presumption under section 114 (g) of the Indian Evidence Act that they have been withheld, because, if produced, they would have been unfavourable to his case. If he is the plaintiff and is claiming accounts though withholding papers, his suit is liable to be dismissed: *Upendra Kishore v. Ram Tara* (2), *Chand Ram v. Brojo Gobind Doss* (3). If he is the defendant who is liable to render accounts, the Court will proceed on the footing of evidence furnished by the plaintiff, and, in doing so, may make all reasonable presumptions against him; see the observations of Phear, J. in *Syed Shah Alai Ahmad v. Bibee Nusibun* (4), quoted with approval by Field, J., in *Annoda Persad v. Dwarkanath* (5). Again, as was pointed out by Field, J., in *Degamber v. Kallynath* (6), if satisfied that the defendant has contumaciously refused or omitted to comply with the order for production of the papers, the Court may enforce obedience by imprisonment or by attachment of property or by both. But, even if the Court does not consider it necessary to exercise its disciplinary powers, it may, by raising a presumption against the defendant, afford relief to the plaintiff. An instance of this nature will be found in the case of *Rampershad Tewarry v. Sheochurn Doss* (7). There the defendant refused to render accounts; on evidence adduced to prove spoliation of the banking books, the Court charged him with the principal sum for which he was accountable with interest at 12 per cent. in lieu of the profits he had failed to account for. The Judicial

Committee affirmed the decree of the Agra Sudder Court and held that the Court had properly visited the failure of the defendant to produce the accounts required, by charging him with interest on the principal sum for which he was accountable. This is in conformity with principles firmly established in equity jurisprudence. Thus, in *Walmsley v. Walmsley* (8), where an accounting party withheld the partnership books and documents and thereby endeavoured to baffle the justice of the Court, Sir Edward Sugden, L. C., held that the Master had rightly raised a presumption against him both as regards the amount of the capital and stock in trade and of the annual gains from the business. Again, in *Gray v. Haig* (9), where an accounting party had destroyed the accounts before the matters had been finally adjusted, Sir John Romilly, M. R., stated that he would act on the principle laid down in the well known case of *Armory v. Delamirie* (10) and presume, as against the person who destroyed the evidence, everything most unfavourable to him, which is consistent with the rest of the facts either admitted or proved. This accords with the view adopted by Lord Nottingham, L. C., in *Wardour v. Berisford* (11). See also *Rowley v. Adams* (12), affirming *Rowley v. Adams* (13). The learned Vakil for the defendant has, however, argued that this Court as a Court of Appeal should not interfere with the report of the Commissioner, when it has been accepted by the trial Court. This contention is clearly opposed to the decision in *Chetty v. Mahomed Essa* (14), which establishes that the Court is entitled to deal with the report on matters of fact as also questions of principle. In our opinion, the narrow view, adopted by the Subordinate Judge, regarding the scope of the preliminary decree has led to an erroneous decision upon the question of the accounts for 1316 and 1317, as is clear from the following passage in his judgment:—

(8) (1848) 3 J. & W. 556; 72 R. R. 129.

(9) (1855) 20 Beav. 219; 52 R. R. 587; 109 R. R. 396.

(10) (1722) 1 Strange 505; 1 Sm. L. C. 396; 93 E. R. 664.

(11) (1687) 1 Vern. 452; 23 E. R. 579.

(12) (1849) 2 H. L. O. 725; 9 E. R. 1267; 81 R. R. 363.

(13) (1844) 7 Beav. 395; 8 Jur. 994; 49 E. R. 1118; 64 R. R. 105.

(14) 5 C. W. N. 692.

(2) 4 Ind. Cas. 542; 13 C. W. N. 696.

(3) 19 W. R. 14.

(4) 24 W. R. 70.

(5) 6 C. 754; 8 C. L. R. 321.

(6) 7 C. 654; 9 C. L. R. 265.

(7) 10 M. L. A. 490 at p. 507; 2 Sar. P. C. J. 177; 19 E. R. 1058.

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"The other items claimed by the plaintiff and not either noticed or allowed by the Commissioner can be disposed of together. They are either sale proceeds of grains, or income from holdings purchased with the profits of the money-lending business or income from money or paddy-lending for the years 1316 and 1317; they are not taken into account by the Commissioner. Be they of whatever category, the same remark applies to them, that they are not proved but are supposed receipts by the defendants. I need not go into details, but I have satisfied myself that they should not be relied on as proved facts. These amounts, the plaintiff argued, the defendant must have received during his tenure. I say he might probably have done so, but the terms of the preliminary order limit the scope of our inquiry and I cannot decree the amounts."

We hold accordingly that the accounts for 1316 and 1317, mentioned in the above paragraph, must be investigated. They relate to profits from the money-lending business and sale proceeds of paddy and of winter crops, turmeric, gram, *kalai* and the like. If the defendant produces the *rokars* for 1316 and 1317, the accounts will be taken in the usual manner; if they are not produced, the Court must make all reasonable presumption against the defendant and base its conclusion upon the figures available for previous years, supplemented by such oral and documentary evidence as may be available. In the events which have happened, the defendant cannot reasonably complain, if the average deducible from the fluctuating figures for previous years works out to his detriment.

As regards the second point, we are of opinion that, on the facts found, the Subordinate Judge has properly exercised his discretion in the matter of costs. The defendant is very largely to blame for this litigation and its protracted proceedings and he has spared no effort to defeat the just claim of the plaintiff and his nephews. The principles on which the costs of a suit for an account are regulated were lucidly stated by Sir John Romilly, M. R., in *May v. Biggenden* (15): "It is generally true that if a suit is instituted for an account be-

tween two persons, one alleging that nothing is due from him, and a balance is found to be due from him, that person will have to pay the costs of the suit and of the account. But the case would be wholly varied, if the case were, that one party admitted a given sum to be due from him, and the other had claimed a much larger sum, and the suit had proceeded only for the purpose of ascertaining whether such contested balance were really due or not. In this case, the costs would depend upon the substantial result; that is, if the balance claimed, or a substantial part of it, were shown to be due, the claimant would obtain the costs of the suit; if no part of it were due, he would have to pay them; and if only a small portion of it were due, the Court would probably give no costs on either side. But in all these cases, the Court endeavours to see what were the substantial questions and causes of litigation between the parties." See also *Collyer v. Dudley* (16); *Kemp v. Burn* (17). In the case before us, the first defendant denied the right of the plaintiff to claim an account and asserted that not only was nothing due from him, but that he himself had not realised, during his possession of the estate, the entire sum of Rs. 15,000 recoverable by him. The result of the litigation is that the plaintiff is unquestionably entitled to an account and that upon accounts taken, it is indisputably established that the defendant has received a considerable sum in excess of his dues. The enquiry has been delayed and lengthened by reason of the obstructive attitude of the defendant, who has managed to hamper the investigations by non-production of the papers. In such circumstances, he has been rightly made liable for the whole costs and we see no reason to interfere with the directions given by the Subordinate Judge.

As regards the third point, the first defendant has argued that his nephews should not have been permitted to be transferred from the category of defendants to that of plaintiffs, not merely after the preliminary decree had been made under Order XX, rule 16, Civil Procedure Code, but also after the time prescribed for an

(16) (1823) T & R. 421; 2 L. J. Ch. 15; 37 E. R. 1163.

(17) (1863) 4 Giff. 348; 1 N. R. 257; 9 Jur. (N. S.) 375; 7 L. T. 665; 11 W. R. 278; 68 E. R. 740; 141 R. R. 224.

(15) (1857) 24 Beav. 207; 53 E. R. 337; 116 R. R. 94.

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appeal against that decree under section 97, Civil Procedure Code, had expired and indeed after an appeal against the decree by the defendant to this Court had been dismissed. We are of opinion that this contention should not prevail. It cannot be disputed that Order I, rule 0, Civil Procedure Code, authorises the Court to make an order of this description *at any stage* of the proceedings. The Courts have always been reluctant to place a narrow construction upon this provision of the law, and to restrict the exercise of this discretionary power: *Wilson v. Balcarres Brook Steamship Co.* (18), *Robinson v. Geisel* (19), *Broindra Kumar Das v. Gobinda Mohan Das* (20). Thus fresh parties have been added after a decree has been passed and a reference made to the Commissioner to take accounts and sell the property: *Vakhatchand v. Advocate General* (21). Similarly, in a suit for partition, a fresh party has been added after the preliminary decree and submission of the report by the Commissioner: *Jotindra Mohan v. Bejoy Chand* (22). The power of the Court depends on the question whether the case is *sub judice*, for as Fry, L. J., observed in *Duke of Buccleuch* (23), the words "at any stage of the proceedings" apply as long as anything remains to be done in the case. See also *Attorney General v. Corporation of Birmingham* (24), *Keith v. Butcher* (25). On this principle, it has been held that, after final judgment, a person, who had hitherto been no party, cannot be made a defendant for the purpose of getting execution against him. *Munster v. Fox* (26). But a person has been allowed to intervene to get a judgment set aside: *Mehaffey v. Mehaffey* (27); *Jacques*

v. Harrison (28). In the case before us, the propriety of the course adopted in the Court below cannot be seriously questioned. If the application of the defendants had been refused, the result would have been the institution of a separate suit by them and possibly a fresh enquiry into the accounts at their instance. This could not have benefited the parties in any conceivable manner. One of the aims of the present procedure law is the avoidance of a multiplicity of suits with reference to the same subject matter, and the course followed by the lower Court is eminently fitted to fulfil that object.

The defendant has finally argued that if a further enquiry into the accounts should be directed as the result of the cross appeal, the benefit should accrue to the original plaintiff alone and not to the added plaintiffs as well, inasmuch as they have not preferred a cross-appeal. In all the circumstances of this case, we are of opinion that we should not accede to this contention. Order XLI, rule 4, and rule 33 give the Court ample power to make the appropriate order needed in the interests of justice. Under the former rule, on appeal by one of the parties upon a ground common to all, the decree may be varied in favour of all, under the latter rule, the Appellate Court has power to make the proper decree, notwithstanding that the appeal is as to a part only of the decree, and such power may be exercised in favour of all or any of the respondents or parties, even though such respondents or parties may not have filed any appeal or objection. In the case before us, the claim of the added plaintiffs rests on precisely the same foundation as that of the original plaintiff; when they were added as plaintiffs, there was no alteration in the nature of the suit nor was there the introduction of a new cause of action. The further enquiry we shall presently direct will consequently cover the case of both sets of plaintiffs.

The result is that the appeal preferred by the first defendant is dismissed with costs and the decree of the Subordinate Judge is confirmed, except in so far as it disallows the claim for accounts of the

(28) (1884) 12 Q. B. D. 165; 53 L. J. Q. B. 137; 50 L. T. 246; 32 W. R. 471.

(18) (1893) 1 Q. B. 422; 62 L. J. Q. B. 245; 4 R. 286; 63 L. T. 32; 41 W. R. 48; 7 Asp. M. C. 32.

(19) (1894) 2 Q. B. 633 at p. 633; 64 L. J. Q. B. 52; 9 R. 555; 71 L. T. 70; 42 W. R. 609.

(20) 34 Ind. Cas. 86; 20 C. W. N. 752.

(21) 8 B. H. C. R. 96.

(22) 32 C. 483.

(23) (1892) P. 201 at p. 212; 61 L. J. P. 57; 67 L. T. 739; 40 W. R. 455; 7 Asp. M. C. 294.

(24) (1880) 15 Ch. D. 423; 43 L. T. 77; 29 W. R. 127.

(25) (1884) 25 Ch. D. 750; 53 L. J. Ch. 640; 50 L. T. 203; 32 W. R. 578.

(26) (1885) 10 App. Cas. 630; 55 L. J. Q. B. 108; 53 L. T. 474; 34 W. R. 461.

(27) (1905) 2 Ir. R. 292; 39 Ir. L. T. R. 11; 8 Ir. L. R. 424.

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years 1316, 1317. The cross-appeal is decreed and the case is remitted to the Subordinate Judge for further enquiry into the accounts of 1316 and 1317 as directed above. This enquiry will be held for the benefit of all the plaintiffs and a decree will be made for such sums as may be found due in their respective shares. The costs of the cross-appeal as also the costs of the further enquiry by the Subordinate Judge will be in his discretion. No separate hearing fee will be assessed in the cross-appeal in this Court.

Appeal dismissed;

Cross-appeal decreed;

Case remanded.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 1248 OF 1916.

May 1, 1918.

Present:—Mr. Justice Scott Smith.

ALLAH BAKHSI—PLAINTIFF—APPELLANT
versus

TOPAN RAM—VENDEE—GHULAMA AND
ANOTHER—VENDORS, DEFENDANTS—
RESPONDENTS.

*Punjab Pre-emption Act (I of 1913), s. 3 (3)—
Taunsa, whether town or village—Census report, entry
in, value of.*

Taunsa is a town for the purposes of the Punjab
Pre-emption Act. [p. 643, col. 1.]

In deciding whether a place is a town or a village
the fact that it is described as a town in the Census
report is of great importance. [p. 643, col. 1.]

First appeal from the decree of the
District Judge, Dera Ghazi Khan, dated the
2nd February 1916, dismissing the suit.

Mr. Badr-ud-Din Kureshi, for the Appel-
lant.

Lala Hargopal, for the Respondents.

JUDGMENT.—This is a first appeal from
the order of the District Judge of Dera
Ghazi Khan, dismissing the plaintiff's suit
for pre-emption of a house in Taunsa. The
lower Court held that Taunsa is a town
and not a village and that the plaintiff
does not own the house immediately to
the north of that in suit. If these findings
are correct, it is admitted that plaintiff has
no right of pre-emption.

The first question is, whether Taunsa is
a town or a village. If it is a village
then plaintiff certainly has a right of pre-

emption superior to that of the vendee, if
it is a town then he has only a right
of pre-emption if he owns the house im-
mediately to the north of that in dispute.
My order of the 14th December 1916 should
be read along with this judgment. By
that order I remanded the case to the
lower Court for re-decision of the issue
whether Taunsa is a town or not, and I
pointed out certain matters into which
enquiry should be specially made. The
enquiry was made by the Subordinate Judge
who also appointed a local Commissioner.
The latter did not record any evidence
but submitted a report. Both the parties
wished to examine the local Commissioner
in Court and the Subordinate Judge ordered
that they should deposit his process fee
and diet money in equal shares. Defendants
deposited their share but the plaintiff did
not deposit his, and the upshot was that
the local Commissioner was not summoned
or examined by the Court. This is unsatis-
factory and I agree with the Subordinate
Judge that the report of the Commissioner,
which is not based upon any recorded
evidence, is not of much value as the
Court has not been able to question him
as to the data upon which he came to his
conclusions. The learned Subordinate Judge
is of opinion that Taunsa is a town. No
objections have been put in to this finding
on behalf of the appellant, but Mr.
Kureshi has argued the point on his behalf.
One of the reasons given by the Subordinate
Judge for his opinion that Taunsa is a town
is that out of an area of 82,000 *kanals*
only 5,780 *kanals* are cultivated. This,
however, appears to be a mistake, for the
evidence on the record shows that some
50,000 *kanals* are cultivated. The other
points relied upon by the Subordinate Judge
are that there are over 100 shops in
Taunsa, that there are three bazars, that
there is a considerable trade with Karachi
and other places, that there is a famous
mosque and splendid buildings attached to
it, that there is a *mela* held in connection
with this mosque yearly, that Taunsa is
the headquarters of a Tahsil and of a
Circle Inspector of Police, that it
contains a Veterinary Hospital, a Civil
Hospital, a District Rest House, a Post
and Telegraph Office, several schools
both for boys and girls, and a certain

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number of *pakka* buildings. In my order of the 14th December 1916 I pointed out that at the last census it was classed as a town because its population exceeded 5,000 inhabitants. I find I was not correct in saying that population was the only reason for which it was classified as a town. The Punjab Census Report of 1911 at page 12 gives definition of town as:—“(4) every other continuous collection of houses inhabited by not less than 5,000 persons, which the Provincial Superintendent may decide to treat as a town for census purposes.”

“NOTE.—In dealing with questions arising under head (4) the Provincial Superintendent will have regard to the character of the population, the relative density of the dwellings, the importance of the place as a centre of trade and its historic associations, and will bear in mind that it is undesirable to treat as towns overgrown villages which have no urban characteristics.”

Presumably the Provincial Superintendent classified Taunsa as a town after due consideration and the fact that he did so is, I consider, very important.

Considering this and the various facts detailed by the Subordinate Judge in his report, I think on the whole that the decision of the lower Court that Taunsa is a town should be upheld, and I uphold it accordingly. Plaintiff, therefore, has only a right of pre-emption if he can prove that the house to the north of that in dispute was gifted to him by his father. The finding of the lower Court is against him and very little has been said against this by Counsel for the appellant. It is not necessary for me to repeat the reasons given by the learned Subordinate Judge for his finding. It is sufficient to say that I entirely agree with him and I have no hesitation in holding that the plaintiff has not proved the alleged gift in his favour.

The appeal accordingly fails and is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 232 OF 1917.

March 28, 1919.

Present:—Justice Sir Charles Chitty, Kt., and Mr. Justice Newbould.

AMRITA LAL MUKHERJEE—DECREE-HOLDER—APPELLANT

versus

HIRALAL MUKHERJEE, OBJECTOR IN MISCELLANEOUS CASE No. 46 OF 1916 AND MOTI LAL MUKHERJEE, OBJECTOR IN MISCELLANEOUS CASE No. 53 OF 1916—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 182—Execution of decree—Cross-examination of objector, whether step-in-aid of execution—Order directing payment of process fees for issue of notice, whether gives fresh start of limitation.

The cross-examination of a person who objects to the execution of a decree does not amount to a step-in-aid of execution so as to give a fresh start of limitation. [p. 643, col. 2; p. 644, col. 1.]

An order to pay *talbana* for the issue of a notice does not furnish a fresh starting point for limitation, where *talbana* is not paid, and in consequence notice is not issued. [p. 644, col. 1.]

Appeal against the order of the Subordinate Judge, 3rd Court, Hooghly, dated the 23rd of March 1917.

Babus Baidyanath Dutt and Samarendra Kumar Dutt, for the Appellant.

Babu Baranasibasi Mukherjee and Mr. A. Paul, for the Respondents.

JUDGMENT.—The only question in this appeal is, whether the decree-holder's application for execution, dated 21st July 1916, was barred by limitation. It appears that the decree was passed on 30th May 1910 on a Solenama, the decree being for partition of joint family property. In 1913 there was an application for execution which was dismissed for default on 31st July 1913. The question is—from what date did the time run against the appellant? It is argued for him that it ran from 26th July 1913 because, first, on that day he cross-examined Hiralal Mukherjee with reference to an objection which was then being taken to execution, and, secondly, there was an order in his favour that he should pay *talbana* for formal possession, if he liked to get it, within three days. It is clear that neither of these things will take the case out of limitation or give him a fresh starting point. The cross-examination of an

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opponent cannot be said to be an application to the Court to take a step in aid of execution. As to the second point, if there had been an issue of notice obviously that would have been a starting point for a fresh period, but there was no such issue of notice. The decree holder was given three days to pay *talbana* if he chose to do so. He did not put that in and his application was then dismissed for default. We think that the application was clearly barred by time. The appeal is accordingly dismissed with costs, hearing fee—three gold *mohurs*—to each of the respondents who have appeared.

Appeal dismissed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 729
OF 1918.

December 20, 1919.

Present:—Mr. Justice Adami
GOPAL JEE SINGH AND OTHERS—
APPELLANTS

versus

RAM NANDAN SINGH AND OTHERS—
RESPONDENTS.

Landlord and tenant—Abandonment of house, effect of—Abandonment of land.

The abandonment by a tenant of his house in a village does not amount to an abandonment of the land on which the house stands. [p. 644, col. 2.]

Appeal from a decision of the Officiating District Judge, Shahabad, dated the 27th February 1918, reversing a decision of the Additional Munsif, Buxar, dated the 5th April 1917.

Messrs. Parmeshwar Dayal and Jadubins Sahai, for the Appellants.

Mr. Narendra Nath Sen, for the Respondents.

JUDGMENT.—Plot No. 301 in the village of Dulahpur, Thana Dumraon, which was the subject of dispute in the suit out of which this second appeal arises, is entered in the Record of Rights as belonging, with regard to a one-half share, to the defendant No. 1, with regard to 1/8th share to plaintiff No. 1 and 3/8ths share

to each of the defendants. The rent is entered as included in the rent of the defendant No. 1, who does not contest the suit. It is recorded as being included in the rent of the holding of the defendant. The plaintiff sought for a declaration of his right to possess the whole plot. He claimed that he had a house on it which he had abandoned about 25 years ago and that since he had used the earth of the land for building a new house and had cut trees on the plot.

The defendants relied on the Record of Rights. The learned Munsif found that the entries in the Record of Rights were on the face of them incorrect and that the shares in it did not correspond to the claim of any of the parties during the settlement proceedings. He found, too, that the evidence adduced on either side was unreliable and unsatisfactory. He came to the conclusion that the disputed land was *ghair mazrua* of the *malik* who was not a party to the suit and dismissed the plaintiff's suit.

On appeal the learned Officiating District Judge held that the plaintiffs' evidence satisfactorily proved his claim. He believed that the disputed land belonged to the plaintiff and that they had been in possession of it until two years from before the hearing. He found that the defendants had not exercised possession over the disputed land within 12 years and, therefore, he decreed the plaintiffs' suit.

Mr. Parmeshwar Dayal on behalf of the appellants urges that the District Judge should have considered the Record of Rights and, considering the unsatisfactory state of the evidence, should have relied on it. He urges, too, that the plaintiff having abandoned the plot, the land became the *ghair mazrua* of the proprietor.

In the first place, the District Judge does come to a finding that the entry in the Khatian was wrong. In the second place the mere fact that the tenant of a plot of land in a village abandons his house on that plot does not amount to an abandonment of the land on which the house stands. The plaintiff in this case remained in the village and built another house close by. The case, as it stands, having reference to the Record of Rights, is not a satisfactory one, but the learned

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District Judge has come to clear findings of fact as to the possession and title of the plaintiff and I am unable to go behind them. The appeal is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE [No. 1565
OF 1918.

July 7, 1919.

Present:—Mr. Justice Newbould.

DURGA CHARAN BISWAS AND OTHERS—
DEFENDANTS—APPELLANTS

versus

KAILASH CHANDRA DAS AND OTHERS
RESPONDENTS.

Pleadings and proof—Case set up in trial Court, failure of—Appeal, fresh case, whether can be advanced in—Remand, order of, whether justified—Possession, suit for, on proof of title—Burden of proof.

A party, who in the trial Court fails to establish the case which he set up, is not entitled to advance a new case in appeal, nor is he entitled to a remand to enable him to establish his claim on the new case so set up [p. 645, col. 2.]

In every case where the plaintiff sues for recovery of possession of land on establishment of his title, the onus is primarily on him to prove his title. But when he makes out a *prima facie* case for establishment of his title and the defendant seeks to contradict his case by establishing title of his own, it is for the defendant to prove the title he sets up, whether it be *lakheraj* or whether it be any other kind of title. [p. 645, col. 2.]

Appeal against the decree of the Subordinate Judge, Khulna, dated the 11th of May 1918, affirming that of the Munsif, 1st Court at Bagirhat, dated the 18th of May 1917.

Dr. Jadu Nath Kanjilal, for the Appellants.
Babus Brojo Lal Chakravarty and Susil Kumar Bose, for the Respondents.

JUDGMENT.—This appeal arises out of a title suit. Two points have been urged on behalf of the appellants-respondents. The 1st is that the issue of limitation has been wrongly decided and the second that in deciding the question of title the onus of proof has been wrongly thrown on the defendants.

The plaintiff, it is found, is the purchaser of the property in question at a sale in execution of a decree for arrears of rent, and any incumbrances that there were to his title have been annulled under section 67 of the Bengal Tenancy Act. The lower Courts have held that limitation runs from the date of the plaintiff's purchase.

It is contended on behalf of the appellants that if the landlord was out of possession, it must be shown that the defendants came into possession after the creation of the holding, in other words, it is sought to make the principle in the case of *Kalikananda Mukherjee v. Bipro Das Pal Chowdhuri* (1) applicable to the present case. It appears, however, that no such contention was raised in either of the Courts below. The question as to the date of the creation of the holding was not gone into, and it does not appear to have ever been suggested before this appeal was filed that the dispossession was prior to the creation of the interest which was purchased by the plaintiff. After having failed on the points on which they fought the case in the lower Courts, the appellants are not entitled to a remand to enable them to try and establish their claim on a new case.

As regards the question of onus it is said that as the defendants pleaded *Lakheraj* title, it was for the plaintiff to prove that the land was rent paying land. In support of this contention the case of *Halodhar Chatterjee v. Kamendri Narain Roy Choudhury* (2) was cited and also other rulings. None of these rulings support the broad contention that has been urged that in every case where the defendant pleads *Lakheraj* title it is for the plaintiff to disprove that title. In every case where the plaintiff sues for recovery of possession of land on establishment of his title, the onus is primarily on the plaintiff to prove his title. But when the plaintiff has made a *prima facie* case for establishment of his title, if the defendant seeks to contradict the plaintiff's case by establishing title of his own, it is for the defendant to prove the title he sets up, whether it be *Lakheraj* or whether it be any other kind of title.

(1) 26 Ind. Cas. 436; 19 C. W. N. 18; 21 C. L. J. 245.

(2) 14 Ind. Cas. 90; 16 C. W. N. 98C.

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In the present case there appears to have been no error committed by the lower Courts. They have held that the plaintiff has made out a *prima facie* case and they have, after considering the evidence on the defendant's side as to his Lakheraj title, held that this does not prevail against the title set up by the plaintiff. There has been no error of law which would justify my interference in second appeal.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1098 of 1914.

May 30, 1918.

Present:—Mr. Justice Shadi Lal and

Mr. Justice Wilberforce.

MAHMUD AND ANOTHER—DEFENDANTS—
APPELLANTS

versus

JUMMA AND OTHERS—PLAINTIFFS—
RESPONDENTS.

Punjab Pre-emption Act (I of 1913), ss. 3 (3), 5 (a)—Taunsa, whether town or village—House, part of, used as shop, whether subject to pre-emption—Appeal, second—Place, whether town or village—Question of fact.

Taunsa is a town for the purposes of the Punjab Pre-emption Act.

Where it is found that a building is for all practical purposes a residential one, the mere fact that a small part of it is used as a shop does not in any way alter its character.

Semble, that the question whether a place is a town or a village is one of fact and cannot be raised in second appeal.

Second appeal from the decree of the Additional District Judge, Multan, dated the 20th March 1914.

Dr. Gokal Chand Narang, for the Appellants.

Mr. Lakshmi Narain, for the Respondents.

JUDGMENT.—The plaintiff in this case sued for pre-emption of a house situated in Taunsa in the Dera Ghazi Khan District. He stated that Taunsa is a town in which the custom of pre-emption prevails and that his house was adjacent to that

in suit, while defendants had no house in the locality. The first Court dismissed the suit, as it held that Taunsa was a village and that plaintiff had not proved any superior right. The lower Appellate Court held Taunsa to be a town and for somewhat curious reasons, which it is unnecessary to discuss as plaintiff's superior rights are admitted if Taunsa is proved to be a town, decreed the suit. The only questions before us are whether Taunsa is a town for the purposes of the Pre-emption Act, and whether, as part of the building sold consists of a shop, plaintiff should have obtained a decree.

It appears most doubtful to us if the question whether a place is a town or village can be raised on second appeal. The finding of the lower Appellate Court is based entirely on the local circumstances which exist and not on any of the legal ingredients, if any such exist, distinguishing a town from a village. Counsel for the appellant relied on *Feroze-ud-din v. Rahim Bakhsh* (1) as an authority in his favour. In that case it was held that a question whether a certain building was a *sarai* or not was a question of law and a second appeal was admitted. We do not consider the two cases to be exactly analogous, but it is not necessary for us to discuss the matter at any length, as we find that in a recent decision contained in Civil Appeal No. 1248 of 1916 [*Allah Bakhsh v. Topan Kam* (2)] Taunsa has been held by this Court to be a town.

As for the question whether the building was not liable to pre-emption as part of it consists of a shop, this matter was not pressed before the lower Courts, although an issue was framed on the subject. It appears that the building is for all practical purposes a residential one, and the mere fact that a small part of it is used for a shop does not in any way alter its character.

We dismiss the appeal with costs.

Appeal dismissed.

(1) 8 Ind. Cas. 356; 96 P. R. 1910; 192 P. L. R. 1910.

(2) 54 Ind. Cas. 642; 28 P. R. 1919 note.

HOCHEN SARDAR v. PORESH NATH PAL.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 736
OF 1917.

July 17, 1919.

Present:—Justice Sir Ernest Fletcher, Kt.,
and Mr. Justice Duval.HOCHEN SARDAR—DEFENDANT No. 1—
APPELLANT

versus

PORESH NATH PAL AND ANOTHER

—PLAINTIFFS—RESPONDENTS

*Bengal Tenancy Act (VIII B. C. of 1885), ss. 11, 16,
85—Raiyat at fixed rates, power of, to grant under-
lease, extent of.*

Section 85 of the Bengal Tenancy Act, which restricts the power of *raiya*t to grant under-leases, must be read along with sections 11 and 18 of the same Act, and, therefore, it does not apply to the case of a *raiya*t holding at a fixed rate of rent.

Hari Mohan Pal v. Atul Krishna Bose, 23 Ind. Cas. 925; 19 C. W. N. 1127, followed.

Appeal against the decree of the Subordinate Judge, Khulna, dated the 3rd of January 1917, modifying that of the Munsif, Additional Court at that place, dated the 30th of April 1915.

Dr. Jadunath Kanjilal, for the Appellant.

Babu Ramtaran Chatterjee, for the Respondents.

JUDGMENT.

FLETCHER, J.—This appeal is preferred by the defendant No. 1 against the decision of the learned Subordinate Judge of Khulna, dated 3rd January 1917, reversing the decision of the Munsif of the same place. The plaintiffs brought the suit for recovery of possession of certain property after establishment of their title. The main point that has been taken in this appeal is this. The plaintiffs are the sub-lessees of a *raiya*t and the question that has been urged on behalf of the appellant before us is that the lease is in contravention of section 85 of the Bengal Tenancy Act and, therefore, incapable of being given in evidence. The persons through whom the plaintiffs claim, i. e., defendants Nos. 1 and 2, have been found as a fact to be *raiya*t holding at a fixed rate of rent. In the case of *Hari Mohan Pal v. Atul Krishna Bose* (1) it has been established that section 85 of the Bengal Tenancy Act, which restricts the powers of *raiya*t to grant under-leases, does not apply to the case of a *raiya*t

(1) 23 Ind. Cas. 925; 19 C. W. N. 1127.

ZEMINDAR OF PANGIDIGUDEM v. VENKATAPPAYYA.

holding at a fixed rate of rent, because section 85 has got to be read along with sections 18 and 11 of the same Act. We are bound by that decision and we do not see any reason to dissent from it.

The other point that is urged before us is that, having regard to the statement of the plaintiffs, as appears from the judgment of the primary Court, that one-fourth of the entire area belongs to the defendant Hochen Sardar, the Court has decreed too much of the property in favour of the plaintiffs. But that is not so. It is clearly shown by the judgment of the lower Appellate Court.

The appeal fails and must be dismissed with costs.

DUVAL, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL SUITS NOS. 106 TO 111 AND 327
TO 341 OF 1917

AND

SECOND APPEALS NOS. 1775 TO 1793 AND
1795 TO 1798 OF 1917.

March 7, 1919.

Present:—Sir John Wallis, Kt., Chief Justice,
and Mr. Justice Kumaraswami Sastri.
Rajah BOMMADEVARA VENKATA
NARASIMHA NAIDU BAHADUR,
ZEMINDAR OF PANGIDIGUDEM
AND OTHERS—APPELLANTS

versus

Rani VENKATAPPAYYA AND OTHERS
—RESPONDENTS.

*Decree settling certain rights and liabilities—
Recurring liability—Subsequent decrees based on first
prior decree—Reversal of prior decree on appeal, effect
of, on subsequent decrees—Res judicata.*

Where the extent of a recurring liability, such as the liability to pay rent, has been determined in one suit and other suits between the same parties as to subsequent periods have been decided on the authority of that decision while it was itself under appeal to a higher Court, the party who ultimately succeeds in the appeal from the first decision is

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entitled to regard the intermediate decrees as superseded and to enforce his rights as regards the intermediate periods with reference to the decision in the first case. [p 651, col. 1.]

The fact that the subsequent suits were decided on the authority of the first decision and not as *res judicata*, makes no difference [p. 651, col. 2]

Kishen Sahai v. Bakhtawar Singh, 20 A. 237; A. W. N. (1898) 24, distinguished.

Appeals against the decrees of the Court of the Subordinate Judge, Bezwada, in Original Suits Nos. 12, 14, 15, 18 to 20, and 11, 13, 16, 17, 21, 22 and 56 to 64 of 1916 respectively and second appeals against the decrees of the District Court, Kistna, in Appeal Suits Nos. 31 to 49 and 51 to 54 of 1916 respectively, preferred against the decrees of the Court of the Honorary Suits Deputy Collector, Bezwada, in Summary Suits Nos. 73 to 1 and 93 to 96 of 1915 respectively.

FACTS.—The second appeals here related to suits for rent by a Zamindar, while the first appeals were in connection with suits by tenants to recover excess rent paid.

As regards the latter, the original suits for rent were filed in the Revenue Courts, against which there were appeals and second appeals. The suits were before the Madras Estates Land Act was passed and while the Act of 1868 was in force. Under section 72 of that Act, the Revenue Courts had no jurisdiction, which was given only by section 52 of Act I of 1908. The Zemindar claimed *waram* rate. The High Court allowed it. Some of the tenants appealed to the Privy Council, which reversed the High Court's decrees. The present suits were by tenants to recover the excess paid by them, they not having been able to appeal against the High Court decrees, and the other suits by the Zemindar were resisted on the strength of the decision of the Privy Council. The earlier decision of the High Court is in *Venkata Narasimha Nayudu v. Chinna Bapaya* (1) and that of the Privy Council in *Ravi Veeraraghavulu v. Bomma Devara Venkata* (2). There were also subsequent decrees for rent by the High Court at *waram* rates prior and subsequent to the Privy Council decision.

(1) 2 Ind. Cas. 614; 33 M. 12; 5 M. L. T. 87

(2) 25 Ind. Cas. 305; 37 M. 443; 16 M. L. T. 262; (1914) M. W. N. 695; 1 L. W. 77; 27 M. L. J. 45; 20 C. L. J. 875; 19 C. W. N. 97; 16 Bom. L. R. 853; 41 I. A. 258 (P. C.).

The question was whether *Ravi Veeraraghavulu v. Bomma Devara Venkata* (2) operated as *res judicata*. The *faslis* to which these decrees related ranged from 1315 to 1323.

Messrs. K. Srinivasa Iyengar, V. Ramadoss and P. Somasundaram, for the Appellants.—Section 11 of the Civil Procedure Code applies only if the former decision was by a competent Court. And 'competency' means competency of the Court of first instance. See explanation II. Here the Revenue Court, which had no jurisdiction under Act VIII of 1865 then in force to try suits for rent, tried them in the first instance. And the mere fact that there were appellate decrees in the High Court and in the Privy Council cannot satisfy the test of competency.

[WALLIS, C. J.—If the rights of landlord and tenant *inter se* are finally adjudicated on, does not the doctrine of *res judicata* operate?]

No, competency of the Court of first instance is the test. See *Malubhai v. Sursangji* (3). See also *Kidambi Venkatachariar v. Lakshmi Doss* (4), *Motari Seshayya v. Venkatadari Appa Row* (5), *Secretary of State v. Raiah of Venkatagiri* (6) and *Bommedevara Venkata v. Andavolu Venkataratnam* (7).

At the most the decision will operate as *res judicata* only as regards the particular *fasli* or *faslis* to which it relates. The *pattas* and *muchilkas* have to be exchanged annually unless dispensed with altogether, which means that they are in force for a year only. The decisions are to the effect that the decree supplies the place of the contract for the year in question. It has no more value. See *Kidambi Venkatachariar v. Lakshmi Doss* (4) and *Vedachata Gramani v. Boomappa Mudaliar* (8). Farther subsequent decrees have been obtained for the subsequent *faslis*. The prior decrees, even if they have any unspent force, are superseded by the subsequent decree. See Second

(3) 30 B. 220; 7 Bom. L. R. 821.

(4) 31 M. 62; 17 M. L. J. 601; 3 M. L. T. 186.

(5) 36 Ind. Cas. 289; 31 M. L. J. 219; (1916) 2 M. W. N. 29.

(6) 35 Ind. Cas. 266; 31 M. L. J. 97; (1916) 2 M. W. N. 96; 4 L. W. 133; 20 M. L. T. 284.

(7) 37 Ind. Cas. 857; 32 M. L. J. 64; (1917) M. W. N. 321; 5 L. W. 632.

(8) 27 M. 65.

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Appeal No 2574 of 1913 followed in *Joganadha Mudaliar v. Neeroy Audiah* (9), *Gokul Mandar v. Pudmanund Singh* (10).

Mr. Prakasam, for the Respondents.—The decision of the Privy Council is a final determination by a "Court" of the rights of landlord and tenant *inter se*. Explanation II to section 11 does not say that competency means competency of the original Court. The section, therefore, applies to the present case.

When a Court has once decided as to the rights in dispute in a particular way, that endures to the benefit of the party in whose favour it was decided for subsequent disputes. Other points may be raised and the suits may have to be tried in full. But so far as the right determined is concerned, the bar to trial is absolute. See *Shama Purshad Roy Chowdhery v. Hurro Purshad Roy Chowdhery* (11), *Rajah Nilmoney Singh Deo Bahadur v. Sharoda Pershad Mookerjee* (12), *Panchanada Velan v. Vaithinatha Sastrial* (13), *Tangutur Subrayudu v. Yerramsetti Seshasini* (14), *Cunniah Mulaly v. Ringaswami Mudali* (15), *Shankar Vishnu Gokhale v. Raghunath Hari Dharap* (16).

Section 72 of Act VIII of 1865 has been replaced now by section 52 of the Madras Estates Land Act (I of 1903). By the latter, exclusive jurisdiction has been given to the Revenue Courts regarding suits for rent. But rights already existing are not disturbed by the new Act. And the right in question is one which has become vested by the decision of the Privy Council.

Mr. K. Srinivasa Aiyangar.—The Privy Council have not made any declaration of rights. Nobody asked for it even. What they did was merely to decide the contract between landlord and tenant for the particular *fasli* or *faslis* in question. That being an adjudication only as regards

particular *faslis*, I cannot get the rent for subsequent *faslis* by executing that decree. Fresh suits have to be brought and tried after fresh exchange of *pattas* and *muchilkas* every year. The contracts are fresh on every occasion. Therefore, there can be no *res judicata*. See also *Rangayya Appa Rau v. Ratnam* (17), Second Appeal No 403 of 1911.

The scope of section 52 of Act I of 1903 is discussed in *Vadladi Jagannadha Bhupathi Deo Garu v. Paddala Appalasawmy* (18) and *Raja of Pithapuram v. Jonnalagodla Venkatasubba Row* (19). The new Act may not disturb existing rights, but it does not confer the right if it did not exist.

The case in *Jogesh Chunder Dutt v. Kali Churn Dutt* (20) is fully discussed in *Kishen Sahai v. Bakhtawar Singh* (21). The question was whether the view of the majority or of the dissenting Judges is to be followed.

See also *Waghla Ransangi v. Shaik Masud-din* (22) and *Mocraree v. Mahomed Akmal* (23), in the latter of which a view contrary to that taken in *Jogesh Chunder Dutt v. Kali Churn Dutt* (20) is taken.

Mr. Prakasam.—Even if the Privy Council sat only as a Revenue Court of appeal, there is a clear finding of right which bars further question.

[WALLIS, C. J.—Supposing that Act I of 1908 had not been passed, do you mean to say that the decision of the Privy Council will endure for ever for your benefit in spite of the fact that you have to accept a fresh *patta* every year?]

Once the permanent arrangement is recognised by judgment, the acceptance of fresh *pattas* makes no difference. And the fact that the decision of the Privy Council was a reversal of only some of the decrees of the High Court does not keep the unappealed decrees intact. They are also superseded. See *Tangutur Subrayudu v.*

(9) 42 Ind. Cas. 718; 6 L. W. 222 at p. 294.

(10) 29 C. 707 (P. C.); 29 I. A. 196; 6 C. W. N. 825; 4 Bom. L. R. 793; 8 Sar. P. C. J. 323.

(11) 10 M. I. A. 203 at pp. 211, 212; 3 W. R. P. C. 11; 2 Suth. P. C. J. 103; 19 E. R. 913.

(12) 18 W. R. 434.

(13) 29 M. 343; 16 M. L. J. 64.

(14) 33 Ind. Cas. 739; 33 M. L. J. 343; 3 L. W. 233; (1916) 1 M. W. N. 155; 14 M. L. T. 245; 40 M. 299.

(15) 48 Ind. Cas. 7; 35 M. L. J. 361.

(16) 17 Ind. Cas. 205; 14 Bom. L. R. 854.

(17) 20 M. 392.

(18) 23 Ind. Cas. 576; (1914) M. W. N. 426; 28 M. L. J. 75.

(19) 31 Ind. Cas. 93; (1915) M. W. N. 813; 18 M. L. T. 348.

(20) 8 C. 30; 1 O. L. R. 5.

(21) 20 A. 237; A. W. N. (1893), 24.

(22) 3 B. 330.

(23) 22 W. R. 161.

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Yerramsetti Seshasani (14), *Panchanada Velan v. Vaithinatha Sastrial* (13).

No doubt *Kishen Sahai v. Bakhtawar Singh* (21) distinguishes *Jogesh Chunder Dutt v. Kali Churn Dutt* (20). See also *Ward & Co. v. Wallis* (24).

Mr. Ramdass follows.—Section 72 of Act VIII of 1865 does not extend the operation of the judgment beyond the year or years concerned, after which it has not even evidentiary value. For the judgment simply supplies the place of the contract for the year and unless exchange of *pattas* and *muchilikas* is made every year, no suit for rent can be brought. See *Kidambi Venkatachariar v. Lakshmi Doss* (4) and *Vedachala Gramani v. Boomiappa Mudaliar* (8).

[KUMARASWAMI SASTRI, J.—Suppose the Court settles in a particular year that you are entitled only to a money rent. Can you ignore the decision the next year and claim rent in kind?]

I can; see *Rangayya Appa Rau v. Ratnam* (17).

[KUMARASWAMI SASTRI, J.—The Privy Council say that you cannot. If you in your *patta* for a year say that the arrangement is to be perpetual, can you ignore that in another year?]

Nobody would say so and there can be no bar. For the contracts are fresh every year. Even a judgment under section 52, clause (3), will have force only until the next *patta*.

See also *Bashyakarlu Naidu v. Gundapaneni Subbanna* (25) and *Shanmuga Mudaly v. Palnati Kuppu Chetty* (26). Even if a decree is passed, the *patta* should be re-tendered, so that the decree does not supply its place. But if refused, the decree will be evidence, and not otherwise.

JUDGMENT.

WALLIS, C. J.—In this case, a batch of appeals and a connected batch of second appeals have been argued together. The appeals are from decrees of the Subordinate Judge of Bezwada ordering the defendant Zemindar to refund to his tenants excess rents for Fasli 1316 and the following Faslis, which the Zemindar has recovered from them by suits on the authority of

(24) (1900) 1 Q. B. D. 675 at p. 678; 69 L. J. Q. B. 423; 82 L. T. 261.

(25) 27 M. 4 (F. B.).

(26) 25 M. 613 at p. 623 (F. B.).

the decision of this Court in *Venkata Narasimha Nayudu v. Ohinna Bapayya* (1) between the same parties for Fasli 1315. When these suits were decreed, the decree of this Court was under appeal to the Privy Council, which reversed it in *Ravi Veeraraghavulu v. Bomma Devara Venkata* (2). The Subordinate Judge has decreed the suits on the authority of *Shama Purshad Roy Chowdhery v. Hurro Purshad Roy Chowdhery* (11) as interpreted by the majority of the Bench in *Jogesh Chunder Dutt v. Kali Churn Dutt* (20). In *Shama Purshad Roy Chowdhery v. Hurro Purshad Chowdhery* (11) the defendant had brought two earlier suits against the plaintiff to recover his share of a debt which the plaintiff was entitled to recover from third parties. The first suit was for his share of the principal with interest thereon to the year 1821. The second suit was for his share in the subsequent interest. The Sudder Adalat decreed the first suit, and the second suit was decreed on the authority of the decision in the first suit and the money recovered while the decree of the first suit was under appeal to the Privy Council, which reversed the decree of the Sudder Adalat and remanded that suit. In these circumstances the Judicial Committee held that the plaintiff was entitled to recover the money which had been recovered from him in execution of the decree in the second suit. The judgment in the second suit, they observed, must be held to be subsisting and valid until it was reversed or superseded by some ulterior proceedings, and they held that in the circumstances of the case the decrees in the second suit as well as the decree in the first suit were superseded by their judgment in the appeal in the first suit. They observed that the order in Council clearly intended that all the rights and liabilities of the parties should be adjusted on the remand in the first suit, and that it would be in contravention of the order to permit the decree obtained while the appeal was pending to interfere with this purpose. Moreover, they observed that the decrees in the second suit rested on precisely the same cause of suit as the decree which was reversed by the Privy Council, and this though the interest sought to be recovered

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in the two suits was in respect of different periods. Consequently they considered that the decrees in the second suit must be held to be mere subordinate and dependent decrees and not to remain in force when the decree on which they were dependent had been reversed. The majority of the Full Bench in *Jogesh Chunder Dutt v. Kali Churn Dutt* (20) held that where the rate of rent had been fixed by decree for one year and rent for subsequent years had been recovered by the landlord from the tenant on the authority of that decision while it was under appeal to a higher Court which reversed it, the tenant was entitled to sue to recover the excess rent paid by him in the subsequent suits which were decided on the authority of the decision in the first case. The principle of this case would seem to be that where the extent of a recurring liability, such as the liability to pay rent, has been determined in one suit, and other suits between the same parties as to subsequent periods have been decided on the authority of that decision while it was itself under appeal to a higher Court, the party who ultimately succeeds in the appeal from the first decision is entitled to regard the intermediate decrees as superseded and to enforce his rights as regards the intermediate periods with reference to the decision in the first case. It may be that, as held in the dissenting judgment of Garth, C. J., the opinion of the majority is not fully covered by the authority of *Shama Purshad Roy Chowdhery v. Hurro Purshad Roy Chowdhery* (11), but if in that case the decree in the second suit could be regarded as dependent on the result of the pending appeal as to the decree in the earlier suit, I do not see why the same view should not be taken with regard to the facts of *Jogesh Chunder Dutt v. Kali Churn Dutt* (20) and of the present case. The decision of the majority in *Jogesh Chunder Dutt v. Kali Churn Dutt* (20) has been followed in this Court in *Panchanada Velan v. Vaithinatha Sastrial* (13) and cited without disapproval in *Kishen Sahai v. Bakhtawar Singh* (21), and I am not prepared to differ from it, more especially as it appears not unsuited to the conditions of litigation in India, where rent suits, such as this, are of constant occurrence and unfortunately may well

take eight years, as here, or even longer from their inception in the Revenue Court to the final decision by the Privy Council, and the landlord cannot be debarred from enforcing payment of his rent as it accrues due in the meantime. If this principle be accepted, the next question is whether it is applicable to the present case where the decree which went on appeal to the High Court and to the Privy Council was the decree of a Revenue Court in a suit under section 9 of the Rent Recovery Act, 1865, and settling the terms of the *patta* for Fasli 1315 including the rent which, when so settled, formed the statutory contract between the parties for that Fasli under section 72 of the Act, but were not binding as *res judicata* on the Civil Courts in suits to recover rent for other Faslis, as the Revenue Court had no jurisdiction in rent suits, as held in Second Appeal No. 408 of 1911 and Second Appeal No. 2574 of 1913.

Nonetheless the decision of the High Court on appeal from the Revenue Court in the landlord's favour, which being a decision in second appeal must be treated as a decision of law, was binding as authority while it was unreversed in the Civil Courts in the rent suits which subsequently came before them. Consequently in the rent suits which came before them while it was under appeal to the Privy Council, it was treated as settling the question and the suits were decreed in the landlord's favour. In these circumstances if the decision in *Jogesh Chunder Dutt v. Kali Churn Dutt* (20) is to be accepted, I see no sufficient reason for refusing to extend it to the present case. I do not think the fact that the Civil Courts decided the subsequent rent suits on the authority of the High Court decision between the parties which was then under appeal, and not as *res judicata*, is a sufficient reason for refusing to apply this rule if it is to be recognised at all. We have been referred to *Kishen Sahai v. Bakhtawar Singh* (21). In that case the landlord had sued in a Revenue Court to fix the rate of rent payable by the tenant, and obtained a decree. He then sued in a Revenue Court for the enhanced rate so fixed and obtained a decree, but subsequently the decree of the Revenue Court fixing the rate of rent was set aside by the Board of

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Revenue under the provisions of the local Statute. The tenants then sued to recover the rent which they had paid, contending that the decree for rent had been superseded by the decree of the Board of Revenue setting aside the decree fixing the rate of rent. The Board of Revenue in that case was not a Civil Court and its decrees were not binding as authority on the Subordinate Civil Courts, and that circumstance appears to me sufficient to distinguish that case from the present.

The question is one of considerable doubt and difficulty, but on the whole I have come to the opinion that the tenants, on reversal of the decree of the High Court by the Privy Council, became entitled to recover the rent which they have overpaid in the intermediate suits by reason of this decision. I think, however, the Subordinate Judge was wrong in assuming that the rate of rent fixed in the Revenue Court for Fasli 1315 has been decided to be the proper rent for succeeding Faslis. The decision of the Revenue Court only related to the contents of the *patta* for Fasli 1315: and all that the Privy Council decided was that the High Court had no sufficient grounds for disturbing this finding of fact. Now that the decree of the High Court has gone, it will, in my opinion, be necessary for the Court to find afresh what is the proper rate of rent with a view to ascertaining to what extent, if any, the plaintiffs are entitled to a refund. I would, therefore, reverse the decrees and remand the suits for disposal according to law. Costs will abide.

The connected second appeals relate to suits for the rent of a Fasli subsequent to the decision of the Privy Council. For the reason already given, I hold that the decision in the revenue suit for 1315 is not binding on the Civil Courts and, therefore, the decrees must be set aside and the suits remanded for disposal according to law. Costs will abide.

KUMARASWAMI SASTRI, J.—I agree.

M. C. P.

Appeals allowed; Suits remanded.

PATNA HIGH COURT

SECOND CIVIL APPEAL NO. 145 OF 1918.

December 20, 1919

Present:—Mr. Justice Coutts and
Mr. Justice Adami.

SUKAN SAO—APPELLANT

versus

KARU MAHTON AND OTHERS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), s. 120. (2a)—Recital in deed executed subsequent to 1883, admissibility of, to determine whether land is khudkasht—Khudkasht, meaning of.

A recital contained in a deed executed subsequent to 1883 that certain lands were the proprietor's private lands (*khudkasht*) cannot, in view of section 120 (2a) of the Bengal Tenancy Act, be received in evidence for the purpose of showing that the lands were of that character. [p 654, col. 2.]

The term *khudkasht* does not conclusively connote proprietor's private land. [p 651, col. 2.]

Appeal from a decision of the Subordinate Judge, Patna.

Messrs. P. C. Manuk, Sami and Jagannath Prasad, for the Appellants.

Messrs. Wasi Ahmad, P. Banerjee and Sant Prasad, for the Respondents.

JUDGMENT.—The plaintiff in this case sought for a declaration that an area of 8 *bighas* 5 *kathas* in village Sheikhpura and 1 *bigha* 10 *kathas* in village Makdumpur had been wrongly entered in the Record of Rights as the occupancy holding of the defendants 1st party, it being the Lakheraj Brahmottar *Khudkasht* land of the defendants 2nd party which the plaintiff had purchased, and in which, being *Khamat*, no occupancy right could accrue. A declaration was also sought that the defendants 1st party were merely temporary settlement holders and had no right to apply for commutation of rent under section 40 of the Bengal Tenancy Act.

The lands formed the ancestral property of the brothers Bishun Lal and Baldeo and their respective sons Gangadhar and Thakur. In 1886 Baldeo and Gangadhar, as representing the two branches, executed what was described as a *satawa thika patta* in favour of Jitan Mahton, father of defendants 1st party, in respect of 3 *bighas* 6 *kathas* and 13 *dhurs* of the land for ten years from 1204 to 1303 at a uniform annual rental of Rs. 12. Out of this sum Rs. 10 a year was to be appropriated by the lessees towards re-payment of the principal, without interest. The lease-holder was to enter into

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possession and cultivate the land or get it cultivated and at the end of the term was to give up possession.

On the 4th June 1897 (Jeth 1304 F. S.) Gangadhar and Thakur borrowed Rs. 850 from Jitan on the basis of *patta* and *kabuliyat*, whereby the 9 *bighas* 15 *kathas* of Khudkasht Brahmottar Lakheraj land were settled with Jitan for a period of nine years from the beginning of 1305 to 1313 F. S. Under these deeds it was agreed that Jitan was to cultivate the land and give half the produce to the lessor; at the end of the term he was to give up possession. Both this deed and the deed of 1886 stipulated that the lessee was to make no claim to an occupancy right.

Again in 1905 Gangadhar mortgaged the land to Karu, Jitan's son, for Rs. 400, and it is alleged by the plaintiff that on the 8th June 1908 Gangadhar settled it with one Baijnath Sahai for the purposes of cultivation, but as Jitan and his son were pressing for payment of the amounts due to them Baijnath was persuaded to give up his lease.

On the 3rd August 1909 Gangadhar settled the 9 *bighas* 15 *kathas* of land under a registered *patta* and *kabuliyat* with Karu for a *zurpeshgi* of Rs. 1,425, the amount found due on the previous bonds. Under this *patta* Karu was to pay half share of the produce to Gangadhar, who was to pay interest on the *zurpeshgi* at the Kalhan, seemingly out of the half share of produce he received. At the end of the term the lessee was to give up possession on payment to him of the principal of the *zurpeshgi* with interest due. Here too it was stipulated that there should be no claim to a right of occupancy.

In 1914 Gangadhar having died, his widow Musammatt Khurdev Kumari mortgaged the land to Karu for Rs. 300 and finally on the 27th June 1915 sold the lands to the plaintiff by a registered *Kabala*. The Record of Rights was finally published in Sheikhpura in January 1920 and in Makdampur in November 1909, showing the defendant 1st party, Karu, to be an occupancy tenant.

The plaintiff's case was that the land was Khudkasht, and was the proprietors' private land, in which no right of occupancy could accrue, and that by his purchase he had

become proprietor; that the defendants 1st party had held the lands not as cultivating *raiya*s but as tenure-holders, and that in any case there had been break in the occupation of the land by the defendants 1st party.

The Subordinate Judge found that the *Kabala* on which the plaintiff relied was valid, genuine and for consideration, and that the sale was made by Musammatt Khurdev Kumari for legal necessity. He held, however, that there was no evidence on the record to establish that the land in suit was Khudkasht Khamat land, and that the recitals in the deed of 1886 and subsequent years, to the effect that the lands were Brahmottar Lakheraj Khudkasht, could not be received in evidence having in view the provisions of section 120 (2) of the Bengal Tenancy Act. He received the documents put in and came to the conclusion that the land had been settled with the defendants 1st party for the purposes of cultivation; that Jitan was a settled *raiya*t of Sheikhpura when he entered into occupation in 1306, and that the plaintiff had failed to prove that Gangadhar had himself cultivated the land in 1304 F. S. or had genuinely settled the land with Baijnath Sahai in 1315.

He decided that the *patta* of the 3rd August 1909 was a cultivating lease and did not create a tenure, so that there was no merger of the occupancy right, which he found the defendants 1st party had, into the superior tenure. He dismissed the suit and on appeal his decision was upheld by the District Judge.

The first point taken by the learned Counsel for the plaintiff appellant is that the lower Courts were mistaken in ruling out the recitals in the documents of 1886 and subsequent years as inadmissible for the purpose of showing that the lands are the proprietor's private lands. He argues that those recitals are admissible as evidence *quantum valeat* and that the fact that the documents were executed after 1883, makes no difference if section 120 (2) be rightly interpreted. In the present case, there is admittedly no evidence that the lands have ever been specifically styled *khumar*, *zirat*, *sir*, *niy*, *niy* *got* or *khamat*, or that they have been recognised by village usage under those names, so that we have to see who.

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ther sub-section (2) of section 120 and the words therein "any other evidence which may be produced" will make the recitals admissible.

The various cases in which the construction to be put on these words has been discussed and decided have been reviewed by Mukherjee and Beauchcroft, JJ., in *Ganpat Mahton v. Rishal Singh* (1). In *Nilmoni Chuckerbutti v. Bykant Nath Bera* (2) it was held that "any other evidence" can only refer to evidence that prior to 1883 there had been transactions showing the land to be proprietor's private land. In *SherBahadur Sahu v. M. H. Mackenzie* (3) it was held that since evidence of letting before 2nd March 1883 was expressly made admissible, the Legislature must be taken to have intended to exclude evidence of letting after that date. In *Ajodhya Prosad Singh v. Ram Golam Singh* (4) *Nilmoni Chuckerbutti v. Bykant Nath Bera* (2) was followed; in this case it was held that the mere fact that the lands in suit were described as *khudkasht* would not in itself be sufficient to prevent the tenants from acquiring rights of occupancy in the lands, and that the landlord could not claim that the tenants were estopped by recitals in the leases, having in view the provision of section 178 of the Bengal Tenancy Act.

The learned Judges in *Ganpat Mahton v. Rishal Singh* (1) express an opinion that the interpretation put forward in *Nilmoni Chuckerbutti v. Bykant Nath Bera* (2) is open to criticism as unduly restricting the generality of the expression "any other evidence that may be produced", and in our opinion, in a sub-section which merely directs a Revenue Officer as to the evidence for which he is to look in coming to a decision, such restriction is not justifiable, especially where the question is before a Civil Court. Lastly the case of *Bhagtu Singh v. Raghu Nath Sahai* (5) was referred to by their Lordships of the Calcutta High Court. In that case it was held that admissions in a *kabuliyat* are evidence admissible under the Indian Evidence Act, whether made before or after 1883, though their probative value must depend on the facts.

(1) 33 Ind. Cas. 978; 20 C. W. N. 14.

(2) 17 C. 469 at p. 468.

(3) 7 C. W. N. 400.

(4) 4 Ind. Cas. 529; 13 C. W. N. 661.

(5) 1 Ind. Cas. 571; 13 C. W. N. 135; 9 C. L. J. 15.

Their Lordships did not comment on the correctness of this finding, for they decided the case of *Ganpat Mahton v. Rishal Singh* (1) on the ground that by the insertion of the new sub-section (2a) by the Amending Act of 1907, it was made clear that an admission made in the recital of an agreement between a landlord and his tenant after 1883 could not be considered by the Court. The question was considered but not decided in *Masulan Singh v. Goodar Nath Pandey* (6) but Harrington, J., expressed an opinion that an admission that the land was let after March 2nd, 1883, as *Kamat* was not sufficient, and that it was an admission made in a contract between the landlord and tenant, which under section 178 could not bar the tenant from acquiring a right of occupancy under the Act.

It seems clear to us that sub-section (2a) of section 120 was inserted by the Amending Act of 1907 specially to bar admissions made in agreements between the landlord and tenant, such as the one with which we are dealing.

We must hold that even if the wording of section 120 (2) does not make the recitals inadmissible, sub-section (2a) bars their admission and that the recitals in the deeds of 1880 and after cannot be taken into consideration.

It is to be noted that the recitals do not refer to the land as *zerait*, *kamat* or *sir*, but as *khudkasht*, and the use of this word does not conclusively connote proprietor's private land.

It is next contended by Mr. Manuk that the documents of 1886 and 1897 conferred the rights of a tenure-holder and not a *raiya* interest. The document of 1886 is called a *thika satawa patta* and settles the land with defendants 1st party on an annual rental of Rs. 12, and the lessee is to cultivate it himself or get it cultivated by others, and to take the whole of the produce; no interest is payable on the *surpeshgi* advance.

The *patta* and *kabuliyat* of 1897, called *Karindgi*, provide that the lessee, having entered into possession and fully cultivated the land, shall pay half the produce to the lessor and that "the proprietor of the said land neither has nor shall have any

(6) 1 C. L. J. 456.

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concern or claim to the *raiya* share." These two documents then show that the land was to be cultivated by the lessee and rent was to be paid in the one case in cash and in the other in kind; the *patta* and *kabuliyat* of 1897 clearly expressed a *raiya* settlement, and removed doubts as to the nature of the previous deed. The mere fact that care was taken to stipulate that an occupancy right would not be claimed, goes to show that the parties had in contemplation a *raiya* settlement.

The last point taken before us is that the years 1304 and 1314-1315 are not covered by the lessees of 1885 and 1897 and that the lower Courts have wrongly thrown the onus of proof of occupation during those breaks on the plaintiff. With regard to 1304 the Subordinate Judge found that the evidence of the defence was sufficient to prove that defendants 1st party were in possession that year, and that the plaintiff had failed to prove his possession. The Court had the full evidence of both parties before it and the question of onus hardly arose.

It is pointed out that the period of the lease of 1897 was from 1305 to 1313 and that of the lease of 1909 was from 1316 to 1324, and that while the Courts below have found that the defendants were in possession from Jeth 1315 to Jeth 1316 they have come to no finding about possession from the end of 1313 to Jeth 1315. The Subordinate Judge has come to a finding that in 1316 the defendants 1st party were in possession as occupancy *raiya*s and the *patta* and *kabuliyat* of the 3rd August 1909 (1316) (Exhibits 3 and 4) show that the defendants had been in possession up till then. Considering that the settlement operations were going on during 1315, if any one else had been in possession at that time we should have found some entry as to that either in the *khana-puri* or attestation stage. The finding that the defendants 2nd party were in possession in 1316 as occupancy *raiya*s would connote a finding that they were in possession in 1314 and 1315.

For the reasons given above, we see no reason to interfere and, therefore, dismiss the appeal with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 318 OF 1916.

January 29, 1917.

Present:—Mr. Stanyon, A. J. C.

Shaikh NUR KHAN—DEFENDANT—

APPLICANT

versus

SHAIKH RAHIM—PLAINTIFF—NON-

APPLICANT.

Civil Procedure Code (Act V of 1908), ss. 15, 115, O. II, r. 2, O. VII, r. 10—Applicability of s. 15—Suit, whether can be transferred to Court of lower grade after it has been properly instituted—Relinquishment of claim, what amounts to—Plaint, return of, for presentation to proper Court, when can be ordered—Appeal—Appellate Court, refusal of, to hear appeal—Revision—High Court, interference by.

The mere fact that in the course of the trial of a suit the plaintiff is found to be entitled to a part only of the relief claimed by him and that that part would have been within the competency of a Court of a lower grade, if the suit had originally been confined to it, gives no authority to the Court under section 15 of the Civil Procedure Code to transfer the suit to a Court of a lower grade, as once a suit is properly instituted and is legally pending, the operation of the section is exhausted. The section depends for its application upon what is actually claimed in the plaint filed, and not upon what ought to have been claimed or is found after trial to have been claimable. [p. 656, col. 2.]

The relinquishment by a plaintiff of a portion of his claim under Order II, rule 2 (1), of the Code refers primarily to the relinquishment before the institution of the suit, and the rule has no application to any part of a dismissed claim abandoned in appeal. No such abandonment can affect appellate jurisdiction. [p. 656, col. 2; p. 657, col. 1.]

After a claim has been tried and dismissed, the mere fact that an appeal is made only as to a part of it, does not involve an admission that the suit was wrongly instituted so as to justify the procedure laid down in Order VII, rule 10, of the Code, as this rule only applies when it is found that a suit as originally framed was wrongly instituted, and the abandonment of a claim *pendente lite* cannot be given retrospective effect so as to vitiate the institution of the suit. [p. 657, col. 1.]

The refusal by a District Judge to hear an appeal amounts to a refusal to exercise a jurisdiction vested in him by law, and is open to revision under section 115 of the Code. [p. 657, col. 2.]

Application for revision of the order of the District Judge, Raipur, dated the 13th September 1916 against the order of the Munsif, Dhamtari, dated the 25th March 1919.

Mr. A. C. Roy, for the Applicant.

Mr. K. V. Deoskar, for the Non-Applicant.

ORDER.—This case is a useful illustration of the absurdity to which the law can be reduced by a want of accuracy in the reading of it, and an insufficiency

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of common sense in the application of it. The facts are simple and may be stated briefly. The plaintiff and the defendant are co-owners of a certain village in the Dhamtari Tahsil of the Raipur District, the defendant being the Limbardar. The plaintiff instituted a suit against the defendant on the 23rd December 1913 in the Court of the Subordinate Judge of Raipur, claiming Rs. 1,152-13-0 as his share of the profits for the years 1907-08 to 1912-13 inclusive. On the 14th April 1915 the Sub-Judge dismissed the suit with costs. The plaintiff appealed from this decree to the Court of the Divisional Judge, Chhattisgarh Division, but in respect of Rs. 450 only. The Divisional Judge remanded the case for re-trial in respect of this claim. So far the law had been correctly applied; but at this point the Subordinate Judge, actively misled by the Pleaders on both sides, made the initial blunder which has led to the deadlock which I am about to remove. Finding that the plaintiff had accepted his decree as to Rs. 702-3-0 of the original claimed and that only Rs. 450 remained in controversy, he considered that the further progress of the suit should be made in the Court of a Munsif. Therefore, he returned the plaint "for presentation to the proper Court." Presumably he considered himself justified in making this order by section 15 and Order VII, rule 10 (1), of the Civil Procedure Code. At any rate there is no other provision of that Code in which any foothold can be found for it. The plaint was presented to the Munsif of Dhamtari, who tried the suit and gave the plaintiff a decree for Rs. 381-9-4 on the 25th March 1916. From that decree both parties presented appeals to the District Court. The learned Judge, considering that he had no jurisdiction over the appeals owing to the value of the subject matter of the suit when originally instituted, returned the memoranda "for presentation to the proper Court." The parties then carried their appeals to the Divisional Court. Here also they found the door closed against them, the learned Divisional Judge holding that the District Court was the proper venue for the appeals. The memoranda were returned once more "for presentation to the proper

Court." Between this Scylla and Charybdis of technicality, the parties have made their way to this Court through the narrow passage afforded by section 115 of the Civil Procedure Code. The plaintiff's application has been registered as Civil Revision No. 285 of 1916, and the defendant's application as Civil Revision No. 318 of 1916. This order, made in the latter because the governing orders of the Courts below have been recorded on the defendant's appeal, will govern the disposal of both cases.

As I have already stated, the root blunder was made by the Sub-Judge when he returned the plaint in a suit properly instituted and legally pending before him. This order involved an inaccurate interpretation of section 15 of the Code. That section requires that every suit shall be *instituted* in the Court of the lowest grade competent to try it. Once the institution has taken place *in accordance with this provision*, the operation of the section is exhausted. The section gives no authority for any transfer of a pending suit, merely because in the course of the trial the plaintiff is found to be entitled to a part only of the relief claimed by him and that part would have been within the competency of a Court of lower grade if the suit had originally been confined to it. Here the plaintiff sued for Rs. 1,152-13-0, and section 15 of the Code was completely satisfied by the institution of the suit in the Court of a Sub-Judge.

We have now to deal with Order VII, rule 10 (1), of the Code. That rule reads thus:—

"The plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted."

In this connection it is necessary to refer to Order II, rule 2 (1), and Order VI, rule 17, of the same Code. The former allows a plaintiff to relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. This provision finds place in an Order which deals with the frame of the suit, and, in my opinion, refers primarily to relinquishment made before institution of the suit. This seems clear from the language of clause (2). At any rate the rule has no application to any part of a dismissed claim abandoned in appeal. No such abandonment

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can affect appellate jurisdiction. Under the Central Provinces Courts Act, 1904, appeals lie from Courts irrespective of the value of the subject-matter in appeal.

No doubt Order VI, rule 17, of Act V of 1908 is sufficiently wide to allow of an amendment of the plaint involving a relinquishment of a part of the original claim, so as to bring the case within the jurisdiction of the Court asked to try it, if as originally laid the claim was beyond its jurisdiction or subject to two or more jurisdictions. It may also be the law, though I refrain from recording any *obiter dictum* on the point, that a claim may be amended before trial so as to bring Order VII, rule 10, into operation and make a return of the plaint necessary. But I hold without hesitation that after a claim has been tried and dismissed, the mere fact that an appeal is made only as to a part of it, does not involve an admission that the suit was wrongly instituted so as to justify procedure under Order VII, rule 10. That rule only applies where it is found that a suit as *originally framed* was wrongly instituted. An abandonment of a claim, *pendente lite*, cannot be given retrospective effect so as to vitiate the institution of the suit. The rule laid down by section 15 of the Code depends for application upon what is actually claimed in the plaint filed, and not upon what ought to have been claimed or is found after trial to have been claimable.

In this case the suit, as originally framed, was instituted in the Court of lower grade competent to try it, namely, the Court of the Sub-Judge. That Court dismissed the suit. The plaintiff appealed in respect of Rs. 450 only, an amount within the competence of a Munsif. Under section 15, clause (b), the appeal was properly carried to and decided by the Divisional Court. Suppose that the Sub-Judge had given the plaintiff a decree for Rs. 450 and the defendant had appealed; that appeal would also have been one for the Divisional Court because "the value of the suit" was Rs. 1,152 13 0. When the case was remanded by the Divisional Judge, it was still the same suit, and the Sub-Judge was bound to dispose of it. On objection by the defendant followed by application from the

plaintiff—objection and application being made orally by the Pleaders—the Sub-Judge returned the plaint for presentation to a Munsif. This return was clearly wrong. Whether it was *ultra vires* is a question which I leave to be decided in appeal before I deal with it. The Munsif accepted the plaint and thereby permitted the institution as a fresh suit of a suit left unfinished by the Sub-Judge. Whether the Munsif had jurisdiction to try the case is another point which must be decided in appeal before it is finally determined by this Court. But, rightly or wrongly, with jurisdiction or without, the Munsif has made a decree. Under section 15, clause (a), of the Central Provinces Courts Act, 1904, appeals from that decree lie to the District Court, and there is no alternative. If that decree is *ultra vires*, still it is only the District Court which can set it aside and order the Munsif to return the plaint for presentation to the Court of the Sub-Judge. If the District Court should so decide the Sub-Judge will be bound by that order. On the other hand, it may be said that the Munsif has only tried a claim, however irregularly laid, for Rs. 450 within his competence, and that his proceedings are saved by section 99 of the Civil Procedure Code. In that case the District Judge must dispose of the appeals on their merits.

It is thus clear that the Divisional Judge was right and the District Judge was wrong in refusing the appeal. The orders of the District Judge, amounting to a refusal to exercise a jurisdiction vested in him by law, are open to revision under section 115 of the said Code, and must be set aside.

For the above reasons the order of the District Judge refusing to accept and adjudicate upon the applicant's appeal is set aside, and he is directed to receive and register the said appeal and to dispose of the same according to law. I make no order as to costs in this Court.

Order accordingly.

LALJIT UPADHYAY v. WAJIHUNESSA BEGUM.

PATNA HIGH COURT.

SECOND CIVIL APPEALS NOS. 66 TO 69 OF 1918.

August 20, 1919.

Present:— Sir Dawson Miller, Kt.,
Chief Justice, and Mr. Justice Coutts.

LALJIT UPADHYAY AND OTHERS—

{ DEFENDANTS—APPELLANTS

versus

Musammam WAJIHUNESSA BEGUM

AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Land Revenue Sales Act (XI of 1859), s. 37
—*Bengal Land Revenue Settlement Regulation (VII of 1822), s. 10 (2), (3), (4)*—"Permanent Settlement," meaning of—Permanent tenure-holder, when protected—Joint settlement—Default by sudar malguzar, effect of—Sale of tenure—Co-proprietors, shares of, whether affected.

The words "permanent settlement" in the first exception to section 37 of the Bengal Land Revenue Sales Act mean the Permanent Settlement of 1793, and not the permanent settlement of any particular mahal. [p. 658, col. 2.]

It is only under the first exception to section 37 of the Bengal Land Revenue Sales Act that a permanent tenure-holder at fixed rates can claim protection against annulment. [p. 658, col. 1.]

Where a joint settlement is made under clauses 2, 3 and 4 of section 10 of the Bengal Land Revenue Settlement Regulation of 1822, all the *malguzars* are jointly responsible for the payment of the Government revenue although the *mahal* is under the management of one of them as an agent or a *sudar malguzar*, and if default is made by the agent or manager or *sudar malguzar*, the entire tenure is liable to sale unless there is a provision to the contrary in the settlement. [p. 659, col. 2.]

Appeal from a decision of the District Judge, Patna, dated the 27th February 1917.

Messrs. S. C. Mitter and A. B. Mukerji, for the Appellants.

Messrs. K. Hussain, Fakhruddin and G. Das, for the Respondents.

JUDGMENT.

COUTTS, J.—These four appeals are against decrees of the District Judge of Patna, dated the 27th February 1917. The suits related to Mouza Maksuspore Erazi Mokadammi Sakri Azrakbe, Touzi No. 18/916. This estate was sold for arrears of revenue in September 1903. It was purchased by the plaintiff in the name of her Mukhtar-am Sidhu Narain Lal, who after the purchase executed a deed of release in her favour. The sale has since been confirmed, and the plaintiff's case is that between the sale and the delivery of possession the late proprietors fraudulently got their names registered as tenure-holders. She accordingly prayed

for annulment of whatever rights the previous proprietors had and for possession. The defendants, who are the previous proprietors, claim to be permanent tenure-holders.

The suits were dismissed in the Court of first instance but on appeal to the District Judge they were decreed, the learned District Judge holding that the defendants were co-sharer Malikhs whose share had been sold along with the rest of the estate at the time of the revenue sale. The defendants have appealed.

It is not denied that if these defendants are co-sharer proprietors, there can be no question of the correctness of the learned District Judge's decision. But it is contended in the first place on behalf of the appellants that they are permanent tenure holders who are protected under the first exception to section 37 of Act XI of 1858. Without at present considering the question of whether the defendants are in reality tenure holders or not, this contention can only succeed if they have held at fixed rates from the time of the permanent settlement. Now it is admitted that the defendants first got settlement in 1849, but it is urged that this was the date of the first permanent settlement of this Mahal and this settlement is the permanent settlement which is referred to in the first exception to section 37. It is, in my opinion, impossible to accept this contention. In the body of the section and in the second exception the word "settlement" occurs. This obviously means, and it has been held in many decided cases to mean, the settlement whenever it is made, but in the first exception to the section the words used are "the permanent settlement" and it was obviously intended that these words should mean something different from the word "settlement" used in the rest of the section. These words, in my opinion, can mean nothing but the Permanent Settlement of 1793 and in this view I am supported by the decisions in *Rai Ohunder Chowdhury v. Shaikh Busheer Mahomed* (1) and *Nagendra Lal Chowdhury v. Nazir Ali* (2). The learned Vakil for the appellants

(1) 24 W. R. 476.

(2) 10 C. W. N. 503.

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relies on the case of *Hamed Ali Sadagar v. Atlas Ali* (3), but it is by no means clear that in that case the learned Judges were dealing with the first exception to section 37 and if they were, I must differ from their view. The defendants, therefore, are not, in my opinion, protected by the first exception.

It has been urged somewhat half-heartedly that if the defendants are not protected by the first exception, they are protected by the second exception to section 37, which refers to "tenures existing at the time of settlement which have not been held at fixed rates." It is clear, however, from the *kabuliyat* which was executed by these defendants (Exhibit B-1) that this was a permanent tenure and that the rate of rent was fixed and as I understand the argument of the learned Vakil for the appellants, the contrary contention has been abandoned.

It has, however, been contended that even if the defendants are permanent tenure-holders at fixed rates and although they do not directly come within the first exception to section 37, the plaintiff is not entitled to annul the under-tenure because it was created by Government and that, therefore, cannot be annulled under section 37. There is no authority for such a contention and in my view it is untenable. It is only under the first exception to section 37 of Act XI that a permanent tenure holder at fixed rates can claim protection and as the defendants do not come within this exception, I cannot see how they can be protected.

The learned District Judge has, however, found that the defendants are not under-tenure-holders but are Mufassil Talukdars who obtained their settlement under clause 2 of section 10, Regulation VII of 1822. There is no denial that this is so, but it has been urged by the learned Vakil for the appellants that a settlement under clause (2) is not, as has been found by the learned District Judge, a settlement with the defendants as Zemindars but as under tenure holders. On a reading of clause (2), however, it cannot, in my opinion, bear this interpretation and the correct view of the position of the

defendants as Mufassil settlement-holders under this clause is described in the case of *Bandhu Acharia v. Nathni Bahar Singh* (4), in which it was remarked: "It is clear, therefore, that if a joint settlement is made under clauses 2, 3, and 4 (that is of section 10, Regulation VII of 1822), all the Malguzars are jointly responsible for the payment of the Government revenue although the Mahal is under the management of one of them as an agent or Sudar Malguzar, and if default is made by the agent or manager or Sudar Malguzar, the entire tenure is liable to sale; but even in these cases the terms of the settlement may provide that the entire tenure will not be liable to sale by reason of the default of the agent or manager or Sudar Malguzar to pay the revenue. In the case of a settlement under clauses 2, 3 and 4 where settlement is made with a Sudar Malguzar who represented all the persons interested in the property, his default makes the entire tenure liable for sale unless there is a provision to the contrary in the settlement." If this view is correct, as in my opinion it is, the defendants were co-proprietors with the Sudar Malguzars from whom the plaintiff purchased and at the sale their share also passed. In the result then I would dismiss these appeals with costs.

MILLER, C. J.—I agree.

Appeals dismissed.

(4) 7 C. L. J. 460.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1342
TO 1346 OF 1913.

March 19, 1913.

Present :—Mr. Justice Chatterjea and
Mr. Justice Panton.

ABDUL RASHID MANDAL AND OTHERS
—PLAINTIFFS—APPELLANTS

versus

SHAHARALI MOLLA—DEFENDANT—
RESPONDENT.

Bengal Tenancy Act (VIII B. C. of 1885), s. 66 (2)
—Rent decree—"Date of decree," what is—Decree under
appeal, effect of.

(3) 19 Ind. Cas. 872.

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The period of 15 days allowed by section 66 (2) of the Bengal Tenancy Act for payment of arrears of rent in an ejectment suit should be reckoned from the date of the decree of the first Court. The fact that an appeal has been preferred against that decree would not affect the matter, as, so long as the appeal is pending, the only decree capable of execution is the decree under appeal. [p. 660, col. 2; p. 661, col. 1]

Appeals against the decrees of the Officiating Subordinate Judge, Mymensingh, dated January 22, 1918, modifying that of the Munsif, Jamalpur, dated April 5, 1917.

Babu Birendra Kumar De, for the Appellants.

Babu Ram Charan Mitra (with him Babus Mukunda Nath Roy and Paramanand Lahiri), for the Respondents.

JUDGMENT.—These appeals arise out of suits for rent brought by the plaintiffs, who were non permanent tenure-holders, against the defendants.

The defence, so far as concerns these appeals, was that the plaintiffs' right as tenure-holders had come to an end in consequence of a decree for ejectment which had been obtained against them by the superior landlord, Maharaja Sir Pradyot Kumar Tagore, and in execution of which the Maharaja had obtained possession of the tenure against the plaintiffs.

It appears that the present plaintiffs, who were the defendants in the suit for rent brought by the superior landlord, did not pay the amount within fifteen days of the decree. After the appeal was filed, the execution proceedings taken by the Maharaja were stayed by the Court of Appeal below allowing the defendants (present plaintiffs) to deposit the decretal amount within 15 days, but they did not do so.

Possession of the tenure was delivered to the Maharaja in execution and the amount was realised by attachment of moveables. After the appeal was dismissed, the present plaintiffs deposited the decretal amount in Court within 5 days of the decree of the Appellate Court. They then brought the present suits.

The Court of first instance decreed the suits. On appeal the lower Appellate Court dismissed the claim of the plaintiffs for the period subsequent to the date on which the superior landlord obtained possession in execution of the decree under section 66 of the Bengal Tenancy Act.

The plaintiffs have appealed to this Court, and the main contention raised on their behalf is that the right of the plaintiffs was subsisting by reason of the fact that the amount ordered to be paid was paid within 15 days of the decree of the Appellate Court.

We do not think that this contention is correct.

Section 66 provides for ejectment of a tenant not being a permanent tenure-holder (and certain other classes of tenants) for arrears of rent, and sub-section (2) of the section provides that in a suit for ejectment for an arrear of rent a decree passed in favour of the plaintiff shall specify the amount of the arrear and of the interest (if any) due thereon, and the decree shall not be executed if that amount and the costs of the suit are paid into Court within 15 days from the date of the decree, or, when the Court is closed on the fifteenth day, on the day upon which the Court re-opens.

The question is, what is meant by the words "date of the decree" in sub-section (2) of section 66 of the Act?

It is contended on behalf of the appellants that it means the final decree in the case, and we are referred to the cases of *Noor Ali Chowdhuri v. Koni Meah* (1), *Nam Narain Singh v. Lala Raghunath Sahai* (2) and certain observations of Banerjee, J., in *Bhola Nath Bhattacharjee v. Kanti Chundra Bhattacharjee* (3) in support of the contention that when there is an appeal against a decree, the words "date of the decree" mean the date of the decree of the Appellate Court, because that is the final decree in the case. But the question is whether the defendant in a suit under section 66 of the Bengal Tenancy Act is entitled to pay the amount of the decree within 15 days of the Appellate Court's decree, even in cases where the decree of the Court of first instance has been executed before the appeal is disposed of.

So long as the appeal is not disposed of, the decree of the Court of first instance is the only decree to be executed and it cannot be said to be superseded by the

(1) 13 C. 13.

(2) 22 C. 467.

(3) 25 C. 311; 1 C. W. N. 671.

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decree of the Appellate Court so long as the appeal is not disposed of. At the time, therefore, when the decree under section 66 was executed by the Maharaja, it was a valid decree and the only decree which was capable of execution. The defendants (present plaintiffs) had defaulted to pay the money as provided by section 66; and we do not see how in these circumstances the present plaintiffs were entitled to deposit the money after the decree of the Appellate Court and to get rid of the proceedings which had taken place under the decree of the Court of first instance. The cases relied upon on behalf of the appellants do not support their contention.

In the case of *Noor Ali Chowdhuri v. Koni Meah* (1) the learned Judges held that "inasmuch as the appellate decree must be presumed to incorporate the terms of the original decree and was the only decree of which execution could be taken, the tenant (judgment-debtor) having paid the decretal amount within 15 days of that decree was protected from ejection." But the learned Judges further observed at page 16 of the report that "it was of course open to the decree-holder to take out execution of the original decree at any time before it was superseded by the decree in appeal. Not having done so, we are unable to see that he has any real grievance because the terms of the appellate decree have been complied with by the appellant."

The decision in *Nam Narain Singh v. Lala Raghunath Sahai* (2) also proceeds upon a similar ground. That was a case under section 88 of Act I of 1879, the provisions of which are similar to those of section 66 of the Bengal Tenancy Act; and the learned Judges in that case held that in a case where the decree of the original Court was not executed pending the appeal to the higher Court, the words "date of the decree" in the latter part of section 88 of Act I of 1879 ought to be read "as the date of the final decree; that the decree of the Appellate Court was the final decree and the only decree capable of execution, and the payment of the decretal amount having been made within 15 days of that decree the application for execution was rightly disallowed."

In both the two cases, the decree of the Court of first instance had not been executed before the appeal was decided and the tenant having paid the decretal amount within 15 days of the appellate decree, the landlord could not object to the same, nor execute the decree of the Court of first instance after the payment had been made.

The case of *Bholi Nath Bhattacharye v. Kanti Chundra Bhattacharye* (3) related to a mortgage decree. Banerjee, J., distinguished the case of *Noor Ali Chowdhuri v. Koni Meah* (1) on the ground that "the provision for stay of execution upon payment of arrears forms no part of the decree; it is a provision contained in the Rent Law; that law enacts that if payment is made within 15 days from the date of the decree, execution should be stayed and the Court held that the date of the decree there meant the date of the final decree in the case." The learned Judge observed, "that may be so, but there is no reason why a decree for foreclosure should be taken subject to any similar limitation." The question, however, whether the words "date of the decree" in section 66 of the Bengal Tenancy Act should be construed to mean the date of the appellate decree, even where the decree of the Court of first instance has been executed before the disposal of the appeal, was not a matter for consideration, and was not considered by Banerjee, J., in that case.

It is urged before us that the fact, that the decree of the Court of first instance was executed before the disposal of the appeal, ought not to make any difference and that, as a matter of construction, the defendant in a suit under section 66 is entitled to pay the decretal amount within 15 days of the date of the decree, which means the appellate decree.

If this contention were accepted, it would follow that the decree of the Court of first instance cannot be executed so long as the appeal is not disposed of; because it cannot be held that proceedings in execution of a decree under section 66 of the Act passed by the Court of first instance and under which the defendant is ejected and possession delivered to the landlord, must be set aside if the tenant pays the decretal amount within 15 days of the appellate decree, al-

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though that decree is one of dismissal. We think that such a construction would be unreasonable, because it would then be in the power of the defendant by preferring an appeal to annul all the proceedings taken under a decree which, so long as it is not superseded by the decree of the Appellate Court, is a good and valid decree.

We are accordingly of opinion that the lower Appellate Court is right in holding that the rights of the plaintiffs, came to an end under the decree obtained by the superior landlord against them.

There remains to consider one short point, namely, that all the present plaintiffs were not parties to the decree in the suit by the Maharaja. It appears, however, that that suit was brought against all the registered tenants and that the plaintiffs who were left out, were not registered tenants. That being so, the contention fails.

The appeals are dismissed with costs.

Appeals dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 837 OF 1918.

CIVIL REVISION No. 161 OF 1918.

December 11, 1919.

Present: - Mr. Justice Jwala Prasad.

MATHURA SINGH AND OTHERS—

APPELLANTS IN S. A. No 837 AND PETITIONERS
IN C. R. No. 161.

versus

RATAN BARHI—RESPONDENT IN S. A.

No. 837 AND OPPOSITE PARTY IN C. R. No. 161.

Bengal Tenancy Act (VIII B. C. of 1885, s. 153 (a))—Rent suit of value below Rs. 100—Appeal, second, whether lies—Civil Procedure Code (Act V of 1908), s. 115—Revision—Failure to decide plea, whether refusal to exercise jurisdiction.

Section 153 (a) of the Bengal Tenancy Act bars a second appeal in a suit for rent where the amount involved is below Rs. 100, irrespective of whether the rent is payable in money or in kind, and whether the plaintiff is a co-sharer landlord and the other co-sharers are impleaded as *pro forma* defendants. [p. 663, col. 1.]

The failure of a District Judge to decide a plea amounts to a refusal to exercise jurisdiction, and his decision is liable to be set aside in revision. [p. 663, col. 2; p. 664, col. 1.]

Appeal and revision from a decision of the District Judge, Shahabad, dated the 19th March 1918.

Mr. Ram Prasad, for the Appellants.

Messrs. S. M. Mullick and H. N. Sahay, for the Respondent.

JUDGMENT.—Second Appeal No. 837 of 1918 and Civil Revision No. 161 of 1918 are directed against the decision of the District Judge of Shahabad dated the 19th March 1918, and arise out of Suit No. 132 instituted in the Court of the Munsif for recovery of Bhaoli rent in respect of 123 mango trees for 1320 and 1321 F.

The plaintiffs are co-sharers in respect of two annas in the *patti* of 8 annas in which the trees in question are situate. The suit was in respect of the share of the plaintiffs, with a prayer in the alternative for the entire rent in case the separate collection of rent by the plaintiffs was not proved. The other landlords in the *patti* were accordingly made *pro forma* defendants.

The plaintiffs alleged that the rent was taken by appraisement of the produce and produced the Danabandi Chithas shewing the estimate of the yield during the years in suit. The tenants on the other hand stated that the rent was paid by actual division of the crop according to Batai system and that the share of the plaintiffs was taken by them. The tenants defendants also pleaded that the plaintiffs' names were not registered and hence the suit for rent could not lie.

The Munsif held that the plaintiffs' names were entered in register D, Exhibit 5, and this question has now been set at rest. He also held that the rent was payable by Danabandi system as alleged by the plaintiffs and entered in the Khatian, and not according to Batai system as alleged by the defendants, and that the defendants had failed to prove payment of the rent to the plaintiffs or the *pro forma* defendants, the co-sharer-landlords in the years in suit, and that the collection of the two annas share of the plaintiffs in the *patti* was not separate. Upon these findings the Court decreed the suit for rent for the entire 8-annas share in full according to the Danabandi papers produced by the plaintiffs. Against this decision the defendants appealed to the District Judge.

The District Judge held that the entry in the Record of Rights that the system for payment of rent was Danabandi was wrong

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and that the rent payable was by Batai system. The learned District Judge considered it immaterial to go into the question whether the rent was actually paid or not and dismissed the suit of the plaintiffs, inasmuch as they failed to prove the system by which the rent was payable. The plaintiffs have, therefore, come to this Court in second appeal and have also filed an application in revision under section 115 of the Civil Procedure Code in case the second appeal was to be held incompetent.

On behalf of the respondents it has been contended that the second appeal to this Court is barred by section 153 (a) of the Bengal Tenancy Act. The contention appears to be sound, inasmuch as the rent claimed was in respect of Rs. 97 odd. The plaintiffs no doubt in the first instance claimed a decree in respect of their share of the rent which amounted to Rs. 24 odd for the years in suit, on the allegation that the collection was separate. The Munsif held that the plaintiffs were not entitled to a decree for their share only as they failed to prove separate collection and the Munsif, therefore, gave effect to the alternative prayer in the suit, for the entire rent which amounted to Rs. 13. The claim in this case should, therefore, be deemed to be in respect of Rs. 93 odd. The appeal to the District Judge was, therefore, competent and was not barred by clause (b) of section 153 inasmuch as the claim was above Rs. 50. But the claim being for less than Rs. 100, the second appeal to this Court from the decree of the District Judge is incompetent. This would be so irrespective of whether the rent claimed is payable in money or in kind, or whether the claim is made by a co sharer-landlord making the other co-sharers *pro forma* defendants to the suit or by the 16-annas landlords. There was at one time a conflict of authorities in the Calcutta High Court with regard to a suit brought by a co sharer-landlord with regard to his share of the rent or with regard to the entire 16-annas rent making the other co-sharers *pro forma* defendants; but the later decisions seem to have settled the point in question: *vide Bhagabati Devi v. Nanda Kumar Chuckerbutty* (1), *Sital Chandra Bhat-tacharjee v. Shishir Aflullin* (2). In my

view these later decisions are in consonance with the scope and object of section 153 of the Bengal Tenancy Act and are supported by the principle enunciated by their Lordships of the Privy Council in *Raja Pramada Nath Roy v. Raja Ramani Kanta Roy* (3). I, therefore, uphold the contention of the respondents and dismiss the second appeal to this Court as being barred by section 153 (a) of the Bengal Tenancy Act.

The plaintiffs seeing this difficulty have also come up in revision. The finding of the Court below that the rent was payable by Batai system being a finding of fact, cannot be and is not seriously challenged in this Court. The ground urged for the exercise of the revisional powers of this Court is that the District Judge failed to exercise jurisdiction in declining to decide the question whether the rent for the years in suit was actually paid or not. Upon the pleas taken by the defendants an issue was framed by the Munsif as to whether the defendants' plea of payment was true (issue No. 4). This issue was decided by the Munsif against the defendants, holding that the tenant defendants absolutely failed to prove payment to the plaintiffs or *pro forma* defendants of the rent for the years in suit. The learned District Judge declined to go into the issue in view of the finding that the system for realisation of rent was by division of the produce and not by appraisement. This view appears to be wrong. Whatever be the system for the realisation of rent it appears to me that the defendants were bound to pay the share of the produce due to the landlords as rent. The Danabandi papers have been accepted to be true by both the Courts below and if the defendants failed to prove the payment of rent alleged by them to the landlords, the plaintiffs would be entitled to a decree in the suit on the basis of the Danabandi papers unless the tenant-defendants were able to prove by satisfactory evidence what was the actual produce during the years in suit. It was, therefore, incumbent upon the District Judge to decide whether as a matter of fact the plea of payment was true or not. In this view the District Judge refused to exercise juris-

(1) 12 C. W. N. 835.

(2) 1 Ind. Cas. 22; 13 C. W. N. 733.

(3) 12 C. W. N. 249; 10 Bom. L. R. 66; 35 C. 311; 35 I. A. 73; 7 C. L. J. 13; 18 M. L. J. 43; 3 M. L. T. 151 (P. C.).

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diction and hence his decision is liable to be set aside in revision.

The application in Civil Revision No. 161 of 1918 is, therefore, allowed and the decree of the District Judge is set aside, and the case is sent back for a decision on the plea of payment raised by the defendants and for disposal of the case in accordance with the result of the finding on Issue No. 4 framed by the Munsif. The costs will abide the result.

Case remanded.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 73 OF 1919.
September 19, 1919.

Present:—Sir Henry Drake-Brockman,
Kt., J. C.

RADHA—NON-APPLICANT—APPELLANT
versus

SAKHU—APPLICANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 144, O. II, r. 2—Restitution, whether can be ordered in case not falling under s. 144—Application for restitution—Suit, subsequent, for mesne profits, whether barred—Limitation Act (IX of 1908), Sch I, Arts. 109, 181—Injunction, temporary, possession under, whether wrongful—Application for restitution—Limitation applicable.

A Court has inherent power to order restitution in a case not covered by section 144, Civil Procedure Code, for the obvious reason that where a Court by a temporary injunction deprives a person of what he is legally entitled to, it should *ex debito justitiæ* restore that which he has thus lost and also compensate him for the profits which he has been precluded thereby from earning [p. 665, col. 1.]

Order II, rule 2, Civil Procedure Code, has no application to a case to which section 144 applies. A suit, therefore, for mesne profits following on an application for restitution to possession is not precluded. [p. 665, cols. 1 & 2.]

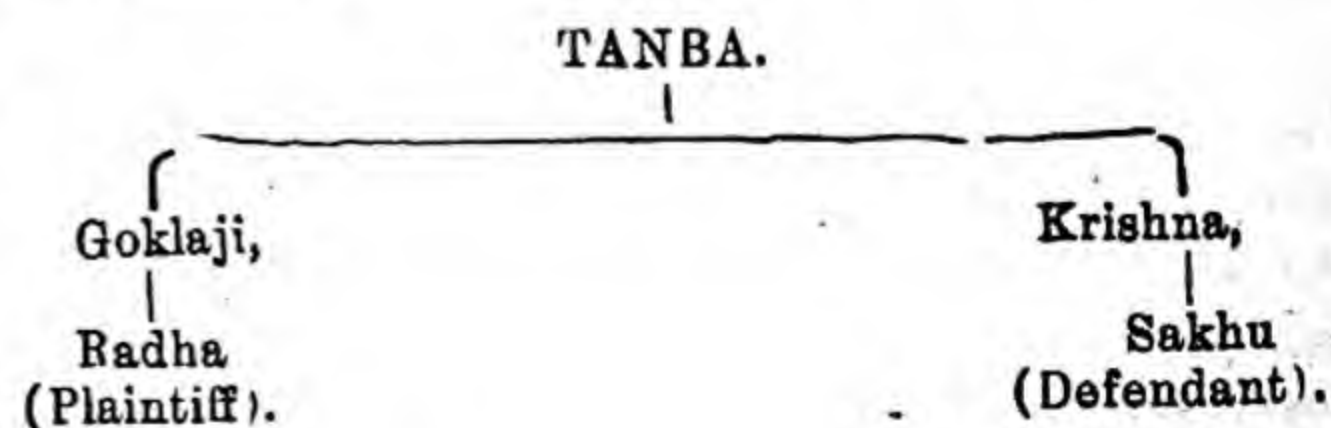
Possession under a temporary injunction is not wrongful for the purposes of Article 109 of Schedule I to the Limitation Act, and as that article is confined to suits, it is inapplicable to an application for restitution. Article 181 provides the period within which such an application must be made, [p. 665, col. 2.]

Second appeal against the decision of the Additional District Judge, Wardha, in Civil Appeal No. 164 of 1918, dated the 15th January 1919, arising out of Miscellaneous Case No. 31 of 1918, in the Court of the Munsif, Wardha, dated the 17th July 1918.

Mr. D. P. Tiwari, for the Appellant,

Mr. S. Y. Deshmukh, for the Respondent.

JUDGMENT.—This second appeal arises out of an application for mesne profits accrued during the five agricultural years 911 12 to 1915-6 from absolute occupancy field No. 109 of Mouza Khairi. The facts of the litigation will be found set out in great detail in the judgment of the District Judge, Wardha, delivered on the 19th February 1914, in Appeal No. 333 of 1913. A copy of this judgment is filed in Second Appeal No. 289 of 1914 decided by Batten, Additional Judicial Commissioner, on the 27th January 1915, by which the case was remanded to the District Judge for a fresh decision of the first appeal. The District Judge after further inquiry decided the appeal to his Court in accordance with his first decision, with the result that the plaintiff Radha's claim with regard to the aforesaid field was dismissed. From this second decision an appeal (Second Appeal No. 503 of 1916) was preferred but was dismissed on the 17th January 1917. Meanwhile the defendant Sakhu had on the 21st February 1916 applied to be put in possession of field No. 109 and she was reinstated after the District Judge on the 9th September 1916 decided Appeal No. 199 of 1916 in her favour. In his judgment the District Judge found that when the plaintiff sued for a declaration that she was solely entitled to field No. 109 aforesaid and also to certain other fields and prayed that the entry in the recent settlement recording the defendant as co-sharer in all those fields to the extent of 8 annas should be cancelled, the defendant was in possession of field No. 109 and that she had been removed in accordance with the two temporary injunctions obtained by the plaintiff on the 4th October 1911 and the 6th November 1912, respectively. The following table will show the relationship between the parties:—



The result of the plaintiff's suit was a decision that No. 109 of Khairi belonged exclusively to the defendant Sakhu by virtue

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of a compromise, whereby the parties settled a dispute which arose soon after the death of Goklaji who had survived Krishna. The application of the 31st January 1918, out of which this second appeal arises, purports to be preferred under section 144, Civil Procedure Code, i. e., to be for restitution after reversal of a decree. The non-applicant Radha objected that section 144 has no application and that the claim for mesne profits is time-barred and in any case should have been joined with the prayer for possession previously granted. Both the lower Courts have held that while section 144 is not in terms applicable, the applicant Sakhu has an equitable right to the compensation claimed and that the Court has inherent power to grant her this relief without relegating her to a separate suit. They also held the application to be governed by Article 181 of the Limitation Schedule and, therefore, to be within time.

The first ground of appeal is based upon a misconception of the view taken by the lower Courts as to the applicability of section 144, Civil Procedure Code. I am inclined to agree that the respondent's application does not fall within the strict terms of that section. The appellant Radha's plaint made no claim either for possession or mesne profits and the relief she obtained from the trial Judge was merely a declaration and injunction. There is, however, ample authority for the view that the Court has inherent power to order restitution in cases not covered by section 144. The obvious reason is that the Court, having by its temporary injunction deprived the respondent Sakhu of what she was legally entitled to, should *ex debito justitiæ* restore her to the possession which she had thus lost and also compensate her for the profits which she had been precluded from earning.

The next contention pressed is that Sakhu should have applied for the mesne profits when she moved for reinstatement in possession. Rule 2, Order II, First Schedule to the Code of Civil Procedure, is relied on in this connection. If section 144, Civil Procedure Code, applied to the application under consideration, the rule cited would have no application: see *Somusundaram Pillai v. Ohokalinga Pillai* (1). If it be taken that

the application does not fall under section 144, the question arises whether the rule cited being applicable under section 141, Civil Procedure Code, would preclude a suit for mesne profits following upon a suit for possession. Upon this question the weight of authority is against the appellant and is in accord with the view as to the nature of a claim for mesne profits which has hitherto obtained in the Court: see *Bhairao Prasad v. Sangaram Singh* (2), *Lalson Babui v. Janki Bibi* (3), *Ponnammal v. Ramamirida* (4) and *Paramsukh v. Yadoji* (5). The second contention, therefore, fails.

It remains to deal with the question of limitation, and as to this it is urged that Article 109 of the Limitation Schedule applies. To this the answer seems to me to be that the appellant Radha's possession under the temporary injunctions granted by the trial Judge cannot be regarded as wrongful for the purposes of the article relied upon. It may be true that the respondent Sakhu might have brought a separate suit for possession or mesne profits or both before Radha's suit was decided, but this cannot affect the position that Radha's possession begun in 1911 was based upon injunctions issued by the Court and with Sakhu's consent. It has also to be observed that Article 109 applies to suits, whereas what we are here dealing with is an application for restitution to which Article 181 appears to be applicable. The application was filed on the 31st January 1918, which is within three years of the District Judge's second decree dismissing Radha's claim, and I agree with the lower Appellate Court in thinking that Sakhu's right to restitution must be taken to have revived on the date of that decision (30th August 1915), even if it arose to begin with on the date of the District Judge's first decision (19th February 1914).

All the appellant's contentions are thus overruled and the appeal is accordingly dismissed with costs. In the Courts below costs will be paid as already ordered.

Appeal dismissed.

(2) 1 C. P. L. R. 143.

(3) 19 O 615.

(4) 27 Ind. Cas. 679; 38 M. 829; 7 M. L. T. 125; 21 M. L. J. 127; (1915) M. W. N. 130.

(5) 46 Ind. Cas. 743; 15 N. L. R. 101.

(1) 38 Ind. Cas. 806; 40 M. 780; 5 L. W. 267.

JHINGUR JHA V. BADRI SAHU.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 796 OF 1918.

December 18, 1919.

Present :—Mr. Justice Adami.

JHINGUR JHA—APPELLANT

versus

BADRI SAHU AND ANOTHER—PLAINTIFFS—

JASODA MISRAIN AND OTHERS—

DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 27—Appellate Court, power of, to take additional evidence when to be exercised.

Rule 27 (b) of Order XLI of the Civil Procedure Code does not mean that in order to enable an Appellate Court to pronounce judgment in favour of a particular party, additional evidence should be admitted in appeal; it means only that where it is impossible to pronounce judgment at all on the evidence, the Court may call for a witness [p. 666, col. 2.]

Appeal from a decision of the Subordinate Judge, Mozuffarpore, dated the 15th March 1918, reversing a decision of the Munsif, Sitamarhi, dated the 26th January 1917.

Messrs. S. P. Varma and Sambhu Saran, for the Appellant.

Mr. Lachmi Narain Singh, for the Respondent.

JUDGMENT.—The plaintiff, who was Thiccadar of an eight-annas share in Mouza Akhta, at the expiry of his lease sued the four defendants, who are recorded as tenants of the holding, for the rent in arrears for the years 1318—1321. The defendant No. 1, who alone contested the suit, pleaded that since the publication of the Record of Rights the holding had been split up and that he had by purchase added to his separated lands. He pleaded too that he had paid the rent due from him in full.

The Munsif in a careful judgment found that the receipts filed by the defendant to prove his payment were genuine and showed recognition by the plaintiff of the splitting up of the Jama by accepting rent from the defendant. He came to the conclusion that the collection papers put in by the plaintiff were forged, and that the plaintiff's witness, the Patwari, who denied his signature on the receipts, was not telling the truth. The Munsif dismissed the suit. The plaintiff's Patwari, who was alleged to have written the receipts, did not appear on the date of hearing before the Munsif to deny his writing, although he had been present in Court on previous occasions.

The Subordinate Judge allowed the

Patwari to appear before him and give evidence on the ground, it seems, that the plaintiff had sought for the issue of a warrant to secure his attendance, but had been refused by the lower Court. On the strength of the Patwari's denial of his writing the receipts, and on the ground that the receipts were the only evidence on which the defendant based his defence, the Subordinate Judge found that the defendant had failed to substantiate his plea and decreed the plaintiff's appeal.

The first ground taken by the appellant is, that the lower Appellate Court wrongly allowed the Patwari to give evidence. Order XLI, rule 27, states the grounds on which such additional evidence may be received on appeal. There must be the necessity for the evidence of the witness in order to allow the Court to pronounce judgment or there must be some other substantial cause.

In the present case in my opinion there was no such necessity, nor was there any substantial cause.

The Munsif had shown that the Patwari had been present up to the date of hearing and had filed collection papers at a very suspiciously late stage of the case.

Recognizance had been taken from the witness for his appearance on the 29th of August 1916 and the witness appeared on that date. The plaintiff did not take any other steps to secure his further appearance till the last date of hearing, when the case was a year old.

The reasons given by the Munsif for refusing to issue a warrant appear to me to be quite satisfactory, and there was no substantial cause for allowing the Patwari to appear to give evidence on appeal in view of the reasons which had been given. The evidence of the Patwari was not necessary to enable the Appellate Court to pronounce judgment; there was quite sufficient material on the record. Rule 27 (b) of Order XLI does not mean that, in order to enable the Appellate Court to pronounce judgment in favour of a particular party, additional evidence should be admitted on appeal; it means only that where it is impossible to pronounce judgment at all on the evidence, the Court may call for a witness, *Kalika Dutt Mandar v. Tulsi*

HATHISINGH v. KUBER JETHA.

Mandar (1). In this case the Subordinate Judge has decreed the appeal simply because the Patwari has denied his writing of the receipts, and gives no good reasons why the Patwari's evidence should be believed. Reasons were especially necessary, since the Munsif had given good reasons for believing the collection papers to be forged.

On the ground that the Appellate Court was not entitled in this case to take additional evidence on appeal and to base its finding on that evidence, the present appeal must succeed. It may further be stated that the Subordinate Judge's statement that the Munsif's finding was solely based on the receipts is not accurate. The Munsif found that another co sharer Malik had recognised the splitting up and this gave him the additional cause for coming to his finding.

The appeal is allowed with costs. The decree of the lower Appellate Court is set aside and that of the Munsif is restored.

Appeal allowed.

(1) 37 Ind. Cas. 1008; 1 P. L. J. 435.

BOMBAY HIGH COURT.

APPEAL FROM ORDER No. 54 of 1916.

July 11, 1917.

Present:—Sir Basil Scott, Kt., Chief Justice,
and Mr. Justice Beaman.

HATHISING JEEBHAI BARIA

AND OTHERS—DEFENDANTS—APPELLANTS

versus

KUBER JETHA PATEL AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Bombay Land Revenue Code (Act V of 1879), s. 135 J, whether retrospective—Record of Rights, entry in—Presumption of correctness.

The provisions of section 135J of the Bombay Land Revenue Code, which was enacted by Act IV of 1913, are not retrospective, and the presumption contained in that section does not, therefore, apply to entries made before 1913.

Appeal from the decision of the Joint Judge at Ahmedabad, in Appeal No. 313 of 1914, reversing the decree passed by, and remanding the suit to, the Subordinate Judge at Godhra, in Suit No. 70 of 1913.

Mr. G. N. Thakor, for the Appellant.

Mr. M. H. Mehta, for the Respondents.

JUDGMENT.—It appears from the judgment of the learned Joint Judge that he has presumed certain entries in the Record of Rights to be true. Those entries were made originally in 1905-06, and were repeated in 1912-13. The revenue years end on the 31st March. Therefore, the latter entry in the Record of Rights must be taken to have been made prior to the 31st March 1913. Bombay Act IV of 1913, which amended the Land Revenue Code and superseded the original Record of Rights Act of 1903, enacted that a new section 135J should be added to the Land Revenue Code, providing that "an entry in the Record of Rights and a certified entry in the register of mutations shall be presumed to be true until the contrary is proved or a new entry is lawfully substituted therefor." That Amending Act did not receive the assent of the Governor-General in Council until the 28th May 1913, which would be in the revenue year 1913-1914, subsequent to the year in which the last entry relied upon by the learned Judge was made. We do not think that the provisions of section 135J, which have just been read, can be retrospective with regard to entries which for the purpose of determining the rights of the parties were until after the year 1913 innocuous. The appellants' Pleader has, therefore, successfully shown that the decree of the learned Judge has been influenced materially by evidence or by a presumption which he ought not to have made. For these reasons we must remand the case to the learned Judge, directing him not to give effect to the presumption in section 135J with regard to entries made prior to the operation of the Amending Act of 1913. If the entries in the Record of Rights are still relied upon as of any probative value, the defendants should be allowed to give rebutting evidence with regard to the facts recorded therein, as the entries themselves appear to have been admitted at a very late stage. The learned Judge should consider the evidence already recorded, and such further evidence as may be given, in the light of the remarks in this judgment. We set aside the decree and remand the case for disposal to the lower Court. Costs in the cause.

Decree set aside; Case remanded.

TEJPAL JAMUNADAS v. B. NATHMULL & CO.

CALCUTTA HIGH COURT.

APPEALS FROM ORIGINAL CIVIL NOS. 21
AND 22 OF 1919.

April 29, 1919.

Present:—Sir Lancelot Sanderson, Kt., Chief
Justice, and Justice Sir John Woodroffe, Kt.
TEJPAL JAMUNADAS—APPELLANTS

versus

B. NATHMULL & Co.—RESPONDENTS.

*Arbitration Act (IX of 1899), ss. 12, 13—Arbitration
—Award—Court, whether has power to extend time
for making award.*

A Court has power, under section 12 of the Arbitration Act, to extend the time for making an award, even though there has been an order of remission and the award has in fact been made, and this power is not limited by section 13 of the Act. [p. 670, col. 1]

Appeals from the orders of Mr. Justice Chaudhuri, dated the 13th March 1919.

Mr. N. Sircar (with him Mr. S. O. Bose),
for the Appellants.

Sir B. C. Mitter (with him Mr. S. N. Bannerjee), for the Respondents.

JUDGMENT.

SANDERSON, C. J.—These are two appeals by the appellants from two orders made by Chaudhuri, J., on the 13th March 1919, in respect of two applications which were heard together.

The facts material to the matters before the Court are as follows:—

A dispute arose between the parties with reference to a contract relating to the purchase of Hessian cloth.

In pursuance of the terms of the contract, the dispute was referred to the arbitration of the Bengal Chamber of Commerce and, on the 14th June 1918, an award was made in favour of Tejpal Jamunadas.

On the 22nd July 1918, the award was remitted to the said Chamber by Greaves, J., in order that evidence might be taken. I have not a copy of the order before me, but I understand that no time for making the fresh award was mentioned in the order, and consequently by reason of section 13 (2) of the Indian Arbitration Act, 1899, the fresh award should have been made within three months after the date of the order remitting the award. The fresh award, which was in favour of Tejpal Jamunadas, was made on the 24th October 1918.

In the learned Judge's judgment, the award is stated to have been made on

the 25th October, but according to the papers before me, it was in fact made on the 24th October.

This was two days beyond the three months allowed by the above-mentioned section.

On the 25th October 1918 it was sent by the Registrar of the Tribunal of Arbitration of the Bengal Chamber of Commerce to the Registrar of the High Court.

In due course it was filed and, on the 18th November 1918, one C. C. Basu on behalf of Tejpal Jamunadas wrote to B. Nathmull & Co., and demanded payment of the amount awarded. On the same day B. Nathmull & Co. obtained a Rule calling upon Tejpal Jamunadas to show cause why the award should not be set aside.

On the 27th November 1918 Tejpal Jamunadas obtained a Rule calling upon B. Nathmull & Co. to show cause why the time for making a fresh award should not be extended until the 31st of October 1918.

The two Rules were heard together. The learned Judge discharged the Rule for extension of time, and directed that the award should be set aside.

The learned Judge was of opinion that a great deal of delay was caused in consequence of the absence of witnesses on behalf of B. Nathmull & Co. and said he would have liked very much to refer this matter to the Chamber again because the whole case had been heard by them.

He, however, came to the conclusion that he had no power to enlarge the time after the award had been made and said that he regretted to have to come to the conclusion that under section 13, clause (2), he had no power to remit such an award: consequently he set aside the award.

Tejpal Jamunadas appealed against both the orders of the learned Judge; the appeal against the order of the learned Judge refusing to extend the time stood first in the list and was numbered 21.

The two appeals were heard together.

Sir B. C. Mitter, on behalf of the respondents, took the point that there was no appeal from Chaudhuri, J.'s order, by which he discharged the Rule for exten-

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sion of time, inasmuch as it was not a judgment within the meaning of clause 15 of the Letters Patent.

It was not disputed that there was a right of appeal against the learned Judge's order by which he set aside the award.

It was contended on behalf of the appellants that the discussion as to the right of appeal in Appeal No. 21 was academical, inasmuch as there was admittedly a right of appeal in Appeal No. 22, and the reasons for the setting aside of the award, given by the learned Judge, must be considered; that the learned Judge would not have set aside the award if he had thought he had power to extend the time; that the Court of Appeal under Order XLI, rule 33 has power to pass any decree or make any order which ought to have been passed or made; and, consequently, that the Court of Appeal, if it thought right, could, in Appeal No. 22, make an order extending the time, and so make the award effective.

In my judgment, the point is purely a technical one: the applications, though two in form, were heard as one matter, and the substance of it was, that the appellants were alleging that the award could be made effective provided the Court would extend the time; the respondents, on the other hand, were alleging that the award was incapable of execution and was incapable of being turned into an effective award by an order of the Court.

The learned Judge set aside the award, because he was of opinion that he had no power to extend the time or to remit the matter to the arbitrators. The appellants contend that he had power to extend the time.

If we were to accede to the respondents' contention that this Court could not go into the question of the Court's power to extend the time, this Court would be in the position that it could entertain an appeal from the learned Judge's decision to set aside the award but it could not consider his reasons for that decision and, further, that if it did consider his reasons, and even if it came to the conclusion that his reasons were ill-founded and that he had power to extend the time, still the Court could not interfere with his decision in that respect because there was no

right of appeal from his order refusing to extend the time.

This would lead to a most unreasonable result. In my judgment, even if there is no appeal against the order refusing to extend the time, which I do not decide this Court in considering the Appeal No. 22, which is against the order setting aside the award, must consider the learned Judge's reasons for his decision; and if the Court comes to the conclusion that the learned Judge's reasons were ill-founded and that he was wrong in holding that he had no power to extend the time, and so make the award effective, this Court would have power to make an order for extension of time under Order XLI, rule 33.

The first question to be considered on the merits of the appeal is whether the Court has power to extend the time. As I read the learned Judge's judgment, it is clear that he would have extended the time for making the award if he had power so to do; but he came to the conclusion that he had no such power and he based his decision on the judgment of Harington, J., in *Shib Krishna Dawn & Co. v. Satish Ohunder Dutt* (1).

This case, however, depended upon the provisions of the Civil Procedure Code. The case which I have now to consider depends upon the provisions of the Indian Arbitration Act and, in my judgment, it is not covered by the case cited.

Section 12 of the Indian Arbitration Act provides that the time for making an award may, from time to time, be enlarged by order of the Court, whether the time for making the award has expired or not.

The Court, therefore, has power to enlarge the time, though the time for making the award has expired, as in this case.

It was, however, contended that this power could not be exercised by the Court after the award was made. In my judgment this is not so.

Section 9 of the English Arbitration Act, 1889, is, in all material respects, identical with section 12 of the Indian Arbitration Act and with reference to

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that section it was decided by the Court of Appeal in *Knowles & Sons, Ltd. v. Bolton Corporation* (2) that the Court had jurisdiction to extend that time for making an award although the award had been in fact made, and in my judgment under section 12 of the Indian Arbitration Act the Court has the power to extend the time, though the time for making the award has expired and even though the award has been in fact made.

The above was not strenuously disputed; but it was urged on behalf of the respondents that the jurisdiction given by section 12 could not be exercised by the Court, after the award has been remitted, as it was in this case, under section 13 of the Act. It was argued that, having regard to the position of section 13 in the Act, and to the fact that it came after section 12, and having regard to the express terms of section 13, the time for making the fresh award was limited to the three months mentioned in the section, unless at the time of the order of remission the Judge, who made the order, otherwise directed.

In my judgment this contention is not well-founded, and I think the power given to the Court by section 12 to enlarge the time is not limited in the manner suggested and may be exercised from time to time, and even after the award has been remitted by the Court to the arbitrators.

It was then urged that the Judicial Committee of the Privy Council had not followed the English cases, and reference was made to the case of *Raja Har Narain Singh v. Ohaudhrain Bhagwant Kuar* (3). This case was the basis of Harington, J.'s decision in the case already referred to.

It was decided entirely upon the construction of the Civil Procedure Code then in force, and in the Judicial Committee's judgment it is pointed out that the construction of the section of the Code could not be much aided by analogies drawn from the sections of the English Common Law Procedure Act.

As already stated, the present case does not depend upon the provisions of the

(2) (1900) 2 Q. B. 253; 69 L. J. Q. B. 491; 48 W. R. 433; 82 L. T. 229; 16 T. L. R. 283.

(3) 13 A. 300; 18 I. A. 55; 6 Sar. P. C. J. 14 (P. C.).

Civil Procedure Code, but upon the provisions of the Indian Arbitration Act, and in my judgment the case cited does not govern the present one.

For these reasons, in my judgment, the learned Judge had power to enlarge the time for making the fresh award, even though there had been an order of remission and the award had been in fact made.

It remains to consider whether the learned Judge should have enlarged the time. I have already said that it is apparent from the learned Judge's judgment that he would have enlarged the time, if he had considered that he had the power so to do, and the merits of the appellants' application to enlarge the time have not been seriously disputed in this Court, and, in my judgment, the time for making the fresh award should be enlarged until the 31st October 1918, in accordance with the appellants' application; so that the award, which was made on the 24th October 1918, should be effective.

The result is that, in my judgment, these two appeals, which are in reality one appeal, should be allowed with costs; the two orders of the learned Judge should be set aside and the time for making the fresh award should be enlarged until the 31st October 1918, and the award should be restored to the file. The respondents must pay the appellants' costs of the proceedings before Chaudhuri, J. WOODROFFE, J.—I agree.

Appeals allowed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 416 OF 1918.

July 25, 1919.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.
TIPANGAVDA SANDAWANGAVDA
GAVDAR—APPELLANT

versus

RAMANGAVDA VENKANGAVDA
GAVDAR—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 89—Execution of decree—Sale, application to set aside, whether can be made to officer conducting sale.

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An application under Order XXI, rule 89 of the Civil Procedure Code to set aside an auction sale must be made to the Court. [p. 671, col. 2.]

The Collector or other officer conducting the sale is not the "Court" within the meaning of Order XXI, rule 89 of the Civil Procedure Code. Therefore, an application under that rule made to the Collector or other officer cannot be considered as having been properly made. [p. 671, col. 2.]

Second appeal against the decision of the District Judge, Dharwar, in Appeal No. 4 of 1916, reversing the decree passed by the Subordinate Judge at Haveri, in Miscellaneous Application No. 60 of 1915.

Mr. S. Y. Abhyankar, for the Appellant.

Mr. G. S. Mulgaonkar, for the Respondent.

JUDGMENT.

MACLEOD, C. J.—This was an application by the judgment-debtor to have an auction sale held by the Mamlatdar of Hangal set aside under Order XXI, rule 89, on the ground that he had deposited in the Mamlatdar's office Rs. 154-12-10, including 5 per cent. of the purchase money, and had applied to the Mamlatdar to set aside the sale that was held on the 15th April 1915, but was referred to the Civil Court. As the Court was closed and re-opened on the 19th May, the period of limitation expired on the 19th May, but the application was not made until the 13th July. It was then argued that the application to set aside the sale made to the Mamlatdar was an application to the Court, and that, therefore, it was within time. The trial Judge disallowed the application, and this order was reversed on appeal, mainly on the authority of *Mathuji v. Kondari* (1) where it was held by the Court that the application and deposit to a Revenue Officer should be looked to on the question of limitation. That decision was under section 310A of the Civil Procedure Code of 1882, and the learned Judges thought that having regard to the words of that section the essential fact upon which the action of the Court was to depend was the deposit within thirty days, and not the fact that the application was to have been made within that period. But now the period of limitation for an application to set aside a sale is transferred from the Civil Procedure Code to the Limitation Act, and it is expressly provided that such an application must be made within thirty days from the date of the sale. It has been argued that the Collector or the Mamlatdar or the Revenue

Officer executing a decree comes within the definition of the word "Court," so that this application was made within time. Now it is obvious that the Revenue Officer under the rules passed under section 320 of the old Code, which are still in force, has no power to consider an application to set aside a sale. If the application be made to the Collector or other officer within the time limited by law, then he should refer the applicant to the Civil Court. That, as I read rule 17 of the rules, means that the Collector or other officer cannot be considered as a Court within the meaning of Order XXI, rule 89, or the corresponding section 310A of the old Code, and, therefore, the judgment debtor who presents his application to the Collector cannot stop limitation running against him, unless after having been referred to the Civil Court he presents his application there within thirty days. He is not protected by section 14 of the Limitation Act, which only excludes time during which a party has been prosecuting with due diligence another civil proceeding whether in a Court of first instance or in a Court of Appeal against his opponent. But I see no hardship in this. It is quite clear that the application to set aside the sale must be made to the Court. The party desiring to make that application has thirty days within which to make it. If he makes it to a Collector or a Revenue Officer so shortly before the period of limitation expires that he has no time to go to Court, then that is his own fault. Here in this case there is no hardship whatever. The judgment-debtor had over a month in which to present his application to the Court after he had been referred to the Court by the Mamlatdar, and he did not choose to present his application until July. In my opinion, therefore, the order of the lower Appellate Court was wrong. We allow the appeal, set aside the decree of the lower Appellate Court and restore that of the trial Court with costs.

HEATON, J.—I agree. Primarily an application under rule 89 of Order XXI of the Civil Procedure Code must be made to the Court. The application in this matter was undoubtedly made to the wrong person in the first instance, and not made to the Court until long after the time allowed, unless the Collector or the Mamlatdar can be regarded as authorized to receive such applications on

(1) 7 Bom. L. R. 263.

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behalf of the Court. We are asked to infer such authorization from rule 17 of the rules. It seems to me this rule can best be read as meaning that the Collector should not receive applications, but should return them to any one presenting them to him with an intimation that the persons presenting them must go to the Civil Court. On that interpretation of rule 17 it follows that this appeal must succeed, and I agree with the order proposed.

Appeal allowed.

PATNA HIGH COURT.

SECOND CIVIL APPEALS NOS. 423 TO 427
AND 545 TO 548 OF 1918.

December 12, 1919.

Present:—Mr. Justice Coutts and Mr. Justice Sultan Ahmed.

IN S. A. 423 OF 1918.

JAGDEO NARAIN SINGH—PLAINTIFF
—APPELLANT

versus

BHAGWAN MAHTO—DEFENDANT
—RESPONDENT.

Bengal Tenancy Act (VIII B. C. of 1885), ss. 50 (2), 115—Tenant recorded as occupancy tenant, whether entitled to presumption under s. 50 (2).

A tenant who is recorded in the Record of Rights as an occupancy ryot is, by reason of the provision of section 115 of the Bengal Tenancy Act, not entitled to the benefit of the presumption arising under section 50 (2) of the Act.

Appeal from a decision of the Subordinate Judge of Patna.

Mr. Nirsu Narain Sinha, for the Appellant.
Messrs. Bimla Charan Sinha and M. S. Sinha, for the Respondent.

JUDGMENT.

COURTS, J.—These appeals arise out of suits for enhancement of rents. The suits were partially decreed in the Court of first instance. On appeal the whole of the suits have been dismissed. The landlords have appealed.

The first point that arises in the suits is whether a tenant who has been recorded as an occupancy *raiya* is, or is not, en-

titled in view of section 115 of the Bengal Tenancy Act to the presumption arising under section 50 (2) of that Act. The learned Subordinate Judge, following the decisions in the *Secretary of State for India v. Kajimuddi* (1) and *Maharaja Radha Kishore Manikya Bahadur v. Umed Ali* (2), which was followed by Mullick, J., in the case of *Pirithi Ohand Lal Choudhry v. Sheikh Mohamed Tahir* (3), has decided that section 115 does not stand in the way of the tenants. The decisions in *Secretary of State for India v. Kajimuddi* (1) and *Maharaja Radha Kishore Manikya Bahadur v. Umed Ali* (2) have been dissented from in the Full Bench ruling in *Pirithi Ohand Lal Choudhry v. Basarat Ali* (4), and this decision has been followed in the case of *Pandit Harihar Persad Bajpai v. Ajub Misir* (5) and in *Birendra Kishore Manikya Bahadur v. Faizuddi* (6) and in *Guru Charan Nandi v. Sarab Ali* (7). In my opinion the view taken in the Full Bench case of the Calcutta High Court or the later decisions of that Court is the correct interpretation of the law.

We are asked, however, in view of the further remarks made in the judgment of the learned Subordinate Judge not to interfere with his decision. All that he has said is that it has been submitted that as all the lands have deteriorated on account of the sluice gates and there is no supply of sufficient water on the lands, no enhancement should be allowed. Without discussing the matter, he says "there is much force in this contention." It is perfectly clear that he has really not considered this question but that his whole decision is based on his finding with regard to section 115. His decision as to whether the lands deteriorated or not, is not in accordance with law. I would, therefore, set aside these decrees and would remand the appeals for re-hearing. Costs to abide the result.

SULTAN AHMED, J.—I agree.

Decrees set aside.

(1) 26 C. 617.

(2) 12 C. W. N. 904.

(3) 35 Ind. Cas. 427; 1 P. L. J. 67; 3 P. L. W. 427.

(4) 3 Ind. Cas. 447; 37 C. 30; 13 C. W. N. 1149 (F. B.); 10 C. L. J. 343.

(5) 22 Ind. Cas. 604; 45 C. 930.

(6) 22 Ind. Cas. 943.

(7) 52 Ind. Cas. 79; 30 C. L. J. 9; 23 C. W. N. 1041.

PADARATH SINGH v. RATAN SINGH.

PATNA HIGH COURT.

CIVIL CRIMINAL REVISION No. 27 OF 1919.

November 3, 1919.

Present:—Mr. Justice Das.

PADARATH SINGH AND ANOTHER—
PETITIONERS

versus

RATAN SINGH—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 195—Penal Code (Act XLV of 1861), s. 193—Sanction to prosecute granted by Munsif—Order affirmed by District Judge—High Court, whether can interfere—Sanction to prosecute for perjury, when to be granted—Perjury, conviction for, when can be upheld—Practice—Patna High Court, whether bound to follow practice of Calcutta High Court.

Where sanction to prosecute given by a Munsif is confirmed on appeal by the District Judge, the High Court has power to interfere with the order of the District Judge under section 195 (6) of the Criminal Procedure Code. [p. 677, col. 1.]

Where there is great delay in applying for sanction to prosecute for perjury, and where the Magistrate would have to determine the question by merely weighing the evidence on both sides, sanction ought not to be granted. [p. 677, col. 1.]

No person can be convicted under section 193 of the Penal Code except on proof that it is impossible that the statements of the party accused made on oath can be true. [p. 677, col. 1.]

Where there is a general practice sanctioned by concurrent decisions in the Calcutta High Court, the Patna High Court will not depart from it. [p. 674, col. 1.]

Civil criminal revision against the order of the District Judge, Patna, dated the 17th July 1919, refusing to revoke in appeal the sanction granted by the Munsif, Patna, on 17th February 1919, for the prosecution of the petitioners under various sections of the Indian Penal Code.

Messrs. A. Sen, Yunus and J. N. Sen Gupta, for the Petitioners.

The Assistant Government Advocate, for the Opposite Party.

JUDGMENT.—This application is directed against an order of the District Judge of Patna refusing to revoke a sanction granted by the Munsif under section 195 of the Code to prosecute the petitioners under section 193, Indian Penal Code, for making certain statements before the Munsif in a suit before him.

The first question which I have to consider is, what is the power of this Court to interfere with the order of the District Judge? Clearly the order is not an order in a criminal case, and, therefore, this Court has no power

to revise that order under the revision section of the Criminal Procedure Code. It is conceded that the power exists under section 115 of the Civil Procedure Code and under section 107 of the Government of India Act, but it is argued that circumstances which would attract the jurisdiction of this Court under the Civil Procedure Code or under the Government of India Act are not present in this case, and that, therefore, this Court will be loath to exercise its jurisdiction under these provisions. The only other section under which power may exist is section 195 itself. Is there any power under section 195, Criminal Procedure Code, to interfere with the orders of the District Judge? That is the substantial question which I have to decide.

If I had to decide this point for the first time, I would have considerable difficulty in holding that there is any power under the Code to interfere with the order of the District Judge when the District Judge approves of the course taken by the Munsif either in granting sanction or in refusing sanction. Clause (6) of section 195 runs as follows: "Any sanction given or refused under this section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate....." If there was nothing else in section 195, then, in my view, there would be ample power in the High Court to revoke a sanction granted by the Munsif, because there cannot be any doubt that the Munsif is subordinate to the High Court. But clause (6) must be read together with clause (7), which gives a statutory meaning to the word 'subordinate' which, in my judgment, it is impossible to ignore. The material portion of clause (7) runs as follows:—"For the purposes of this section every Court shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie....." The use of the word 'deemed' is significant. It implies that the position deliberately created by clause (7) may not be true outside section 195 and may be purely artificial, but that, for the purpose of section 195, a Munsif's Court is subordinate only to that Court to which appeals from the Munsif's Court ordinarily lie, and to no other Court. Therefore, the short point is, to which Court do appeals from the Munsif's Court ordinarily lie? Only one answer is

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possible to the question, and that is, to the Court of the District Judge and not to the High Court. Therefore, it would appear that the only Court which can revoke a sanction granted by the Munsif is the Court of the District Judge.

But it was argued that, as the Court of the District Judge is clearly subordinate to the High Court, this Court is competent to set aside an order passed by the District Judge under section 195. The answer to this argument seems to be that section 195, clause (6), merely gives a power to revoke a sanction granted by the sanctioning Court or to grant a sanction refused by the sanctioning Court. Can it be said, in this case, that the District Judge has granted a sanction for the prosecution of the petitioners? In my opinion, it cannot. No doubt if the District Judge had differed from the Munsif, then his order would be an order either granting or refusing sanction, and the High Court would have power under clause (6) of section 195 to interfere with the order of the District Judge. It is on this ground that the judgment of the Full Bench of the Madras High Court in the case of *Muthuswami Mudali v. Veeni Chetti* (1) can be supported. But where the District Judge merely affirms the order of the Munsif, it is difficult to see how he can be said either to grant or refuse sanction, giving to the High Court any power to interfere under section 195.

But whatever my opinion may be as to the construction of section 195, clause (6), it seems to me that I am conclusively bound by a construction put upon that clause by the Calcutta High Court and long acquiesced in, not only by that Court, but, so far as I can see, by this Court ever since its creation. In this Court we have adopted the principle that, where there is a general practice sanctioned by concurrent decisions in the Calcutta High Court, we will not depart from it in Patna. If, therefore, Mr. Sen is right that the settled practice of the Calcutta High Court is to assert its jurisdiction with reference to applications made before it against orders of District Judges approving of sanction granted by the Munsifs, then, speaking for myself, I

would be loath to depart from that practice, merely because I would construe section 195, clause (6), differently.

What, then, is the settled practice of the Calcutta High Court in this respect? The learned Assistant Government Advocate refers me to a case reported as *Hamijuddi Mondol v. Damodar Ghose* (2) in support of his contention that there is no such settled practice of the Calcutta High Court in this respect. In that case, the Calcutta High Court took the view that it was powerless to interfere under section 195 with an order of the District Judge revoking a sanction for prosecution granted by a Munsif. But Mr. Justice Rampini, who was a party to this decision, himself took another view in the later cases. In the case of *Habibur Rahman v. Munshi Khodabux* (3) Rampini, J., held that, where a sanction to prosecute given by a Munsif was confirmed on appeal by the District Judge, the High Court had power to interfere under section 195, clause (6). The point was again debated in the case of *Girija Sankar Roy v. Benode Sheikh* (4). Mr. Justice Rampini was again a party to this decision. The learned Vakil who appeared to show cause expressly relied upon *Hamijuddi Mondal v. Damodar Ghose* (2) for the proposition that the High Court was powerless to interfere under section 195, clause (6). Rampini, J., distinguished that case in these words: "That was a case in which it was held that the High Court cannot interfere, under section 195, Criminal Procedure Code, with an order of the District Judge revoking a sanction for prosecution granted by a Munsif. But the present case is one in which the District Judge affirmed the sanction, and did not revoke it. We think we have the power to interfere with such an order under sub-section (6) to section 195 of the Code of Criminal Procedure." I do not profess to understand the distinction which was made by that learned Judge, but the Madras High Court is probably right in pointing out that the decision in *Hamijuddi Mondol Damodar Ghose* (2) rested on the ground that an order revoking a sanction to prosecute was not a refusal of a sanction

(1) 30 M. 382; 2 M. L. T. 239; 17 M. L. J. 266 (F. B.); 6 Cr. L. J. 102.

(2) 10 C. W. N. 1026; 4 Cr. L. J. 168.

(3) 11 C. W. N. 195; 5 C. L. J. 219; 5 Cr. L. J. 29.

(4) 5 C. L. J. 222; 5 Cr. L. J. 188.

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within the meaning of sub-section (6). Whatever may be the basis of *Hamiyuddi Mondol v. Damodar Ghose* (2), that case, at any rate, is no authority for the proposition that the High Court has no power to interfere with an order of the District Judge approving of sanction granted by the Munsif. The view of Rampini, J., who was a party to the decision in *Hamiyuddi Mondol v. Damodar Ghose* (2), is clear and decisive on this point.

The next case to which I shall refer, the case of *Emperor v. Har Prasad Das* (5), is of importance in that it lays down the settled practice of the Calcutta High Court in this respect clearly and unambiguously. What was really in debate in that case was the power of the High Court to interfere with orders under section 476 of the Criminal Procedure Code by Civil and Revenue Courts. Holmwood, J., in his order of reference to the Full Bench, said as follows:—"Our own view of the matter in a recent case was that there was no question as regards the jurisdiction of the High Court in sanctions under section 95. There it is expressly laid down that any sanction given or refused under this section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate, and in the case of an Assistant Settlement Officer the Special Judge would in the first instance deal with the matter, and in the event of its going further, the Civil Bench of the group to which the case belonged. It is the settled practice in this Court to treat cases under section 195 by way of appeal, and no question as to the revisional powers of the Court or the powers under the Charter arises". Holmwood, J., presided for a long time over the Criminal Bench of the Calcutta High Court, and his authoritative statement as to the settled practice of the Calcutta High Court in this respect cannot be ignored.

There is another case to which I must refer, the case of *Ram Prasad Malla v. Raghbar Malla* (6) on which the learned Assistant Government Advocate strongly relied. In that

case, the District Judge revoked a sanction granted by the Munsif, but directed prosecution under section 476 of the Code. Having regard to the decision of the Full Bench in the case of *Begu Singh v. Emperor* (7) the course adopted by the learned District Judge could not be justified, and the High Court had no difficulty in setting aside the order under section 476. But the High Court was clearly of opinion that the order of the District Judge revoking the sanction granted by the Munsif was an erroneous order. It had, therefore, to consider the question whether it had any power to set aside the order of the District Judge revoking a sanction granted by the Munsif. The case, it will be seen, fell expressly within the ruling reported as *Hamiyuddi Mondol v. Damodar Ghose* (2), from which the learned Judges could not differ without referring the point to the Full Bench. And they solved the difficulty by interfering under section 115 of the Civil Procedure Code. This is the whole decision, and I am at a loss to understand how it may be said to assist the arguments of the Assistant Government Advocate. The head-notes* are entirely misleading, but the actual decision is a clear intimation of the disagreement of the learned Judges with the view expressed in *Hamiyuddi Mondol v. Damodar Ghose* (2). The case is certainly not an authority for the proposition that the High Court is powerless to interfere with the order of the District Judge approving a Munsif's sanction.

I think Mr. Sen is clearly right in his contention that it is the settled practice of the Calcutta High Court to exercise its jurisdiction in respect of applications made before it against the orders of District Judges approving of sanction granted by the Munsifs. I cannot say that this practice is against the Statute law of the land, for, though I would construe clause (6) differently, the Calcutta High Court has undoubtedly taken the view that approval of sanction operates as giving of sanction and that, therefore, the High Court has power to interfere with the orders of District Judges. The question is whether I ought to depart from this construction

(5) 19 Ind. Cas. 197; 40 C. 477; 17 C. W. N. 647; 17 C. L. J. 245; 14 Cr. L. J. 197.

(6) 4 Ind. Cas. 6; 37 C. 13; 13 C. W. N. 1033; 10 Cr. L. J. 454.

(7) 34 C. 551 (F. B.); 11 C. W. N. 568; 5 C. L. J. 508; 5 Cr. L. J. 398; 2 M. L. T. 298.

*Head-notes relate to 10 & 11 C. W. N.—Ed.

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of section 195 which has been acquiesced in uninterruptedly for a large number of years. In my view, I ought not, unless there is any decision of this Court which directs me so to do.

This brings me to the Full Bench decision of this Court to which I was a party in the case of *Lalji Tewari v. Emperor* (8). The learned Assistant Government Advocate strongly relies upon the following passage in the judgment of Atkinson, J., with which I agreed: "Sanctions granted or refused by a Small Cause Court may come before this Court in its revisional jurisdiction under section 115 of the Code of Civil Procedure, or possibly under section 107 of the Government of India Act, but not certainly under the provisions of section 195 of the Code of Criminal Procedure, which is self-contained and marks out and defines the procedure applicable in its own terms." The sole question for our decision in that case was, to what Court could an application, with respect to a sanction given or refused by a Court of Small Causes under section 195 of the Code, be made for its revocation or grant, as the case may be? The point that was in debate before the Full Bench was, to what Court is the Court of Small Causes subordinate? The Full Bench decided that the Court of Small Causes is subordinate to the Court of the District Judge, and that, therefore, the District Court is the proper Court to review the order of a Provincial Small Cause Court granting or refusing a sanction passed under section 195 of the Code. This is the only decision of the Full Bench and is of course binding on me. It is worthy of notice that Atkinson, J., based his decision largely on the settled practice of the Calcutta High Court in this respect, and it will be useful to cite the following passage from his judgment: "It has been stated more than once by distinguished Judges of this Court that where a uniform course of practice existed referable to particular legal principles in the Province of Bengal before the partition, that then this Court would recognise such practice in the administration of law in this Province" Mr. Justice Atkinson proceeded to say as follows: "Therefore, on the grounds of continuity from long established practice I would have thought that in this Province at least a

new departure would not have been hastily embarked on without consideration, which was inconsistent with the prior existing practice prevailing in old Bengal when the present Province of Bihar and Orissa fell within its jurisdiction."

The passage cited from the judgment of Atkinson, J., on which the Assistant Government Advocate strongly relies, represented our view of section 195, clause (6), but the question which has been argued before me was never in debate in the Full Bench case. There was no argument advanced to us on this point, no cases were cited on the settled practice of the Calcutta High Court in this respect, and we were not asked to consider whether, if and when the District Judge approved of the sanction granted by the Court of Small Causes, there would be any power in this Court to interfere with the order of the District Judge. Had the case been argued before us from this point of view, it would have been difficult for us to depart from a construction of section 195 long acquiesced in by the Calcutta High Court, since we based our decision largely on the practice that prevailed in Calcutta before the partition. I still adhere to the view which I expressed in that case, but, when the point comes before me expressly for decision, I find it impossible to ignore the settled practice of the Calcutta High Court in this respect. The expression of our opinion on this point in the Full Bench Case was in the nature of an *obiter dictum* and is of no binding authority. In this connection, I may cite the following valuable passage from the speech of Halsbury, L. C., in the case of *Quinn v. Leatham* (9): "There are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny

(8) 52 Ind. Cas. 193; (1919) Pat. 329; 4 P. L. J. 609; 20 Cr. L. J. 577.

(9) (1901) A. C. 495 at p. 506; 70 L. J. P. O. 76; 85 L. T. 289; 50 W. R. 139; 65 J. P. 208; 17 T. L. R. 749.

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that it can be quoted for a proposition that may seem to follow logically from it."

I hold that this Court has power to question the propriety of the order of the District Judge approving the sanction granted by the Munsif.

The next point is, ought I to interfere in this case? In my view, I ought to interfere. There was great delay in this case in applying for sanction. In my opinion, the petitioners have been prejudiced by this delay, inasmuch as the serving peon is now dead. The whole point in the case is, was summons in a Small Cause Court suit served on the opposite party or not? The case of the petitioners is that summons was served. This is denied by the opposite party. There cannot be any doubt that the serving peon would, if he were alive, be an important witness in the case. It is argued that delay is of no consequence when the Crown applies for sanction. That may be so, but still I have to see whether, in this case, delay has prejudiced the petitioner. In my opinion, it has. In the next place, it cannot be shown in this case with any certainty that the statements made by the petitioners must necessarily be false, as it could if the petitioners had made two contradictory statements. No person can be convicted under section 193, except on proof that it is impossible that the statements of the party accused made on oath can be true. I have always taken the view that sanction to prosecute for perjury should not be lightly granted in cases like this, where the Magistrate would have to determine the question by merely weighing the evidence on both sides.

I would set aside the order passed by the learned District Judge and revoke the sanction granted by the Munsif.

Order set aside.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 794 OF 1919.

September 18, 1919.

Present:—Mr. Pratt, J. C.

ABDUL SALAM—APPLICANT

versus

RAMNEWAL SINGH—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 179, 181 (2)—Penal Code (Act XLV of 1860), s. 406—Criminal breach of trust—Offence, what constitutes—Offence committed at one place, whether can be tried at another—Jurisdiction.

The gist of the offence of criminal breach of trust is the dishonest misappropriation, conversion or disposal of the property: the loss to the complainant is a consequence of the breach of trust and not necessarily an integral part of it. [p. 678, cols. 1 & 2.]

Complainant authorised the accused to withdraw certain money belonging to the complainant at Rangoon and to transmit it to him at Maymyo. The accused withdrew the money but failed to remit it to the complainant. He was prosecuted for criminal breach of trust at Maymyo:

Held, that inasmuch as the money had been received, retained and misappropriated at Rangoon, the Rangoon Courts alone had jurisdiction to try the case. [p. 679, col. 2.]

Mr. C. H. Campagnac, for the Applicant.

Mr. P. N. Bose, for the Respondents.

JUDGMENT.—Ramnewal Singh, contractor of Maymyo, filed a complaint against Abdul Salam of Rangoon before the Sub-Divisional Magistrate, Maymyo, charging him with criminal breach of trust under section 406 of the Penal Code.

Complainant's case was that he deposited Rs. 9,000 with the Superintendent of Police Supplies, Rangoon, in connection with tenders for certain contracts.

He gave Abdul Salam a power-of-attorney to withdraw this Rs. 9,000 from the Superintendent of Supplies, on an express agreement that he was to remit half the money to complainant at Maymyo and deposit the other half as security for a rice contract with the Superintendent of Police Supplies. The accused drew the money but failed to remit or bring any to Maymyo and failed to account for it.

The allegation is that accused has misappropriated the money and that part of it has been paid without authority to one Haji Rahamat Ulla.

The alleged breach of trust took place in Rangoon. Objection was taken to the juris-

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diction of the Magistrate at Maymyo, but the Magistrate on the authority of *Queen-Empress v. O'Brien* (1) held that section 179 of the Code of Criminal Procedure gave him jurisdiction.

Accused is at present within the local limits of the appellate jurisdiction of this Court, which is now asked to revise the order of the Sub-Divisional Magistrate and decide under the provisions of section 185 of the Criminal Procedure Code by what Court the offence should be tried.

Section 181 (2) of the Criminal Procedure Code provides that the offence of criminal misappropriation or of criminal breach of trust may be inquired into or tried by a Court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received or retained by the accused person, or the offence was committed.

According to the allegations of complainant the money was received, retained and misappropriated in whole or in part in Rangoon and, therefore, there is no doubt that under section 181 (2) the Rangoon Courts have jurisdiction to try the case.

It is argued, however, that under section 179 the case is triable in Maymyo, because the failure to remit the money to complainant there has caused a loss to him at Maymyo.

Section 179 runs as follows: "When a person is accused of the commission of any offence by reason of anything which has been done, and of any consequence which has ensued, such offence may be inquired into or tried by a Court within the local limits of whose jurisdiction any such thing has been done, or any such consequence has ensued."

If section 179 is read as it stands in connection with the definition of criminal breach of trust given in section 405 of the Penal Code, it would appear that the applicant, Abdul Salam, is accused of the commission of the offence of criminal breach of trust by reason of the misappropriation of the money in Rangoon and not because of the consequent loss, which has ensued to complainant at Maymyo.

The gist of the offence of criminal breach of trust is the dishonest misappropriation,

conversion or disposal of the property, which in the present case is alleged to have taken place in Rangoon.

The loss to the complainant, which has accrued in Maymyo, is a consequence of the alleged breach of trust and not necessarily an integral part of it.

In *Queen-Empress v. O'Brien* (1), however, Sir John Edge, C.J., took the view that where B, being in charge, on behalf of a company at a place in Bengal, of certain goods belonging to the company and being ordered to return the goods to Cawnpore, where the office of the company was, did not do so and failed to account for the goods or their value, the Courts at Cawnpore had jurisdiction to inquire into the charge, inasmuch as the consequence of B's acts, viz., loss to the company, occurred in Cawnpore.

To my mind this view is hardly in accordance with what appears to be the obvious construction of section 179 of the Criminal Procedure Code. No doubt the loss, which is the consequence of B's acts, occurred in Cawnpore, but the loss was the consequence of the misappropriation elsewhere, and B was accused primarily on account of the misappropriation and only secondarily on account of the consequence of his act.

It was the dishonest misappropriation elsewhere and not the resulting loss at Cawnpore, which constituted his offence.

This was the view taken in the later Allahabad case of *Ganeshi Lal v. Nand Kishore* (2) by Karamat Husain, J., who in the course of his judgment observes: "The word 'consequence' in this section, i.e., 179, Criminal Procedure Code, in my opinion, means a consequence, which forms a part and parcel of the offence. It does not mean a consequence, which is not such a direct result of the act of the offender as to form no part of the offence."

With this expression of opinion, I am entirely in agreement, and it was approved by a Bench of the Madras High Court in the leading case of *Rambilas, In re* (3), where the effect of various Allahabad rulings on the point in question was discussed.

It was there pointed out that "The offence of criminal breach of trust is completed

(2) 15 Ind. Cas. 319; 34 A. 487; 10 A. L. J. 45; 13 Cr. L. J. 479;

(3) 26 Ind. Cas. 136; 38 M. 639; 16 M. L. T. 505; (1914) M. W.N. 894; 29 M. L. J. 175; 15 Cr. L. J. 688.

(1) 19 A. 111; A. W. N. (1896) 191.

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(assuming a preliminary trust) by the misappropriation or conversion of the property dishonestly....It is only the intention which is essential. Whether wrongful gain or loss actually results is immaterial; it is a consequence, but no essential part of the offence, and a person is not accused of the offence by reason of it."

The judgment is particularly apposite to the facts of the present case and the continuing portion may well be quoted:—

"The learned Public Prosecutor has drawn our attention to the second part of section 405, which deals with dishonest use or disposal of property in violation of law or contract. He says accused had contracted by letters received at Dharapuram to remit the amounts to the complainants there; and argues that the contract was broken by failure to deliver the money at Dharapuram, and that this fact gives jurisdiction to the Erode Court.

"We are unable to follow this reasoning. In the first place the present case falls under the first, and not the second part of the section: the complaint clearly charges dishonest misappropriation to accused's own use, and not use or disposal in violation of law or contract.

"Secondly, if it were otherwise, the offence would be committed where the dishonest use or disposal took place not where the contract was made or should have been performed."

On behalf of complainant *Rajani Benode Chakravarti v. All India Banking and Insurance Co.* (4) is cited, but the circumstances of the two cases are not parallel. The complaint in the Calcutta case contained allegations of cheating, forgery and fraudulent tampering with a document and the Court was of opinion that there was no doubt on the allegations that the Courts at Lahore and Chittagong were equally competent to exercise jurisdiction.

There was, therefore, no doubt as to the Court by which the offences could be tried or enquired into.

In the present case it is not disputed that the offence is triable at Rangoon, whereas it is more than doubtful if the Maymyo Court has jurisdiction.

Section 181, sub section 2, expressly lays down where the offence of criminal breach

(4) 22 Ind. Cas. 192; 41 C. 305; 17 C. W. N. 1207; 15 Cr. L. J. 48.

of trust can be tried, and under that section the Maymyo Court certainly has no jurisdiction.

It does not appear to be justifiable to appeal to section 179 and strain what I take to be its plain construction in order to give the Maymyo Court jurisdiction, simply because complainant resides in Maymyo and it would suit his personal convenience to have the case tried there.

My decision is that the offence must be inquired into or tried by a Court in Rangoon.

Application allowed.

BOMBAY HIGH COURT.

CIVIL APPLICATION No. 681 OF 1919.

October 15, 1919.

Present:—Sir Norman Macleod, Kt., Chief Justice, Mr. Justice Heaton and Mr. Justice Kajiji.

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AND OTHERS—RESPONDENTS

Letters Patent (Bom.) 1865, cl. 10—Bombay Pleaders Regulation (II of 1827), s. 56—"Misbehaviour" meaning of—Disciplinary jurisdiction of High Court, extent of—Satyagraha pledge, signing of, by lawyer, whether unprofessional.

In the exercise of its disciplinary jurisdiction the High Court can deal with a legal practitioner in the same way as if he were applying for enrolment. [p. 682, col. 1.]

The term "misbehaviour" in section 56 of Bombay Regulation II of 1827 is not restricted to misbehaviour in the strict course of a Pleader's professional duties, but includes general misbehaviour. [p. 681, col. 1.]

There may be acts which would entitle the High Court to refuse admission to a candidate seeking to be enrolled as a Pleader or an Advocate, or to consider that it is improper that a Pleader or Advocate should remain as a practitioner of the Court, although the acts complained of do not involve an imputation of general infamy or bad character. [p. 683, col. 1.]

Where certain legal practitioners signed the following pledge:

"Being conscientiously of opinion that the Bills known as the Indian Criminal Law (Amendment) Bill I of 1919 and the Criminal Law (Emergency Powers) Bill II of 1919 are unjust, subversive of the principles of liberty and justice, and destructive of the elementary rights of individuals on which the safety of the community as a whole and the State itself is based, we solemnly affirm that in the event of those Bills becoming law and until they are

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withdrawn we shall refuse civilly to obey these laws and such other laws as a committee to be hereafter appointed may think fit, and further affirm that in this struggle we will faithfully follow truth and refrain from violence to life, person or property:

Held, that those who had signed this pledge were not fit persons to be allowed to continue as members of the legal profession. [p 684, col 1.]

Sir Ohimanlal Setalvad (with him Messrs. V. Divatia, G. N. Thakor, Ratanlal Ranchhoddas, Jayakar and M. H. Vakil), for the Respondents.

Mr. Bahadurji, acting Advocate-General (with him Mr. S. S. Patkar, Government Pleader), in support of the notice.

JUDGMENT.

MACLEOD, C. J.—A notice was issued by the High Court in its Disciplinary Jurisdiction on the 12th of July 1919, against Jivanlal Varajrai Desai and Vallabhaji Jhaverbhai Patel, who are Barristers at law and Advocates of this Court, and Mr. Krishnalal Narsilal Desai, High Court Pleader, at present practising in the Courts at Ahmedabad. The reason for issuing the notice was the receipt of a letter from Mr. Kennedy, the District Judge of Ahmedabad, dated the 22nd of April 1919, which runs as follows:—

1. "I have the honour to submit for the determination of their Lordships the question of the Pleaders of this Court who have signed what is known as the Satyagrahi pledge. The following are the Pleaders practising here who have given in their names as members of the Satyagrahi league.

Mr. Gopalrao Ramchandra Dabholkar.

Mr. Krishnalal Narsilal Desai, High Court Pleader.

Mr. Manilal Vallabhram Kothari.

Mr. Kalidas Jaskaran Jhaveri.

There are others who have not yet given in their names to me.

2. I had an interview with the above gentlemen on the 16th and expressed my sentiments and elicited theirs. I asked for some sort of satisfactory explanation of the sense in which they took the Satyagrahi oath. They have furnished an explanation which I do not think is satisfactory. I, therefore, submit the case for orders, as I suppose the question is general to all Districts.

3. As I understand the Satyagrahi oath, it binds the signatories not only to oppose the Rowlatt Bills and cognate legislation, but to break all laws of whatever kind which a committee may decide should be broken. I gather also from the papers that some illegal acts have been already ordained. I cannot myself see that the public adherence to a body which has that rule binding on it, is consistent with the duty of a Pleader and the terms of his Sanad, and I think the explanation furnished by the Pleaders leaves matters much where they are.

4. I am not in any way impressed by the temporary suspension of the illegal activities of this league. There can be no doubt (at least I have none) that suspension is merely a device to avoid the possibility of punishment falling on the Satyagrahis in respect of acts directly or indirectly due to their teaching and influence, the actual perpetrators of which and the instigators of which are likely to meet with condign punishment.

5. I am of the belief that the above gentlemen are sincerely and conscientiously under the impression that the Rowlatt Bill legislation is a crime, and as they have that impression, I would not blame them for going to the edge of the law to oppose it. They are all men for whom I have considerable esteem, and I have known them and appreciated them for some years, and it is very painful for me to raise their case, but I am of the opinion that they are unfit to practise until they have severed their connection with this league in the same public way in which they have joined it.

6. There are also at least two Barristers who have joined and are prominent members of the local league.

Mr. Jivanlal Varajrai Desai.

Mr. Vallabhaji Jhaverbhai Patel.

But I have no power to deal with them and very likely recent events in Ahmedabad may make it unnecessary to proceed against them. I enclose a copy of the Satyagrahi oath and of the explanation and covering letter of three of the Pleaders concerned. No one would be more pleased than myself if it could be found that the explanation

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was satisfactory. But personally I am of the opinion it is not."

Accompanying the letter were copies of what is known as the "Satyagrahi oath," and letters to the District Judge from Messrs. G. R. Dabholkar, Krishnalal Narsilal Desai, Kalidas Jaskaran Jhaveri and Manilal Vallabhram Kothari, explaining their conduct as the District Judge had requested at an interview with them on the 16th of April. It will be noted that the District Judge did not consider this explanation satisfactory, and that he considered that those four Pleaders were unfit to practise until they had severed their connection with the Satyagrahi league in the same public way in which they had joined it. With regard to Messrs. Jivanlal Varajrai Desai and Vallabhrai Jhaveribhai Patel, Barristers-at law, who the Judge stated had joined and were prominent members of the local league, the Judge said he had no power to deal with them.

This notice was issued under clause 10 of the Letters Patent. A similar notice was also issued on Messrs. G. R. Dabholkar, Manilal Vallabhram Kothari, and Kalidas Jaskaran Jhaveri, under clause 56 of the Bombay Regulation II of 1827. Cause has now been shown by all the respondents and it has been admitted by Sir Chimanlal Setalvad, who appeared for Messrs. J. V. Desai, G. R. Dabholkar and K. N. Desai, that whether they are to be dealt with under clause 10 of the Letters Patent or clause 56 of the Bombay Regulation II of 1827, the same principles are involved.

In the case of *Government Pleader, Bombay v. Annaji Narayan Deshpande* (1) it was held that the term "misbehaviour" under clause 56 of the Bombay Regulation II of 1827 is not restricted to misbehaviour in the strict course of a Pleader's professional duties, but includes general misbehaviour. And in *Sarbadhicary, In re* (2) at page 45, appears the following passage:—

"Their Lordships will not attempt to give a definition of 'reasonable cause,' or

to lay down any rule for the interpretation of the Letters Patent in this respect. Every case must depend on its own circumstances. It is obvious that the intention of the Crown was to give a wide discretion to the High Court in India in regard to the exercise of this disciplinary authority."

The powers of a Court in dealing with cases of alleged misconduct against attorneys are described in *Hill, In re* (3). An attorney, while acting as a clerk to a firm of attorneys, in completing the sale of certain property, received the balance of the purchase-money, which he appropriated to his own use. On an application to strike him off the roll, he admitted the misappropriation, and it was held that although the misconduct was not committed strictly in his professional character, yet, as it was misconduct which would have prevented him from being admitted as an attorney, the Court would exercise its summary jurisdiction, and punish the misconduct. Lord Blackburn said:—

"But where there is a matter which would subject the person in question to a criminal proceeding, in my opinion, a different principle must be applied. We are to see that the officers of the Court are proper persons to be trusted by the Court with regard to the interests of suitors, and we are to look to the character and position of the persons, and judge of the acts committed by them, upon the same principle as if we were considering whether or not a person is fit to become an attorney."

Lord Cookburn said:—

"I should add, there is one consideration I omitted, and which, I think, is entitled to great weight. It is that put to us in the course of the discussion, namely, that if these facts had been brought to our knowledge upon the application for this gentleman's admission, we might have refused to admit him; and I think the fact of his having been admitted does not alter his position; having been admitted, we must deal with him as if he were now applying for admission; and as in the case of a person applying for admission as an attorney, we should have considered all

(1) 19 Ind. Cas. 529; 37 B. 354; 15 Bom. L. R. 231; 14 Cr. L. J. 257.

(2) 34 L. A. 41 at p. 45; 9 Bom. L. R. 9 at p. 14; 4 A. L. J. 34; 17 M. L. J. 74; 11 C. W. N. 273; 5 C. L. J. 110; 2 M. L. T. 1; 5 Cr. L. J. 152; 29 A. 95 (P. C.).

(3) (1868) 3 Q. B. 543 at pp. 546, 547; 9 B. & S. 481; 37 L. J. Q. B. 295; 18 L. T. 564; 16 W. R. 1061.

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the circumstances, and either have refused to admit, or have suspended the admission for a certain time, so where a person has once been admitted we are bound, although he was not acting in the precise character of an attorney, to take notice of his misconduct."

It is not suggested that the respondents have done anything which would subject them to criminal proceedings, but that case is sufficient authority for stating that we can deal with the respondents in the same way as if they were now applying for enrolment.

It is necessary, therefore, to carefully consider the terms of the document known as the Satyagraha oath or pledge which, according to the copy sent to us by the District Judge, runs as follows:—

"Being conscientiously of opinion that the Bills known as the Indian Criminal Law (Amendment) Bill I of 1919, and the Criminal Law (Emergency Powers) Bill II of 1919 are unjust, subversive of the principles of liberty and justice, and destructive of the elementary rights of individuals on which the safety of the community as a whole and the State itself is based, we solemnly affirm that in the event of these Bills becoming law and until they are withdrawn we shall refuse civilly to obey these laws and such other laws as a committee to be hereafter appointed may think fit, and further affirm that in this struggle we will faithfully follow truth and refrain from violence to life, person or property."

The movement to obtain signatures to this oath commenced in February. I may say at once that no one can reasonably object to the right of a citizen to express his opinion as to the merits or demerits of a legislative measure proposed to be adopted by the Government and, if he is opposed to it, to take every means to induce Government to withdraw it, provided he keeps within the bounds imposed by established law. The signatories to the oath have expressed their objection to these Bills, which came to be known as the Rowlatt Bills, and affirmed that they would civilly refuse to obey them if they became law. Civilly according to the dictionary means in a polite manner, politely. It is suggested that civil or polite

disobedience is the same as what is known as passive resistance. That is not so. Passive resistance connotes complete inaction in the presence of a command of law, that is to say, the refusal to do what the law commands, while disobedience includes the doing of something which is forbidden by law. Whether the disobedience is active or passive depends on the nature of the law which it is intended to disobey.

Now we are concerned in this matter with the conduct of the respondents not as citizens but as Advocates and Pleaders.

We have nothing to do with their political views, nor have we anything to do with expressions of opinion on their part, however strong, against any particular measure proposed by the Legislature. But a public declaration made by an Advocate or a Pleader that he has bound himself civilly to disobey any laws which a committee to be thereafter appointed might think fit, appears to me to go very much further than a mere expression of opinion as to the merits of a Bill proposed by a Legislature. I take it for the purpose of the argument that the respondents, as Mr. Kennedy believes, were sincerely and conscientiously under the impression that the Rowlatt Bill legislation was a crime, and that they honestly thought that signing the Satyagraha pledge would be a constitutional form of agitation against the passing of the Rowlatt Bills. But I have to consider whether the signing of such a pledge is consistent with the duties which they owe as officers of this Court. Advocates and Pleaders are a privileged class enrolled not only for the purpose of rendering assistance to the Courts in the administration of justice, but also for giving professional advice, for which they are entitled to be paid, to those members of the public, who require their services. Their position, training and practice give them immense influence with the public and their example must necessarily have a much greater effect, whether for good or for evil, than the example of those who do not occupy this privileged position. It is not necessary in order for us to be able to exercise our jurisdiction that any offence should have been committed, nor is it necessary that what the respondents have done should have subjected them to anything

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like general infamy or imputation of bad character. The case of *Walloce, In re* (4) was relied on by the respondents. But I do not think that Lord Westbury in giving judgment went so far as to say that an act to render an attorney remaining in the Court as a practitioner improper must necessarily be an act committing an attorney to anything like general infamy or an imputation of bad character. That was an appeal from a decision of a Canadian Court, and as regards the respondent in the case proceedings of a different nature could have been taken against him for the act complained of. Under the Letters Patent and the Regulation each case must be decided on its own facts, as their Lordships of the Privy Council said in *Sarbadhi-cary's case* (2) and in my opinion there may be acts which would entitle us to refuse admission to a candidate seeking to be enrolled as a Pleader or an Advocate, or to consider that it was improper that a Pleader or Advocate should remain as a practitioner of the Court, although the acts complained of do not involve an imputation of general infamy or bad character. This pledge, however, can be said to involve, if not directly, certainly indirectly, the professional character and reputation of the respondents. Their duty as Pleaders and Advocates under their Sanads is to advise their clients to the best of their abilities as to what the law is, not as to what the law should be in their opinion. But it would be impossible for them to keep their duties to the League separate from their professional duties. This conflict would become the more pronounced if any of the respondents had occasion to advise his client regarding one of the laws denounced by the league.

Sir Chimanlal was asked whether his clients would be able to give advice conscientiously to their clients without being influenced by their pledge, and Sir Chimanlal replied that they would give advice as lawyers conscientiously and not as Satyagrahis. He was bound to say that, but the atmosphere of this Court, before which his clients have been arraigned, is somewhat different to the atmosphere of their consulting chambers in Ahmedabad. Supposing

for instance the committee had denounced the Income Tax Act, the respondents would be bound by their pledge to refuse to fill in the schedules sent to them for the purpose of assessment. If a client consulted one of them regarding the way in which the schedule should be filled in he would be on the horns of a dilemma. Every member of the League of this description is of necessity a propagandist. To arrive at the desired end as many adherents must be gathered in as possible, no opportunity of doing so must be lost. It would, therefore, be the respondent's duty as a Satyagrahi to persuade the client to disobey the law, it would be his duty as an officer of the Court to tell the client to obey.

It cannot be doubted for a moment that it is extremely undesirable that any of those who hold Sanads as Advocates or Pleaders of this Court should find themselves involved in this conflict of duty. Then there is the danger of their example being followed by persons who do not possess that high moral character, that love for the truth, that abhorrence of all ideas of violence to life, person or property possessed by the respondents. It would appear on the face of it that the signatory to the pledge abdicates all independent judgment in favour of an unknown body of his fellow signatories. I am told that if the committee referred to in the pledge called upon the signatories in pursuance of their pledge to do acts repugnant to the respondents' feelings, they would not act in accordance with their pledge. If that is the case, the signing of the pledge would not involve any obligation on the part of the signatories to act according to the pledge, and if a signatory considers himself entitled to form his own opinion whether he should follow the lead of the committee or not, it follows that the pledge is worthless and he would much better not have signed it. But the public can only judge men by their actions, and the more ignorant and less educated of the public who sign the pledge and see the names of other signatories are not acquainted with the mental reservations of their fellow signatories. A very sound principle to remember is that those who live by the law should keep the law. I should certainly be inclined to grant a Sanad of this Court to

(4) (1866) 1 P. O. 283; 4 Moore P. O. (N. S.) 140; 36 L. J. P. O. 9; 15 W. R. 533; 16 E. R. 269.

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any one who I knew was a signatory to this pledge, for I should not consider him a proper person to be enrolled in that privileged class referred to above. That being so, I should be inclined to say under the powers given us by the Charter and the Regulation that a person who had signed this pledge was not a fit person to be allowed to continue amongst that privileged class.

Turning now to the letters of explanation given by the Pleader respondents to the District Judge, I am not surprised at his expressing the opinion that they were not satisfactory. It must be remembered that those letters were written a few days after the lamentable riots on the 10th and 11th April at Ahmedabad and, though I do not for a moment suggest that any of the respondents took any part either directly or indirectly in those riots, it is a matter of common knowledge that there had been several meetings attended by thousands of millhands during March and the first ten days of April which were summoned by the leaders of the Satyagraha Sabha. Whether those meetings had any connection with the subsequent riots was a question which was not discussed during the course of the arguments, but it has already been the subject of judicial decision. The District Judge considered he had no power to deal with the Barrister respondents; so the record contains no letter of explanation from them. Mr. J. V. Desai, however, has put in an affidavit at the last moment, a proceeding which cannot be commended considering that the hearing of these notices has twice been adjourned for the convenience of the respondents, while Mr. V. J. Patel with wiser discretion has contented himself by being represented before us by Mr. G. N. Thakore who supported the argument of Sir Chimanlal.

There is no need to deal with Mr. Desai's affidavit. It is sufficient to say that it does him no credit.

I have refrained from dealing with many points contained in the argument of Counsel for the respondents, which concern rather the politician than the Judge, and are, therefore, always open to controversy. The plain issue is what are the duties of the respondents to this Court?

I have waited in vain for any acknowledgment on the part of the respondents that they have realised, in the events which have happened, that, however harmless and constitutional they may have considered this movement when it was started, it is absolutely incompatible with their duties as lawyers to the High Court that they should continue to take part in it.

Sir Chimanlal did indeed say that it might be that the Satyagraha movement would receive its quietus. He hoped and trusted that it had received its final quietus now. That no doubt was his own personal opinion, but is there any trace on the record that that was also the opinion of the respondents?

Sir Chimanlal also said it was open to the signatories to withdraw from the pledge. Then why does not he advise his clients to do so now?

I wish to make it perfectly clear that apart from all other considerations, those who are enrolled as Advocates and Pleaders of this High Court or of the District Courts cannot serve two masters. It may be that after due consideration of this expression of our opinion the respondents may see the force of it. We have no desire to deal harshly with them, and for the present we shall content ourselves with giving them this warning. We do so because we are told that the Satyagraha Sabha since the riots of April has been quiescent. Whether we shall take any further action depends entirely on the development if any of the Satyagraha movement, so that these notices will be adjourned with leave to the Advocate-General and the respondents to move for their restoration to the Board should occasion arise.

In connection with these notices there has been a regrettable incident of which we are bound to take notice. An application was made to this Court by some of the respondents or their Pleaders for copies of Mr. Kennedy's letter. Copies were furnished and considering that the respondents were lawyers, it did not appear necessary to inform them that such copies were given to them for their private information and not for publication. That letter was published before the case came on for hearing in Court. Who is responsible for what we must regard as a very grave

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breach of a well-recognized rule we cannot say. We are quite sure that the legal advisers of the respondents are free from blame; if the respondent or respondents who published the letter do not give in his or their names to the Registrar, the blame must for the present rest on all the respondents.

HEATON, J.—I concur generally in the judgment just delivered by my Lord the Chief Justice and I concur in the order proposed by him. There are, however, a few words of my own to add. One of the legal gentlemen concerned in these proceedings in dealing, in an affidavit, with the Rowlatt legislation and the Satyagraha movement wrote as follows:

"I believe that it is the inherent right of a citizen to protest against such legislation by such constitutional methods and I have merely acted on that *bona fide* belief."

Of the rights of ordinary citizens however little need be said, for we are not dealing with the case of ordinary citizens. Our notices were issued against professional lawyers, and it is with them and with them only that we are concerned. They belong to a privileged class and they enjoy their privileges with our consent. But just as they enjoy special privileges, so they are under peculiar obligations. Moreover, this Court is under special obligations in regard to them. Just as it licenses or permits them to practise as lawyers, so it is bound to see that they do not flagrantly abuse their privileges.

I will first deal with their obligations to clients. We not unnaturally asked what advice would a professional lawyer, who had taken the Satyagraha pledge, give to a client who asked him whether as a citizen he ought to obey one of those laws which as a lawyer he was pledged civilly to disobey. If the lawyer's answer were that, to quote the words of the pledge "the law was unjust, subversive of the principles of liberty and justice and destructive of the elementary rights of individuals" and ought to be disobeyed, then a position would arise which we could not but consider reflected very unfavourably on the lawyer's performance of his professional duty. For, it is as much the

lawyer's duty in dealing with his client to act on the law as it is, not as he would have it be, as it is the duty of a Judge to do the same.

We were, however, most positively assured by Counsel who appeared for the respondents that this would not happen. In other words, we are told that though as citizens the respondents would unhesitatingly assert that certain laws ought not to be obeyed; yet they would, as professional lawyers, advise their clients that those same laws had to be obeyed. It may be so; but the temptation to tell the client that the law should be disobeyed would at least be severe, and would place them in a position which no conscientious lawyer ought to occupy.

I will now turn to the duty of professional lawyers to this Court and to the law. They are bound, as I have said, to act according to the law as it is, not as they would have it be. Criticism of the law, even severe criticism, is permitted even to Judges, much more so perhaps to professional lawyers. Nevertheless it is a matter of conscience with both, that they are to recognize and give effect to the law. We must assume that professionally the respondents would obey all the laws: but as they have taken a pledge, as citizens, to disobey certain laws, their position is just as unsatisfactory in relation to this Court and to the law as it is in relation to their clients.

It seems to me that professional lawyers cannot fulfil both the obligations of the Satyagraha pledge and the obligations of their profession. They are pledged to follow the truth, but this they cannot consistently do if they disobey certain laws as citizens whilst as lawyers they obey and advise obedience to those same laws.

It has been necessary to say all this, as I gather that the respondents are blind to the fact that there is anything unsatisfactory or unbecoming in their attitude. They are under the impression that their position as professional lawyers is correct. But to me it seems to be essentially incorrect.

Suppose we were dealing with those who desired to become professional lawyers

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and who applied to us for enrolment on our list of Advocates or for Sanads to practise as Pleaders. Should we grant the applications? I greatly doubt it. At any rate until the applicants had given definite undertakings that they would limit their political activities, not merely so as not to interfere with, but so as not to excite suspicion as to the correctness of their professional conduct.

The attitude which the respondents have adopted is to my mind undeniably embarrassing and unseemly from a professional point of view. But need we anticipate that anything worse will follow? That we cannot say. It depends on the development of the Satyagraha movement with which the respondents have intimately associated themselves.

KAJIJI, J.—I have had the advantage of reading the judgments of my Lord the Chief Justice and brother Heaton and I concur in the order proposed and have nothing to add.

*Respondents warned;
Notice adjourned.*

PATNA HIGH COURT.
CRIMINAL REVISION No. 423 OF 1918.
January 3, 1919.

Present:—Mr. Justice Jwala Prasad.
CHAKAURI RAI—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1869), s. 203—Criminal Procedure Code (Act V of 1898), s. 476—Order directing prosecution—Preferring false claim—Accused, whether must be given opportunity to show cause.

The mere dismissal of a suit in the absence of a clear finding that the suit was false and was brought with intent to injure the defendant, is not a justification for directing the prosecution of the plaintiff under section 209 of the Penal Code. [p. 638, col. 1.]

Where a plaintiff is called upon to show cause why he should not be prosecuted under section 209, Penal Code, he should be afforded every opportunity of adducing evidence in support of his claim and to remove any doubt in the mind of the Court as to the falsity of the case. [p. 638, col. 2.]

Criminal revision against the order of the Munsif, Siwan, dated the 23rd November 1918, directing the prosecution of the petitioner under section 476, Criminal Procedure Code, for an offence under section 209, Indian Penal Code.

Messrs. P. K. Sen and Rajendra Prasad, for the Petitioner.

Mr. Manohar Lall (Assistant Government Advocate) for the Crown.

JUDGMENT.—This is an application against an order of the Munsif of Siwan, dated the 23rd November 1918, passed under section 476 of the Code of Criminal Procedure directing the prosecution of the petitioner for an offence under section 209 of the Indian Penal Code. The facts are as follows:—

The petitioner brought a suit on the 29th May 1918 for recovery of Rs. 100 principal, with interest, from the defendant. The claim was based on a Farad Hisab, which purported to bear the thumb impression of the defendant and to have been signed by one Ram Narain Lal on behalf of the defendant. The defendant denied his liability, his having put the thumb impression on the Fard Hisab and his having authorised Ram Narain Lal to sign on his behalf. As a motive for the false case the defendant alleged that the plaintiff had demanded oil from him at a cheaper rate on the occasion of his daughter's marriage, which the defendant refused to supply.

On 30th July 1918 the Munsif on hearing the evidence of both sides dismissed the suit of the plaintiff. On 7th November 1918, more than three months after the disposal of the suit, the Munsif issued a notice upon the petitioner to show cause, on or before the 23rd November 1918, why he should not be prosecuted under section 209 of the Indian Penal Code, or under any other provision of the law, for having laid a false claim in the aforesaid suit.

On the 23rd November 1918 the petitioner showed cause, asserting that the claim was not a false one, and wanted to apply for time to adduce evidence. The Munsif rejected the petition with the remark: "The Pleader for the opposite party says that he has no instructions. From the judgment of the Small Cause Court Suit No. 233/73 of 1918

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it appears that the Court found that the suit was falsely brought by the opposite party. A motion in the High Court against the judgment has already been rejected. I direct that the opposite party be prosecuted under section 209, Indian Penal Code, by the Sub Divisional Magistrate of Siwan for bringing the said Small Cause Court suit falsely. Let a proceeding be drawn up, and send the same to the Sub Divisional Magistrate by the 29th November 1918 for necessary action." Aggrieved by the said order, the petitioner has come to this Court.

It appears to me that the order of the Munsif directing the prosecution of the petitioner must be set aside. The basis of the order under section 476 is solely the judgment of the Munsif in the suit brought by the plaintiff; but in that judgment there is no finding of the elements that constitute section 209 of the Indian Penal Code to justify the Munsif to take action under section 476 on the ground that a *prima facie* case was made out against the petitioner. The claim of the plaintiff was based upon a Fard Hisab which purports to bear the thumb impression of the defendant and to have been signed by one Ram Narain Lal (P. W. No. 3) on his behalf. The thumb impression was blurred and the expert could not come to any definite opinion as to whether it was or was not of the defendant. So from the internal evidence of the thumb impression, the Fard Hisab could not be held to be a false document. Ram Narain Lal and Manhgu Raut (P. W. No. 6) swear that the defendant put his thumb impression and that the former signed for him and at his request. The Munsif has not disbelieved this evidence in his judgment, nor has he held that the Fard Hisab was necessarily a forged document. The Fard Hisab relates to old debts, the account of which was settled at the time of execution of the Fard Hisab. Most of these debts consisted of rents paid by the plaintiff to the landlord for and on behalf of the defendant. In support of this the plaintiff filed village papers such as Siahas, counterfoil books from 1318 to 1322, and examined the Patwari Gopee Lal (P. W. No. 5) and Durbal Gossain (P. W. No. 4), an agent of the Malik, who proved that the rents of the land held by the defendant were paid by the plaintiff. The Munsif again does not say a word about the oral evidence

of the plaintiff as to the aforesaid payment of the rents, which formed a part of the consideration of the Fard Hisab in suit. He suspected the genuineness of the Siahas and the counterfoils for the reasons given by him. Of course it is impossible to believe that for the sake of the plaintiff the landlord would forge his counterfoil books and Siahas extending over long years from 1318 to 1322. Be that as it may, there may be reasons for the Munsif to suspect these papers which may be considered to have been disposed of by his judgment, but no attempt has been made by him to dispose of the oral evidence on the point. Unless it was held that the old debts in respect of which the Fard Hisab in question was executed did not exist, the claim of the plaintiff could not be said to be false even if the Fard Hisab be held to be a forged one for the purpose of supporting the plaintiff's just claim. The Munsif only holds that he is not satisfied that there was any dealing between the plaintiff and the defendant, or that the Fard Hisab was executed by him. This is not a sufficient finding that the case of the plaintiff was a false one to his knowledge and was brought with intent to injure the defendant.

The Munsif has accepted the statement of the defendant that he had refused to supply to the plaintiff a higher quantity of oil per rupee. This is supported only by one witness Ramnandan. It may be enough for the Munsif to suspect the case of the plaintiff, but it is certainly not enough for putting the plaintiff on his trial when the onus of proving the falsity of the claim would be upon the defendant. Upon the record there is nothing to show conclusively that the claim of the plaintiff was a false one and there is not a clear finding of the Munsif upon the point. On this ground alone the Rule must be made absolute.

Yet there are other grounds. The Munsif did not use judicial discretion in directing the prosecution of the petitioner—there is absolutely no chance of any conviction. The oral evidence of the witnesses on behalf of the plaintiff, who swear that an account was made, the Fard Hisab was executed and the defendant put his thumb impression upon it and got it signed by Ram Narain Lal for himself

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and that rents were paid by the plaintiff to the landlord, has not been disposed of by the Munsif at all and it will be difficult for the Criminal Court to hold that the witnesses were all lying. Against this the prosecution will have no evidence to show that the claim of the plaintiff was false and was instituted with intent as contemplated by section 209 of the Indian Penal Code. We cannot expect any more evidence than is on the record. The prosecution will rest entirely upon the sole testimony of the defendant. His only witness will not be able to prove the falsity of the claim but that there was a motive to bring a false case. It is a fundamental principle that in a case of this kind there must be a clear case for putting the accused on his trial before directing the prosecution. The mere dismissal of the plaintiff's case, or his failure to prove it, does not necessarily render the plaintiff liable for prosecution under section 209 for bringing a false claim.

Yet another ground—the civil suit was disposed of on the 30th July. More than three months after, on the 7th November, the Munsif issued a notice on the petitioner to show cause why he should not be prosecuted. The Munsif, however, explains this by saying that he had already moved the District Magistrate through the District Judge on the 3rd August 1918 for taking action against the petitioner under Government Circular No. 697-701-J, dated the 18th October 1913, and that the District Magistrate declined to proceed against the petitioner by his letter received by the Munsif on the 6th of November 1918. This was also four days after the judgment of the Munsif. Be that as it may, it does not appear that the Munsif himself, on the 30th July 1918 when disposing of the case, had not (*sic*) contemplated any action to be taken by (*sic*) the petitioner himself *suo motu*. If that were so, he would have at once started proceedings under section 476 instead of writing to the District Magistrate to take action under the Government Circular, by helping the defendant in obtaining a sanction under section 195. The Munsif apparently did not consider that the case was so clear as demanded a prompt action under section 476 of the

Code of Criminal Procedure. I am aware of instances of much longer delay in proceedings taken under section 476, but it must be dependent on the circumstances in each case where it was originally in the mind of the Court at the time of trying the case that an action under section 476 would be necessary.

Again the Munsif directed the petitioner to show cause within a fortnight of the issue of the notice. The petitioner did appear and showed cause, but wanted time to prove his case. Considering the lapse of time since the judgment was passed, the Munsif should have, in my opinion, allowed time to the petitioner to remove any doubt that may have remained in the mind of the Munsif regarding the truth of his case. The Munsif declined to do so and at once directed the prosecution of the petitioner upon the grounds mentioned in his judgment. It has already been shown that the judgment of the Munsif in the suit does not afford sufficient ground for holding that the case of the plaintiff was necessarily false to his knowledge and was brought with intent to injure the defendant. The mere use of the word 'false' at the end of the judgment by the Munsif does not comply with the requirements of section 209 of the Indian Penal Code.

The order of the Munsif, dated the 23rd November 1918, directing the prosecution of the petitioner is, therefore, without jurisdiction and is hereby set aside.

Order set aside.

JAGANNATH KASHIRAM v. SHANKAR GANPAT.

BOMBAY HIGH COURT.

LETTERS PATENT APPEAL No. 29 of 1915.

July 30, 1919.

Present :—Sir Norman Macleod, Kt.,
Chief Justice, and Mr. Justice Haaton.
JAGANNATH KASHIRAM TAMBOLI—
APPELLANT

versus

SHANKAR GANPAT SHIMPI—
RESPONDENT.

Evidence Act (I of 1872), s. 92, proviso (4)—Mortgage, registered—Agreement, oral, to accept less than mortgage debt in full discharge of mortgage, whether can be proved.

Under proviso (4) of section 92 of the Evidence Act, oral evidence is inadmissible to prove an agreement whereby a mortgagor agrees to accept less than the amount due to him under a registered mortgage in full discharge of the mortgage. [p. 690, cols. 1 & 2.]

Letters Patent Appeal against the decision of Mr. Justice Batchelor in Second Appeal No. 971 of 1913, which confirmed the decree passed by the District Judge, Nasik, in Appeal No. 294 of 1912, confirming the decree passed by the Assistant Judge, Nasik, in Suit No. 241 of 1911.

FACTS of the case appear from the following judgment of

BACHELOR, J.—The appellant, who was the plaintiff below, brought this suit to recover on two mortgages dated 1894 and 1899. The original mortgagor was one Ganpat, the father of the present defendants. The defence was that the mortgages had been discharged by a payment of Rs. 800 made by Ganpat to the mortgagee. It was shown that Ganpat and the mortgagee were friends, and that Ganpat on his death-bed prevailed upon the mortgagee to accept Rs. 800 in full satisfaction of the mortgage claim. It was further found that the money was there and then formally paid over to the mortgagee in the presence of several persons. That is a finding of fact in which both Courts have concurred, and it cannot of course be canvassed in this Court.

The appeal, however, is based upon the argument that the evidence as to this circumstance was inadmissible under section 92 of the Indian Evidence Act, read with proviso 4 of that section. I am of opinion, however, that the evidence was admissible.

The evidence which under section 92 would be inadmissible would be evidence of an oral agreement or statement for the purpose of contradicting, varying, adding to, or subtracting from the terms of the original mortgage. That is not the evidence which was called and received in this case. The evidence called and received was directed to a totally different purpose, namely, the purpose of showing that these contracts of mortgage had been terminated by the discharge of the obligation imposed by them, and I see nothing in section 92 which prohibits the admission of such evidence. Illustration (e) to section 91 of the Act shows, what could not be disputed, that evidence as to the payment of Rs. 800 could unquestionably be received. It would appear from the case of *Ramlal Ohandra Karmokar v. Gobinda Karmokar* (1) that in a case substantially similar, so far as one can gather from the report, Rampini and Wilkins, J.J., took the view which I am taking now. The decree of the lower Appellate Court is affirmed and this appeal is dismissed with costs.

Mr. A. G. Sathaye, for the Appellants.

Messrs. G. S. Rao and D. G. Dalvi, for the Respondent.

JUDGMENT.

MACLEOD, C. J.—This is an appeal under the Letters Patent from the decision of Mr. Justice Batchelor. The trial Court had admitted evidence led by the defendant to show that the two mortgages in the suit were discharged by the mortgagees by a payment of Rs. 800. It was argued in appeal that this evidence was inadmissible, on the ground that it rescinded or modified the contract required to be in writing which had been registered according to law. The learned Appellate Judge has held that the evidence called and received was directed to a totally different purpose, namely, the purpose of showing that these contracts of mortgage had been terminated by the discharge of the obligation imposed by them, and he saw nothing in section 92 prohibiting the admission of such evidence. We have been referred to the recent case of *Karampalli Kuni Kurup v. Thekku Vittal Muthorakutti* (2)

(1) 4 C. W. N. 304.

(2) 26 M. 195

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which seems to be exactly on all fours with the present case. The head-note runs: "A subsequent oral agreement to take less than is due under a registered mortgage-bond is an agreement modifying the terms of a written contract, and, if it has to be proved, oral evidence is inadmissible under section 92, proviso 4, of the Indian Evidence Act." But the argument before us has been that there has not been a subsequent oral agreement to rescind or modify the mortgage, but there has been an actual discharge, and that oral evidence was admissible to prove a discharge. In my opinion there is no substance in that argument. The defendant's case must be that the mortgagee agreed to receive Rs. 800 in full satisfaction of the much greater amount which was due on the mortgage, and although he might have said when receiving Rs. 800 "I now discharge you from the mortgage," there was nonetheless an agreement which modified the original agreement of mortgage. It would be an extremely dangerous precedent if oral evidence were allowed of such agreements. In this case it may be noted that the plaintiff himself denied having received Rs. 800, or having given a discharge on the mortgage, although the payment has been proved as a fact. But one can easily imagine that there may be many cases where the mortgagor may set up a false case of such an agreement, and it appears to me that it was to meet such cases, *inter alia*, that proviso 4 of section 92 of the Indian Evidence Act was enacted. In my opinion the appeal must succeed. The result will be that the defendant will be allowed credit for Rs. 800, which he has proved he has paid to the mortgagee. We allow the appeal with costs in proportion throughout, and remand the case to the lower Court to take an account in accordance with this judgment.

HEATON, J.—I agree. But as the case presents so many possibilities of argument, I would like to put my conclusion in my own way. There are three ways in which the defendant's case might have been presented. The defendant might simply have pleaded that the mortgage was discharged and nothing further. That was not what he did plead, and presumably not what he could have proved. So I come to the

second way in which the defendant could make his defence, and that was the way he adopted. He said that an agreement had been entered into between the mortgagee and the mortgagor according to which, on the payment of Rs. 800, which was only a part of the mortgage debt, the mortgagee would give a complete discharge, and the mortgage-deed would cease to operate. It is found as a fact that Rs. 800 were paid. But this payment was a payment of part only of the mortgage debt, so the mortgage-deed would still be operative; it would still regulate the relations between the mortgagor and the mortgagee, unless there had been some modification of its terms. The modification suggested is that the mortgage debt should be changed, from what under the deed it would be, to a sum of Rs. 800. That would be a very large modification of the terms of the deed. This modification could not be proved, as is provided by proviso 4 to section 92 of the Indian Evidence Act, by the method by which the defendant sought to prove it. We cannot, therefore, take it that the defendant can succeed in that way. He has not shown that the mortgage debt has been discharged, because the law of evidence prevents him from showing it.

The third way in which the defendant might have presented his defence was one which has not been adopted by him, and as to which I will say nothing beyond mentioning it. He might have pleaded that the mortgagee had entered into an agreement to reconvey to him the mortgaged properties on payment of Rs. 800. Whether that defence would have availed him or not I do not know. But I do not wish my judgment to be understood as stating that a defence of that kind would necessarily be excluded by the law of evidence. I, therefore, agree with the proposed order.

Appeal allowed.

HARNANDROY V. GOOTIRAM.

CALCUTTA HIGH COURT.

APPLICATION IN ORIGINAL CIVIL SUIT No. 721
OF 1915.

May 12, 1919.

Present:—Mr. Justice Rankin.

HARNANDROY FOOLCHAND—

PETITIONER

versus

GOOTIRAM BHUTTAR—RESPONDENT.

Costs awarded to plaintiff—Death of plaintiff—Attorney, whether can realise costs from opposite party.

Where costs are awarded to a party and he dies before they are realised, and his legal representatives are unable to pay his Attorney's costs, it is open to the Attorney to ask the Court for an order for direct realisation of his costs from the opposite party. [p. 693, col. 1.]

Mr. B. L. Mitter (with him Mr. S. Ghose),
for the Petitioner.

Mr. P. L. Buckland, for the Plaintiff Firm.

JUDGMENT.—In this case I am prepared to make the order which is asked for by the Attorney against the plaintiff. An action was brought by the plaintiff against the defendant. The defendant happened to be the Receiver appointed by the Court of the assets of a certain firm. The plaint in the action shows that in the course of the work the defendant did as Receiver for that firm he executed certain promissory notes on which the plaintiff became in the end the endorsee, and the action was brought really against him as the maker of the note by a person to whom it had been endorsed by the original payee. That being so, there can be no doubt that the Receiver was personally liable and that the action was brought against him personally. Whatever the rights may be between the defendant in that action and the firm over whose assets he had been appointed Receiver, that was a matter which had nothing to do with the case, and in no way bound the plaintiff. It is like the simple case of an executor who, in order to carry out his duties, orders certain goods—it may even be for the funeral of his testator. The action that has to be brought against him by the supplier of those goods would be an action against him personally in respect of his order, and if it were brought in the form of an action against the executor as representing the testator's estate, it would be an action which was wrong in form. In the old days you could not have coupled such a claim with

a count for a debt which had been incurred by the testator in his lifetime.

Now, in the course of certain interlocutory proceedings, the defendant was successful and he obtained orders against the plaintiff for certain costs which have been taxed at Rs. 1,030. The defendant died, no steps were taken to reconstitute the action, and the action was dismissed, no order being made as to costs. In these circumstances the Attorney for the defendant comes before me and asks that I make an order to pay him Rs. 1,030 against the person who was plaintiff in the action. Now, the lien of an Attorney for his costs upon property recovered or preserved is not only one of the oldest doctrines of law, but one which is based on very manifest justice, and the objection to the order that I am asked to make is that, although the law which prevails here recognises the Solicitor's lien, I have no jurisdiction to make such an order as this because there is nothing in the Code or in the rules that enables me to make a direct order for payment to the Attorney. What exactly is the correct method of enforcing a Solicitor's lien I do not know on this hypothesis, but I presume it would be by starting another suit and going into the whole matter from the beginning with a plaint and written statement. In my view that is entirely unnecessary. I find that it has been held by the late Chief Justice of this Court when sitting as a puisne Judge at first instance on the Civil Side, *Khetter Kristo Mitter v. Kally Prosonno Ghose* (1), that there is authority to make an order for payment direct in this class of cases. If I may be allowed to say so, I think that the short and summary way in which that point was dealt with was the correct way to deal with it, to regard it as a matter of settled law, that when the Court has jurisdiction in an action it has jurisdiction not only as between the parties to that action, but also as regards those officers of the Court who act for the parties. If, for example, one is minded to give parties their costs out of a fund, and the fund is a fund that is in Court, it is an old Chancery practice to order payment to the Solicitor direct, and not to the parties. Why? Because the Solicitor is recognised by the Court; the matters between the Solicitor and his client, so far as they concern that

(1) 2 C. W. N. 508 at p. 511; 25 C. 887.

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action, are just as much under the hand of the Court as is the contention between the party and party, and the improvement as to procedure that was introduced into England by the Solicitors' Act is an improvement as to procedure only. Thus it may be that it is a better remedy to a Solicitor to apply against his own client in the action for an injunction to restrain his client receiving the proceeds of the judgment, and thus defeating the Solicitor. That remedy in the action it is still open to the Court to give. As between the Solicitor and his client, the action is in the hand of the Court, and when I find that the late Chief Justice did not feel himself hampered by any technicality, I am certainly not going to create a technicality that seems to me to be contrary to principle.

Now, the only other point which has been taken by Mr. Buckland is this. He says that this summary remedy is not to be regarded as a remedy *ex debito justitiæ*: it is only to be resorted to in a proper case, and *prima facie* it is not a proper case unless it is clearly shown that the Attorney is unable to recover his costs from his client.

Two cases have been cited to me for that, and upon consideration I think both of these cases are very special ones. The first is a divorce suit [*Harrison v. Harrison* (2)]: it is a case where a husband was granted a divorce against his wife, and one of the terms of the divorce was that he had to provide or secure an income for the wife to live upon of £130 per annum. The wife's Solicitors took out an application under the Solicitors' Act, and proposed to take their costs out of this annual maintenance of £130, and the Court said in effect, "We won't do that unless you satisfy us that that is really necessary." *Prima facie* the person responsible to pay the wife's costs was the husband, who in England is liable to pay the costs of his wife in such an action even although the wife is the opposite party. The Court's view was:—"We are not going to put our hand upon this tiny fund that is intended for the woman's living, unless we are shown it is reasonable and necessary in the circum-

stances. We do not think it would be a proper case under the Solicitors' Act." It was argued in that case that this £130 was a mere matter of alimony as it is strictly called; the Court held it was not alimony in strictness, and that the Solicitors' Act did, technically speaking, apply to it; but in substance it was a maintenance or living fund for the wife, and the Court would not let the Solicitors have recourse to that without being satisfied that it was reasonable and necessary.

The next case was the case of *Jackson v. Smith* (3). Now that case is this: there was a partnership action, an action for dissolution, and there was a Receiver appointed, the affairs of the partnership were wound up and there was a certain fund in Court, but the creditors of the firm had not been paid out of the fund; and when the learned Judge who decided that case (Mr. Justice Kay) was making his order upon further consideration he held that unless he was shown that the plaintiff was unable to pay his own Attorney's costs, he would not there and then at once make a charging order upon this fund so as to put this Attorney's costs in front of the creditors of the partnership. The plaintiff, who apparently did not desire to pay his own Attorney's costs if he could get out of it, preferred that the fund which the partnership creditors had to look to, should bear the brunt in the first instance. The Court said no, and I do not think that either of these decisions interferes with the exercise of my discretion upon the facts of this case. I am not going to lay down that I shall require an Attorney, before I enforce his lien, to satisfy me that he has utterly exhausted every possibility in order to get payment otherwise. It seems to me that this Solicitor is quite reasonable in coming to the Court to ask that the Court should allow him to stand in the shoes of this defendant and to claim this money which the plaintiffs have been ordered to pay. The original client is dead; there is evidence that his legal representatives are not people of substance; there is definite evidence they are unable to pay; and I think it is no

(2) (1888) 13 P.D. 180; 58 L.J.P. 28; 60 L.T. 39; 36 W.R. 784

(3) (1884) 53 L.J.Ch. 972; 51 L.T. 72.

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abuse at all of the summary powers of this Court for this Attorney to ask for an order which merely puts him in the shoes of his own client, so that this sum of money which was ordered to be paid in 1916 should at last be realised.

I shall direct that this order be made so far as the plaintiff is concerned, and that the plaintiff be ordered to pay those costs to the Attorney direct. As regards the legal representatives of the defendant, I have express power under the rules to make an order upon them to pay the costs of the Attorney. The order ought strictly to have been asked in Chambers, but of course it is elementary that anything I can do in Chambers I can *a fortiori* do in Court, and I do not think that any costs have been thrown away in joining both matters in one motion. So far as the legal representatives are concerned, I shall only allow the applicant the costs as of a Chamber application to be added to the amount which I shall order them to pay. The plaintiff must pay to the applicant half of the costs of this motion.

Application allowed.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 254 of 1917.

August 1, 1919.

Present:—Sir Norman Macleod, Kt.,
Chief Justice, and Mr. Justice Heaton.

CHANBASAYYA PADADAYA—

DEFENDANT—APPELLANT

versus

CHENNAPGAVDA RAMCHANDRA-

GAVDA PATIL—PLAINTIFF—RESPONDENT.

*Dekkhan Agriculturists' Relief Act (XVII of 1879),
s. 2 (1st)—“District to which this Act may for the time
being extend,” meaning of.*

The extension of the Dekkhan Agriculturists' Relief Act to a particular district contemplated in section 2 (1st) of the Act is the extension of the substantial portion of the Act and not merely the extension of a particular section or one or more sections. What is meant is that there must be an extension of the Act sufficient to provide that its main purpose applies to the district, or a really substantial part of the main purpose. [p. 694, cols. 1 & 2.]

First appeal from the decision of the Assistant Judge, Dharwar, in Civil Suit No. 23 of 1916.

Mr. D. A. Tuljapurkar, for the Appellants.

Mr. B. A. Jahagirdar, for the Respondents.

JUDGMENT.

MACLEOD, C. J.—The plaintiff sued to recover possession of the plaint land and Rs. 900 as mesne profits for three years before suit from the defendant. The suit was filed in the Court of the Assistant Judge of Dharwar. The defendant sought to prove by parole evidence that the sale-deed which he had admitted having executed should be construed as a mortgage. This was a defence which he could set up if he was an agriculturist at the time of the transaction, which was in 1903.

It is argued that the defendant could prove he was an agriculturist within the meaning of section 2 of the Dekkhan Agriculturists' Relief Act because the Act had been extended to the District of Dharwar before the execution of the sale-deed. When the Act was passed, sections 1, 11, 16, 60 and 62 only were extended to the whole of British India. The rest of the Act extended only to the Districts of Poona, Satara, Sholapur and Ahmednagar, but might, from time to time, be extended wholly or in part by the Local Government to other Districts. In 1903 sections 2 and 20 of the Act were extended to Dharwar. Clearly the object of that extension was to enable agriculturists to obtain the benefit of section 20, which enacts that the Court may at any time direct that the amount of any decree passed, whether before or after the Act comes into force, against an agriculturist, or the portion of the same which it directs under section 19 to be paid, shall be paid by instalments with or without interest. Section 19 had been repealed, and section 20 ought to have been amended accordingly.

It has been argued then that the defendant can prove that he was an agriculturist at the date of the execution of the sale-deed, but that argument depends upon the definition of 'agriculturist,' which expression under section 2 must be taken to mean 'a person who by himself or by his servants or by his tenants earns his livelihood wholly or principally by

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agriculture carried on within the limits of a district or part of a district to which this Act may for the time being extend, or who ordinarily engages personally in agricultural labour within those limits."

But I do not think it can be said that the Act has been extended by the Notification of 1903 to the Dharwar District, and that, therefore, the defendant can now prove that he was an agriculturist at the date of the transaction, so that he can be allowed to prove by parole evidence under section 10A that the sale-deed should be construed as a mortgage. It may have been the intention of the Local Government to enable a person resident in Dharwar to prove that he was an agriculturist in order to take advantage of section 20. Clearly such a person could only prove that he was an agriculturist if he was earning his livelihood wholly or principally by agriculture carried on, if he was a resident of Dharwar, in the Dharwar District, provided the Act had been extended to that District and, therefore, it may be said that the Local Government considered that the Act had been extended to Dharwar. But we have to consider what is the plain meaning of section 2. In my opinion it cannot be said that in 1903 the Act was extended to Dharwar merely because sections 2 and 20 were extended. What is meant by the extension of an Act to a District is the extension of the substantial portion of the Act, and not merely the extension of a particular section or one or more sections. Otherwise the Act would extend to the whole of British India because sections 1, 11, 56, 60 and 62 extend thereto. The plaintiff could only succeed if section 2 had contained the words "district to which this Act may for the time being either wholly or in part extend." In my opinion, therefore, the decision of the learned Assistant Judge was correct and the appeal must be dismissed with costs.

HEATON, J.—We have in this case, as has happened so often before, to consider the meaning of the word 'agriculturist.' Broadly speaking, at any rate for the purposes of this Court, there are two ways of ascertaining the meaning of that word: one way is to turn to the dictionary, the other way is to turn to the Dekkhan Agriculturists' Relief Act. But the

Dekkhan Agriculturists' Relief Act only provides you with an 'agriculturist' if that person (broadly speaking) is residing within the limits to which the Act has been extended. The word as used in the Act has no application whatever to cultivators and others who live outside those limits. In this particular case the person claiming to be an agriculturist lived and carried on his work in the Dharwar District and the transaction we are concerned with was of the year 1903. So we have to consider whether the Act extended to the Dharwar District in 1903. There can be no doubt that the Act cannot extend to a District because a few sections only extend. I think the Act itself provides us with good reason for saying this, because it provides that section 1 and four other sections extend to the whole of British India, and that the rest of the Act extends only to the four named Districts. I do not think that would have occurred in the Act itself if the Legislature had intended that the extension of these five sections would have to be regarded as an extension of the Act. I think the very contrary appears.

Then it may be said that the Act cannot extend to a District unless every single word of it extends. I do not think that applies either. I think what is meant is that there must be an extension of the Act sufficient to provide that its main purpose applies to the District, or a really substantial part of the main purpose. That happened in the Dharwar District in 1905, not in the year 1903. We have the effect of section 10A dealt with in the Full Bench case of *Sawantrawa Fakirappa v. Giriappa Fakirappa* (1). The result is rather curious, because section 10A is held to apply to transactions which were entered into after the Act is extended in a particular region, and not to apply to transactions before that time, and this has been described as very arbitrary. But for all that, there is a very good reason for it, and the reason is this. Section 10A was enacted to meet an evil which had arisen by reason of the operation of the Dekkhan Agriculturists' Relief Act in the four Districts to which for many years it had been applied, and it was feared that when the

(1) 21 Ind. Cas. 4; 15 Bom. L. R. 778 (F. B.); 38 B. 18.

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Act came to be applied to other Districts the same evil might arise there also. But it did not appear that the evil which was prevalent in the four Districts had at that time become at all common elsewhere. That I believe to be a correct statement of facts so far as they were then known, and I believe so far as they are now known, and, therefore, it would be natural and it would exactly fulfil the intention of those who suggested section 10A that it should result precisely as laid down in the Full Bench decision in *Sawantrawa Fakirappa v. Giriappa Fakirappa* (1). The remedy for the evil is only to be applied after the evil comes into existence, and the evil is not likely to come into existence until the Act is extended. The result that we have arrived at in this case is absolutely in accordance with what I believe to be the intention of section 10A. We find that it does not apply to the transaction in this case, because that transaction happened at a period before there was any reason to suppose that the evil which section 10A was intended to thwart had arisen in the Dharwar District. I agree, therefore, that the appeal should be dismissed with costs.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2558
OF 1917.

July 4, 1919.

Present:—Mr. Justice Chatterjea and
Mr. Justice Deval.

Musammât AITI KOCHUNI—PLAINTIFF—
APPELLANT
versus

AIDEW KOCHUNI AND ANOTHER, MINOR, BY
HER MOTHER AND GUARDIAN B SHALYA
KOCHUNI—DEFENDANTS—RESPONDENTS.

*Hindu Law—Dayabhaga School—Koches of Assam,
law applicable to—Succession—Unchaste daughter,
whether entitled to inherit—Subsequent marriage with
paramour, effect of.*

In matters of succession the Koches, aboriginals of Assam, are governed by the Dayabhaga School of Hindu Law, under which an unchaste daughter is not entitled to inherit the estate of her father, and the disability caused by her unchastity is not cured by her subsequent marriage after her

father's death, with the person with whom she lived an unchaste life, as the right to inherit was not hers at the time the succession opened out. [p. 695, col. 1; p. 697, col. 1.]

Appeal against the decree of the Subordinate Judge, Assam Valley Districts, dated the 30th of July 1917, reversing the decree of the Munsif, Nowgong, dated the 16th of April 1917.

FACTS appear from the judgment.

Dr. Jadunath Kanjilal, for the Appellant.—The plaintiff is the appellant. This appeal arises out of a suit for the recovery of the property left by her father as his heiress. The parties belong to the Assam Valley Districts. The plaintiff during the lifetime of her father is alleged to have eloped with a person with whom she lived as man and wife for sometime, and after the death of her father they were married. The contesting defendant is a daughter by a mistress of the father of the plaintiff and is in possession of the property left by her father. The sole question is the right of succession of an unchaste daughter to the property left by her father according to Dayabhaga Law.

In this case there is no issue by valid marriage. The defendant is an illegitimate child and cannot succeed. According to Dayabhaga Law illegitimate children cannot succeed. They are trespassers here. *Ram Saran Garain v. Tek Ohand Garan* (1), *Narain Dhara v. Rakhal Gain* (2), *Kirpal Narain v. Sukurmoni* (3). We are to consider the position at the time of the institution of the suit, and not at the time of the death of the father.

Once a woman is found unchaste it does not follow that she will always remain so. In this case the bridegroom is himself alleged to have defiled her. *Gangadhar v. Yellu Viraswami Shiravale* (4). I rely on Yagnavalkya's text beginning with "Ananyopurbikam," etc. If a maiden is defiled by the very bridegroom, she has not got to atone for that act.

[CHATTERJEA, J.—Yagnavalkya's texts do not lay down any Statute Law.]

But commentators like Raghunandan interpret it in my favour. He only classi-

(1) 28 C. 194.

(2) 1 C. 1; 23 W. R. 334.

(3) 19 C. 91.

(4) 12 Ind. Cas. 714; 33 B. 133, 13 Bom. L. R. 1038

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fied between 'Punarvee' and 'Shairini,' and the present case does not fall within the classification and no penance is laid down for this particular case.

Under the Mitakshara Law illegitimate sons cannot succeed. *Narain Dhara v. Rakhal Gain* (2).

Mitakshara should prevail where Daya-bhaga is silent.

The case of *Kerry Kolitane v. Monee Ram Kolita* (5) is repugnant to the Hindu ideas.

The attitude of the Hindus is better illustrated in the case of *Sakuntala*.

In this part of the Province the custom is in existence and custom is transcendent and can override any express law.

There is absolutely no legal evidence to show that the plaintiff was unchaste before the death of the father or after that.

The onus lies on the defendant to shew that she eloped and the age is also important in this case, and none of them have been proved.

Sasadhar died in 1909 and the suit was brought in 1916.

The bar to inheritance is removed by subsequent marriage: *Pedda Amani v. Zemin-dar of Marungapuri* (6).

Babu Banbehari Sorkar, for the Respondents.—I submit that the Privy Council decision does not help my learned friend.

We must look at the time when succession opened, and not at the time when the suit was instituted.

I submit further the sons of a continuous concubine are the sons of one of 13 kinds of Dasi Putras and can inherit. *Ohatturbhuj Patnaik v. Krishna Ohandra Patnaik* (7) referred to.

[Dr. Kanjilal cites *Kirpal Narain v. Sukurmoni* (3) and shews that the sons of a continuous concubine cannot succeed.]

I would refer to Digest of Colebrooke, Volume II, page 340.

The cases of *Narain Dhara v. Rakhal Gain* (2) and *Kirpal Narain v. Sukurmoni* (3) dealt with only limited interests and the decisions are not sound.

Colebrooke's translation is correct and is approved by Babu Golap Chandra Sarkar in his book at page 197.

(5) 19 W. R. 267; 13 B. L. R. 1 (F. B.).

(6) 1 I. A. 282 at p. 293; 14 B. L. R. 115; 21 W. R. 358; 8 Sar. P. O. J. 318.

(7) 17 Ind. Cas. 276; 16 C. L. J. 335; 17 C. W. N. 442.

There cannot be a valid marriage with a girl who has lost her virginity.

Marriage 'Mantras' are only meant for virgins. See Manu VIII, 226, and also Golap Chandra's book, 4th Edition, page 95.

"Panigrahana," etc., of virgins alone can be accepted according to Hindu Law.

'Ananyapurbikam' in Yagnavalkya means that she must be a virgin, and not that she should be defiled by anybody else.

Medhatithi as commentator explains in Chapter VIII, 226, Manu's Text, page 1016; 'Panigrahanika,' etc.

There 'Kanya' has been explained as a maiden not defiled.

Kullukavatyia also says there cannot be any legal marriage with a defiled girl.

See Kulluk's Commentary, page 223.

In Dayabhaga 'Kanya' and 'Kumari' have been said to be first claimants in order of succession, i.e., maiden daughter should take first and then married daughter.

Chapter XI, section 2 (Dayabhaga).

Tara v. Krishna (8) referred to.

'Ananyopurbikam' has been translated by Monmo-ho Nath Sastri in Dharma Shashtra as one who has not been known by anyone before and who has not been given away in marriage.

There was not a legal marriage at the time when succession opened out.

If there has been no legal marriage, the Privy Council case of *Pedda Amani v. Zenindar of Marungapuri* (6) has no application.

Mayne's Hindu Law, page 831, 8th Edition.

We are in possession and we have got mutation of one name in the Government records and we have been all along in possession.

In an ejectment suit plaintiff must shew better title.

From an examination of the Chapter on Exclusion of Inheritance it is clear that one addicted to vice cannot succeed. In Assam Dayabhaga applies. See *Deepo Debia v. Gobindo Deb* (9), *Dino Nath Mohunto v. Ohundi Koch* (10).

Dr. Kanjilal, in reply.—Under the Assam Regulations as soon as a man dies, his heirs apply and get their names recorded in the office of the Government.

According to Dayabhaga they cannot succeed as trespassers.

(8) 31 B. 495; 9 Bom. L. R. 774.

(9) 16 W. R. 42; 11 B. L. R. 131 note.

(10) 16 Ind. Cas. 349; 16 C. L. J. 14.

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The Privy Council decision is in my favour.

Raghunandan in his *Utbahatatta*, page 697, supports my contention when he says:—
"Khotajonaya..." etc.

The custom is transcendental and it ought to prevail against Statute Law.

JUDGMENT.—The question involved in this appeal relates to the right of succession of an unchaste daughter to the estate of her father under the Dayabhaga Law.

The appellant before us is the daughter of one Sasadhar Koch. During her father's lifetime she eloped with a person named Khedu Koch and they lived together for several years as man and wife. After her father's death, however, she married Khedu, and she now claims the property left by her father as his heiress.

It appears too that Sasadhar after the death of the plaintiff's mother took another woman Bishali as his "mistress or wife without any formal marriage" and had a son by her and two daughters by her. The son is dead, but the daughters are alive and are in possession and they contested the plaintiff's claim. The Court of first instance decreed the suit. On appeal the suit has been dismissed and the plaintiff has appealed.

The parties are Koches, aboriginals of Assam. It has been held by this Court [see *Deepo Debia v. Gotindo Deb* (9)] that the Dayabhaga School of Hindu Law is the law applicable to Assam and the learned Vakil for the appellant has argued the case on the view that the Dayabhaga is the law applicable to these parties.

Now it has been held that according to the Dayabhaga the daughter is under the same obligation to chastity as a widow, therefore, as the law is now settled, unchastity will prevent her from taking the estate. See *Kerry Kolitane v. Monee Raa Kolita* (5) (per Mitter, J.), *Ramnath Tolapattro v. Durga Sundari Debi* (11), *Ramnada v. Raikishori* (12) and *Sundari Letani v. Pitambari Letani* (13). It is found in the present case that the plaintiff ran away from her father's house, took one Khedu as her paramour and lived with him as his mis-

tress until after her father's death. That being so, she would be excluded by reason of her unchastity from inheritance under the Dayabhaga.

It is contended, however, on behalf of the appellant that the disability caused by her unchastity was cured by her subsequent marriage with the same person with whom she lived as a mistress before her father's death.

It is argued that as a child procreated before marriage may be legitimized if born after the mother's marriage with the person who procreated it even under the Hindu Law, similarly the bar to inheritance caused by reason of unchastity may be removed by subsequent marriage with the person with whom she was living as mistress. In support of the proposition that in order to render a child legitimate the procreation as well as the birth need not take place after marriage, reliance is placed upon the observations of the Judicial Committee in the case of *Pedda Amani v. Zemindar of Marungapuri* (6): "The point of illegitimacy being established by proof that the procreation was before marriage, had never suggested itself to the learned Counsel for the appellant at the time of the trial, nor does it appear from the authorities cited to have been distinctly laid down that according to Hindu Law in order to render a child legitimate the procreation as well as the birth must take place after marriage. That would be a most inconvenient doctrine. If it is the law that law must be administered. Their Lordships, however, do not think that it is the Hindu Law. They are of opinion that the Hindu Law is the same in that respect as the English Law." With reference to these observations Sir Gurudas Banerji in his *Tagore Lectures* (Hindu Law of Marriage and Stridhan, 3rd Edition, page 166) remarks: "This decision, so long as the Privy Council do not think it fit to reconsider the point, must be received as the law on the subject. But with every respect that is due to the decision of the highest tribunal for India, I may be permitted to say that the doctrine that procreation in lawful wedlock is necessary to constitute legitimacy is not only supported by the language of the texts, but is also in accordance with the general spirit of the Hindu Law by which

(11) 4 C. 550.

(12) 22 C. 347.

(13) 32 C. 571; 2 C. L. J. 97; 9 C. W. N. N. 1003.

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the nuptial rites are primarily meant only for virgins, while the necessity of marrying girls before puberty reduces the practical inconvenience of the doctrine within the narrowest possible limits." The decision of the Privy Council so far as it goes is of course binding upon us, but the marriage of the mother and the birth of the child in the case before the Privy Council took place before the succession opened out, and the only question, therefore, was as to the legitimacy of the child. The question raised in this case, viz., whether a daughter is excluded by reason of unchastity at the time when the succession opened out, did not arise in that case and was not considered by their Lordships.

Reference is made by the learned Pleader for the appellant to the text of Yajna-
valkya—

and the translation of it in Golap Chandra Sarkar's Hindu Law, 4th Edition, page 78, "Let a man who has finished his student-ship espouse an auspicious wife who is not defiled by connection with another man, is agreeable, non-Sapinda, younger in age and shorter in stature," etc., and it is contended that the words "not defiled by a person other than the person with whom she is to be married." We think, however, that those words mean a "virgin," i. e., one who has not been defiled by any person, because the text does not contemplate any sexual connection between the bride and the bridegroom before marriage. The nuptial rites among Hindus and the nuptial Mantras are meant for virgins, and the view we take is in accord with the practice and sentiments of Hindus. It is unnecessary, however, to discuss this matter further nor the question whether unchastity in a maiden may be expiated by penances before marriage, because no marriage took place before the succession opened out in the present case. The only question we have to consider is whether the disability of the plaintiff to inherit by reason of her unchastity, when the succession opened out on her father's death, was removed by her subsequent marriage with her paramour. At the time the succession opened out she had not married her paramour and there was no knowing when she would marry

him or whether she would marry him at all. Did the estate remain in abeyance until she married, so that her marriage with her paramour might remove the disability caused by her unchastity at the time of her father's death? We cannot hold that under Hindu Law there can be such abeyance. The learned Subordinate Judge says: "It is a matter of common knowledge that many people of lower castes such as Koches, etc., in Assam contract unions with women without any marriage and get married afterwards, sometime in their old age after their children become grown up men, and no stigma attaches to the children from before the formal marriage provided there was a marriage afterwards. But as neither side has raised the plea of local custom, I must decide the case according to the Dayabhaga and its interpretation by the Bengal High Court." The plaintiff and her paramour, therefore, could have married in their old age possibly half a century after the succession opened out, and if the appellant's contention is correct, we must hold that the estate must remain in abeyance until she marries and the heir upon whom it has vested on the death of her father (and it must have vested in someone) should be divested, may be after half a century, if she chose to marry her paramour at that distance of time. We are unable to uphold such a contention.

The last ground urged is that no question of vesting and divesting arises in this case as the defendants are not the heirs of the deceased they being the daughters by Bishalya, a mistress, and that although there was also a son born of Bishalya who survived, his father, he could not succeed because it has been held that under the Dayabhaga illegitimate sons even of Sudras, except a *dasi putra*, cannot succeed. See *Narain Dhara v. Rakhal Gain* (2), *Kirpal Narain v. Sukurmoni* (3). There was some discussion before us as to whether the brother of the defendants could be called a *dasi putra* (in which case he would be an heir) and whether or not a narrow construction had been placed upon the expression by this Court in those cases. We think it, however, unnecessary to consider those questions. So far as the question of vesting of the estate is concerned, it is to be

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observed that there are brothers and nephews of the deceased so that there were heirs of the deceased; and the defendants are in possession of the property left by the deceased and have been recognised as tenants by the Revenue Authorities. In these circumstances they are entitled to contest the claim of the plaintiff if she is not the heiress of the deceased.

We would add that according to the learned Subordinate Judge it is common practice among people to which the parties belong in that part of the country to contract unions with women without any marriage and to get married afterwards when the children are grown up men. To apply to such people the strict rules of Hindu Law (and specially those of the Dayabhaga School which are based upon the principle of spiritual benefit), in such matters, may lead to injustice in some cases. We think such questions should be decided with reference to local custom and usage, and it is to be regretted that the parties did not set up such custom or usage, although the existence of the "practice" as a "matter of common knowledge" is referred to by the Court below. As it is, we must decide the case according to the Dayabhaga Law, and under that law the plaintiff was excluded from inheritance, and her subsequent marriage with Khedu did not revive the right which was not hers at the time the succession opened out.

The appeal must accordingly be dismissed with costs.

Appeal dismissed.

PATNA HIGH COURT.

CIVIL REVISION No. 130 OF 1919.

December 11, 1919.

Present:—Mr. Justice Coutts and
Mr. Justice Adami.

Syed KHELAFAT HUSSAIN—PETITIONER
versus

Syed AZMAT HUSSAIN AND OTHERS—
OPPOSITE PARTY.

Provincial Insolvency Act (III of 1907), s. 20 (d)—
Insolvent, suit by, to recover deferred dower of
daughter, maintainability of.

A person who has been declared an insolvent cannot, while his estate is in the hands of the

Receiver, maintain a suit in his own name for the deferred dower of his daughter, even though the Receiver has refused to bring such suit. [p. 700, col. 2.]

Civil revision from an order of the Subordinate Judge, Monghyr.

FACTS.—The petitioner, Khelafat Husain, was declared insolvent in 1911 and a Receiver was appointed for the administration of his assets. During the course of his insolvency his daughter died and he became entitled to a portion of the deferred dower due to his daughter. He asked the Receiver of his estate in insolvency to bring a suit in respect of the dower, inasmuch as the same was getting barred by limitation. The Receiver refused to sue. Khelafat Husain, thereupon, applied to the Subordinate Judge of Monghyr for permission to sue as pauper. The learned Judge declined to give him the permission by the following order, dated the 27th August 1918:—

"There is no asset to enable the petitioner to institute the suit and I don't think he should do so as the right of action vest in the trustee. I don't see how permission can be given to the insolvent to sue. Whether he can sue *in forma pauperis* is a question for the trying Court to decide. The application is disallowed."

Thereafter on a suit being instituted the application for leave to sue as a pauper was disposed of by Mr. Satish Chunder Mitra, the Second Subordinate Judge of Monghyr, on the 7th April 1919 in the following terms on the question of cause of action:—"So long as there is a Receiver of the insolvent's properties, the applicant insolvent cannot sue at all..... He must wait till his disability ceases, when and when only he can sue. He cannot in my opinion sue in his personal capacity making the Receiver a defendant in the case, when the Court did not permit the Receiver to sue. It is said that by the time the disability ceases the claim of the plaintiff would be barred by limitation. That no doubt is a difficult point. If the disability of the applicant be a legal disability, I do not see any reason as to why he should not get an extension of time on that ground."

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The petitioner thereupon made an application to the High Court in revision against the above order of the Subordinate Judge.

Mr. *Khurshad Husnain*, for the Petitioner.— Under section 16 (2) (a) of the Provincial Insolvency Act the property of the insolvent vests in a Receiver, and under section 20 (d) the Receiver may institute any suit relating to the property of the insolvent. The claim for a portion of the dower debt has not yet ripened into property so that the Receiver may get a hold over it. In any case there is nothing in law to prevent an insolvent (a beneficiary) from bringing an action for the ultimate benefit of creditors (the other beneficiaries) when the Receiver (a trustee) is unable to sue owing to want of funds. Under English law personal actions may be brought by the insolvent himself. Halsbury's Laws of England, Volume 2, page 137.

Mr. *Fakhruddin*, for the Opposite Party.— The insolvent has no cause of action and section 20 (d) is a bar to the suit. It is the Receiver alone that can sue. The Receiver's discretion should not be interfered with.

Mr. *Khurshad Husnain* heard in reply.

JUDGMENT.

CUTTS, J.— This is an application in revision made in respect of an order of the Subordinate Judge of Monghyr rejecting an application by one *Khelafat Hossain* to sue as a pauper. It appears that the petitioner was declared an insolvent in the year 1911, but it has been found by the learned Subordinate Judge that in spite of the petitioner having been declared an insolvent and his estate being in the hands of a Receiver, he has sufficient funds to prosecute the suit and that he has no cause of action inasmuch as his property and assets are in the hands of a Receiver.

The first point urged before us is that the learned Subordinate Judge had no power to go behind the order, declaring the petitioner an insolvent. It is unnecessary to discuss this point for, even assuming it to be a valid contention, the petitioner would not be entitled to sue. "All rights of action which relate directly to the bankrupt's property and can be turned into assets for the payment of debts pass to the trustee but where a

cause of action arises from the bodily or mental suffering or personal inconvenience of the bankrupt, or from injury to his person or reputation, then the right of action remains with the bankrupt" (Halsbury's Laws of England, Volume 2, page 137 paragraph 236).

Now the suit which the petitioner desires to bring in this case is a suit for the deferred dower of his daughter. This is certainly not a suit of a nature which can be brought by the insolvent himself. It appears that the Receiver had been asked by the insolvent to bring the suit and had declined. This, however, will not assist the insolvent, and it may be that the Receiver had very good grounds for his refusal.

In these circumstances this application must be dismissed with costs. Hearing fee two gold mohurs.

ADAMI, J.— I agree.

Application dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 118 OF 1916.

August 8, 1919.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Panton.

THE OFFICIAL ASSIGNEE OF THE CALCUTTA HIGH COURT—DEFENDANT NO. 1

—APPELLANT

versus

BIDYASUNDARI DAS AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Appeal—Final hearing—Court, whether can go into whole case—Gift to wife by member of firm heavily indebted, validity of—Intention to delay or defeat creditors—Pleadings, inconsistent, when permissible.

At the stage of the final hearing of an appeal the entire appeal is open for consideration, including an investigation of the issues remitted for trial, where such investigation is essential for the proper determination of the matter directly in controversy between the parties [p 702, col. 1.]

A gift to his wife by a member of a firm heavily involved in debt, which is deliberately kept secret till the firm is adjudged bankrupt and the plain object of which is to delay, if not to defeat, creditors, and under which possession is not obtained by the donee, nor is any convincing explanation given to justify the transaction, is a fictitious gift and confers no title on the donee to the properties dealt with thereby. [p. 702, col. 2.]

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Either party to a litigation may in a proper case include in his pleadings two or more inconsistent sets of material facts and claim relief thereunder in the alternative, but whenever such alternative cases are alleged, the facts belonging to them respectively should not be mixed up but should be stated separately so as to show on what facts each alternative relief is claimed. [p. 703, col. 1.]

The plaintiff, who avails himself of the right to place inconsistent cases before the Court and endeavours to establish both the alternatives by contradictory oral testimony, is in a state of inextricable difficulty; evidence adduced in support of both the cases can hardly be expected to secure confidence. [p. 703, col. 1.]

Appeal against the decree of the Subordinate Judge, Dacca, dated the 7th February 1916.

Babus Dwarka Nath Ohakrabarti, Biraj Mohan Mojumdar and Suresh Chandra Basu, for the Appellant.

Babus Gopal Chandra Das and Bhagirath Chandra Das, for the Respondents.

JUDGMENT.--This is an appeal by the fourth defendant in a suit for cancellation of a deed of gift. On the 20th February 1909 Raimohan Saha executed the deed in question in favour of his wife Bidyasundari Dasi. The deed covered immoveable properties valued at Rs. 14,000 by guess. On the 5th July 1911 Raimohan was adjudged an insolvent and his assets vested in the Official Assignee of this Court. On the 21st November 1911 Bidyasundari executed a deed of gift in favour of Raimohan. This deed covered all but six of the properties covered by the previous deed of gift executed by the husband in favour of the wife. On the 16th December 1911 Raimohan died. On the 22nd December 1913 Bidyasundari instituted the present suit for cancellation of the deed of gift executed by her. In the fourth paragraph of the plaint it is alleged that she executed the document under the impression that it was a power-of-attorney for the management of her properties. It is further alleged that she did not execute the document with her free-will and consent but was under the influence of her husband and his brothers. She adds that she was not informed of the particulars of the document, got no independent advice about it and did not understand its force and effect. On these grounds she prays that the deed of gift be declared void, invalid, collusive, inoperative, ineffective and not binding on, nor enforceable against, herself and her

properties. The claim was resisted by the Official Assignee. On his behalf it was asserted that the gift by Raimohan to his wife was a fictitious transaction, intended to defeat and delay his creditors and partners. It was further alleged that the deed of gift executed by Bidyasundari in favour of her husband was not executed under compulsion nor in ignorance of its contents. On these pleadings the following issues were raised:

(a) Was the plaintiff induced to execute the disputed deed of gift under undue influence;

(b) Did the plaintiff execute the above document without knowing its contents and understanding its effect upon her interest;

(c) Is it true that the plaintiff had no independent and disinterested advice in connection with the disputed deed of gift?

The Subordinate Judge disbelieved the allegation that the plaintiff had executed the document under the impression that it was a power-of-attorney. He held that she must have been told that it was a deed of gift, although she might not have been supplied with full particulars. But the Subordinate Judge held that the plaintiff had no independent or disinterested advice, that she did not understand the true nature and contents of the document and that she executed it under undue influence and pressure. He declined to investigate the allegation of the Official Assignee that the gift by the husband to the wife was never intended to operate as a genuine transaction. In this view, the Subordinate Judge decreed the suit and cancelled the deed of gift. The Official Assignee has appealed to this Court. The appeal was heard by Chitty and Beachcroft, JJ., on the 20th July 1917 when they held that, for the proper determination of the appeal, evidence should be taken and a finding arrived at with regard to the first deed of gift. They accordingly framed and remitted for trial the following issues:

(i) Whether the deed of gift by Raimohan to Bidyasundari was a *benami* transaction or was intended to convey the properties to her;

(ii) Under what circumstances and for what purposes was that deed of gift made;

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(iii) Was Bidyasundari ever in possession of the properties so conveyed?

The Subordinate Judge took evidence, oral and documentary, and came to the conclusion that the deed of gift by Raimohan to Bidyasundari was a *benami* transaction, that it was executed to defeat the claim of creditors and that the lady was never in possession of the properties ostensibly transferred to her. The new evidence together with these findings has been made part of the record and the appeal has been argued before us with reference to all the materials.

On behalf of the plaintiff-respondent, the propriety of the order made by Chitty and Beachcroft, JJ., has been called in question, and our competency to reconsider its necessity has been supported by reference to the decisions in *Hiatunnessa v. Kailash Chandra* (1), *Hanuman Das v. Gursahay Singh* (2) and *East Indian Railway Co. v. Ohanga Khan* (3). It is needless to define the exact powers of the Court at the stage of the final hearing of the appeal: it is sufficient to state that the entire appeal is open for consideration and we must base our decision on such portions of the materials on the record as appear to us to be relevant. We are further clearly of opinion that for the proper determination of the matter directly in controversy between the parties, an investigation of the issues remitted for trial by Chitty and Beachcroft, JJ., was essential. The two gifts, though separated by nearly three years in point of time, cannot be assumed to be wholly unconnected transactions; and the facts disclosed after remand tend to show that there is an intimate relation between them.

As regards the deed of gift executed by Raimohan in favour of Bidyasundari, the Subordinate Judge has laid stress upon the suspicious circumstances which attended its execution. The document was executed secretly and was attested by witnesses, the majority of whom cannot be traced. Although the donor had three sons, he transferred the best and most valuable of his properties including his homestead to his wife; why he felt impelled to adopt such a course is

not satisfactorily explained. Suspicion as to the genuineness of the transaction is deepened, when we discover that at the time of the alleged gift, the firm (in which Raimohan was a partner) was heavily involved in debt and was greatly embarrassed, though perhaps not actually insolvent; and we have further the significant fact that the gift was deliberately kept secret till the firm was adjudged bankrupt. In such circumstances, it is by no means difficult to form an estimate of the true nature and purpose of the gift; the object plainly was to delay, if not to defeat, the creditors whose dues were steadily increasing in amount. We have finally the unquestionable fact that the donee never took possession of the properties transferred to her. The Subordinate Judge has classified the properties under six heads and has found with regard to each of the classes that the plaintiff has failed to prove her possession in respect thereof. The evidence has been placed before us and has been minutely scrutinised, but no error has been found in the analysis given by the Subordinate Judge, such as would affect the validity of his conclusion. We must consequently affirm the finding of the Subordinate Judge that the deed of gift was secretly executed at a time when the failure of the firm was in sight, if not actually imminent, that the matter was kept secret till the firm had been declared insolvent, that the lady never obtained possession of the properties and that no convincing explanation has been attempted to justify the transaction. In this view, we must hold that title did not pass from the donor to the donee and that consequently the plaintiff had no title to the disputed properties.

Apart from this, it is plain that as regards the second deed of gift, the plaintiff has not laid the foundation for a case of cancellation. Her allegations in the plaint are mutually contradictory. She asserts that when she executed the deed she was assured that it was a power of attorney for the management of her properties. This, if true, involves in essence a charge of fraud. But, not content with this, she asserts, in the alternative, that the document was not executed with her free-will and consent. This, if true, is a case of coercion or undue influence. It may be conceded

(1) 17 Ind. Cas. 224; 16 C. L. J. 259.

(2) 21 Ind. Cas. 700; 18 C. L. J. 181.

(3) 23 Ind. Cas. 245; 22 C. L. J. 212; 42 C. 888; 19 C. W. N. 1034.

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that either party to a litigation may in a proper case include in his pleading two or more inconsistent sets of material facts and claim relief thereunder in the alternative; but whenever such alternative cases are alleged, the facts belonging to them respectively should not be mixed up, but should be stated separately so as to show on what facts each alternative relief is claimed. Reference may be made in this connection to the decision of the Full Bench in *Narendra Nath Barari v. Abhay Charan Chatterpadhya* (4) and of the Judicial Committee in *Mahomed Buksh Khan v. Hoseini Bibi* (5), which is explained in *Jino v. Manon* (6), *Phillips v. Phillips* (7), *Berdan v. Greenwood* (8), *Morgan, In re, Owen v. Morgan* (9) and *Davy v. Garrett* (10).

The plaintiff, who avails himself of the right to place inconsistent cases before the Court and endeavours to establish both the alternatives by contradictory oral testimony, is, however, plainly in a state of inextricable difficulty; evidence adduced in support of both the cases can hardly be expected to secure confidence. The allegation in the present case that the plaintiff did not receive independent advice is the ground of attack common in this class of cases. The deed was of the simplest character and was free from all complexity; no explanation could have been needed to make its effect intelligible to her. The theory of undue influence looked more promising, but was not supported by tangible evidence. What really happened is clear from the evidence on the record. When bankruptcy was imminent, Raimohan transferred the properties to his wife so as to thwart, if possible, the claims of the creditors. But after the insolvency had taken place, when assets were needed to bring about a composition with the creditors, the properties had to be replaced in the name of Raimohan. After this had been

effected, the contemplated settlement fell through and Raimohan himself died. Now, with a view to save as much property as possible from the grasp of the Official Assignee, Bidyasundari, probably with the concurrence of other members of the family, has instituted the present suit. The truth is that the first transaction was fictitious and the second which is challenged is genuine.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and the suit dismissed. The plaintiff must pay the Official Assignee his costs in all Courts; but in view of the fact that the paper books prepared after remand consist very largely of irrelevant papers, we direct that each party should pay his own cost of preparation of the paper book after remand. This does not affect the sum which was paid by the Official Assignee in this Court on behalf of the respondent for the preparation of the paper book; he will be entitled to realise that sum. The hearing fee on each occasion is assessed at Rs. 500.

Appeal allowed.

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 180 OF 1917.

November 17, 1919.

Present:—Sir Dawson Miller, Kt., Chief Justice, and Mr. Justice Jwala Prasad.

BHAGWATI SARAN SINGH—APPELLANT
versus

THE SECRETARY OF STATE FOR INDIA
IN COUNCIL—RESPONDENT.

Court Fees Act (VII of 1870), s. 19C, scope of—Court-fees paid on Will—Death of beneficiary before full administration—Probate of beneficiary's Will—Court-fee, whether payable—"Estate," meaning of.

The "estate" referred to in section 19C of the Court Fees Act means the property of a deceased person, and it is impossible to dissociate the identity of the person from the property in the meaning of the word. [p. 704, col. 2.]

Section 19C of the Court Fees Act only provides for cases where a fresh grant of Probate of a Will or Letters of Administration of the estate of the same person becomes necessary and the fees have already been paid in respect to the whole or part of the

(4) 34 C. 51; 4 C. L. J. 437; 11 C. W. N. 20; 1 M. L. T. 364.

(5) 15 I. A. 81 (P. C.); 15 C. 684; 5 Sar. P. C. J. 175.

(6) 18 A. 125; A. W. N. (1896) 1.

(7) (1878) 4 Q. B. D. 127; 48 L. J. Q. B. 135; 39 L. T. 556.

(8) (1873) 3 Ex. D. 251; 47 L. J. Ex. 628; 39 L. T. 223; 26 W. R. 902.

(9) (1887) 35 Ch. D. 492; 56 L. J. Ch. 603; 50 L. T. 503; 35 W. R. 705.

(10) (1878) 7 Ch. D. 473; 47 L. J. Ch. 218; 38 L. T. 77; 26 W. R. 225.

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property comprised in the estate of the deceased person. [p. 704, col 2; p. 705, col 1.]

There is nothing in the wording of the section which can be so construed as to support the contention that when a beneficiary under a Will dies before the estate of the testator is fully administered and Probate is taken out of the Will of the beneficiary, then no Court-fees are required to be paid in respect of that portion of the beneficiary's estate which he has taken under the previous Will and in respect of which Court-fees have already been paid. [p. 705, col. 1.]

First appeal from a decision of the District Judge, Gaya, dated the 19th May 1917.

Messrs. *Kulwant Sahay* and *Kailaspati*, for the Appellant.

Mr. *Muhammad Fakhruddin* (Government Pleader), for the Respondent.

JUDGMENT.

MILLER, C. J. —The appellant Babu Bhagwati Saran Singh is the executor by implication of the Will of his late wife *Musummat* Mayian Godavari Koer, who died on the 16th April 1917 leaving a Will of even date. The property comprised in the Will consisted principally of a half share in the Maksudpur estate, which the deceased acquired under the Will of her late father Raja Rameshwar Prasad Narain Singh who died on the 2nd December 1902. The only other property comprised in the Will was a house at Gaya and a decree against the testator's sister. The property was left by the deceased to her husband, the appellant, for life and after his death to such of her daughters as should survive their father. It appears that when Raja Rameshwar Prasad Singh died, he also left a Will disposing of his property which included the bulk of the property mentioned in the Will of his daughter now under consideration. His widow, the Rani Ram Sunder Kuer, obtained Letters of Administration with the Will of her late husband annexed and paid the full fee chargeable under the Court Fees Act of 1870. That estate has up to the present apparently not been fully administered.

The appellant, having applied for a grant of Probate of his deceased wife's Will before the District Judge of Gaya, petitioned the Court for an order that by reason of section 19C of the Court Fees Act, 1870, no fee is chargeable upon a grant of Probate in the present case in so far as concerns the property comprised in the Will of the estate of his deceased wife's father, upon which duty was paid under the Act

when Letters of Administration were granted to the latter's widow. The learned District Judge rejected this application and in my opinion rightly.

Section 19C of the Indian Court Fees Act provides:

"Whenever a grant of Probate or Letters of Administration has been or is made in respect of the whole of the property belonging to an estate, and the full fee chargeable under this Act has been or is paid thereon, no fee shall be chargeable under the same Act when a like grant is made in respect of the whole or any part of the same property belonging to the same estate.

"Whenever such a grant has been or is made in respect of any property forming part of an estate, the amount of fees then actually paid under this Act shall be deducted when a like grant is made in respect of property belonging to the same estate, identical with or including the property to which the former grant relates."

It is only necessary to read that section to see that the estate therein referred to means the property of a deceased person, and it is impossible to my mind to dissociate the identity of the person from the property in the meaning of the word "estate" as there used. I may point out that in another part of the Act when the word estate is used merely to indicate the property without involving any connotation of individual ownership, as in section 7, clause (5), the Legislature thought fit to append an explanation to that section in order to shew exactly the sense in which the word "estate" is there used. But in section 19C and the other sections of the same Chapter relating to Probate and Letters of Administration it seems to me impossible to treat the word "estate" as having any other meaning than that already mentioned. If the appellant's contention was right, then it would follow that once the fee chargeable under the Act had been paid in respect to any particular property on the death of the owner for the time being, that property would be exempt ever afterwards from similar fees notwithstanding that it continued to pass from generation to generation by Will or inheritance, and successive Probates or Letters of Administration were granted. That clearly was not the intention of the section. The section, in my opinion, provides for cases

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where a fresh grant of Probate of a Will or Letters of Administration of the estate of the same person becomes necessary and the fees have already been paid in respect to the whole or part of the property comprised in the estate of the deceased person. The Probate is sometimes revoked, or again a portion of an estate may remain unadministered and may require a fresh grant, and there are many cases in which a fresh grant becomes necessary. It is clearly to provide for such cases that section 190 of the Act was passed, and it stipulates that in such cases no fresh fees should be chargeable where the fees had already been paid by some previous executor or administrator. There is nothing in the wording of the section which, in my opinion, can be so construed as to support the contention now put forward by the appellant. This appeal must be dismissed.

JWALA PRASAD, J.—I agree.

Appeal dismissed.

CALCUTTA HIGH COURT. FULL BENCH.

APPEAL FROM APPELLATE DECREE NO. 2313
OF 1913.

August 7, 1919.

Present:—Sir Lancelot Sanderson, Kt.,

Chief Justice, Justice Sir John

Woodroffe, Kt., Justice Sir Asutosh

Mookerjee, Kt., Mr. Justice Chatterjea

and Mr. Justice Newbould.

KALIMUDDIN MOLLAH—PLAINTIFF—
APPELLANT

versus

SAHIBUDDIN MOLLA alias SYWALI
(SYEDEYA IN vakalatnama), MOLLA AND

—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), ss. 14, 29 (b)—Registration Act (XVI of 1908), s. 77—Suit to enforce registration of document—Limitation, whether can be extended under s. 14 of Limitation Act.

In computing the period prescribed under section 77 of the Registration Act for bringing a suit to enforce the registration of a document, the provisions of section 14 of the Limitation Act are not applicable. [p. 708, col. 1; p. 712, col. 1; p. 715, col. 1.]

Appeal against the decree of the 1st Additional District Judge, 24 Pergunnas, dated

the 12th July 1916, affirming that of the Munsif, 1st Court, Sealdah, dated the 18th December 1914.

FACTS appear from the judgment.

Maulvi A. K. Fazlul Huq (with him Babus Atindra Nath Mukherji and Santosh Kumar Bose), for the Appellant.—If the Sub-Registrar refuses to register a document, the person claiming under such a document has to bring a suit within 30 days from the date of such refusal. (*Vide* section 77 of the Indian Registration Act.) Now if he makes a *bona fide* mistake in selecting the Court in which his suit should be instituted, he will get an extension of time under section 14 of the Indian Limitation Act. (*Vide* section 14 of the Indian Limitation Act.) In the present case the plaintiff presented a document for registration in the Sealdah Sub-Registry Office, but the executant of the document did not appear and the registration was refused. There was an appeal to the Registrar of Alipore under section 73 of the Registration Act and the appeal was dismissed. Now the plaintiff thought that as the Registrar of Alipore had refused to register the document, the suit should be filed in the Alipore Munsif's Court. The suit was filed in the Alipore Munsif's Court. It was kept pending there for some time and eventually the Munsif of Alipore found that he had no jurisdiction to try the suit. Then it was filed in the proper Court. Now section 14 says that it will extend the period of limitation prescribed for any suit whether such period has been provided for in the Indian Limitation Act or not. It is clear that if the last day is a holiday, the suit should be filed on the first re-opening day. The other side relies on section 29 of the Indian Limitation Act. It does not take away the application of sections 4 to 25, which are general rules of computation [*vide Golap Chand Nowluckha v. Krishto Chunder Dass Biswas* (1) and *Srinivasa Aiyangar v. Secretary of State* (2)]. The general principle of law which was settled long ago, has been enacted in section 14 of the Indian Limitation Act [*vide Nrityamoni Dassi v. Lakhon Chunder Sen* (3)]. The Registration Act may be a

(1) 5 C. 314.

(2) 18 Ind. Cas. 617; 38 M. 92; 24 M. L. J. 41.

(3) 33 Ind. Cas. 452; 20 C. W. N. 522 at p. 534; 30 M. L. J. 529; (1916) 1 M. W. N. 332; 3 L. W. 471; 18 Bom. L. R. 418; 24 C. L. J. 1; 20 M. L. T. 10; 43 C. 660 (P. C.).

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special Act. It is not a self-contained enactment. It is like the Insolvency Act. *Vide Daropadi v. Hira Lal* (4), also *Nizabutolla v. Wazir Ali* (5), *Matabbar Mollah v. Shoshi Bhushan Ghatak* (6), *Surendra Nath Nag v. Gopal Chunder Ghosh* (7), *Kamal Krishna Kundu Chowdhury v. Rai Kedar Nath Kundu* (8) and *Behari Loll Mookerjee v. Mungolanath Mookerjee* (9).

The Full Bench case in *Nagendro Nath Mullick v. Mathura Mahun Parhi* (10) is of no help to the other side, as the Registration Act is not a complete Code in itself.

Secretary of State v. Shib Narain Hazra (11) is not against me. Section 29 of the Indian Limitation Act says that the period prescribed should not be affected or altered. *Vide Golap Ohand Nowluckha v. Krishto Chunder Dass Biswas* (1), and *Khetter Mohun Chuckerbutty v. Dina Bashy Shaha* (12).

Babu Kshitish Chandra Chuckeravarti (with him Babu Nitish Chandra Lahiri), for the Respondents.—The history of the controversy began in 1859, when the two Acts, viz., the Act X of 1859 (Rent Act) and the Act XI of 1859 (Indian Limitation Act) came into force. The first question that arose for consideration was whether the Limitation Act had any application to the rent suits. The first case was decided in 1865, *John Foulson v. Modhoosoodun Paul* (13). The next case is *Dixonath Panday v. Roghoonath Panday* (14), then *Unnoda Persaud Mookerjee v. Krishto Coomar Moitra* (15), then *Mohummud Buhadoor Khan v. Collector of Bareilly* (16). In 1877, two Acts, viz., Act III of 1877 (Registration Act) and Act XV of 1877 (Limitation Act), were passed.

In the case of *Golap Ohand Nowluckha v. Krishto Chunder Dass Biswas* (1) Mr. Justice

Mitter argued that by the Act of 1877, the period prescribed should not be altered or affected. But it is clear that if section 14 applies to the present case, the period prescribed by section 77 of the Registration Act cannot but be affected, if not altered. Mr. Justice Mitter in *Abdul Hakim v. Latifunnessa Khatun* (17) has concurred with the Chief Justice, Sir Francis Maclean, and has held the other way. There are three classes of cases which come before the Court for consideration:—

Firstly:—*Lex non cogit ad impossibilia* cases. *Vide Ahad Baksh v. Sheikh Babar Ali* (18).

Secondly:—Bengal Tenancy Act cases. *Vide* sections 184 and 185 of the Bengal Tenancy Act. *Kamal Krishna Kundu Chowdhury v. Rai Kedar Nath Kundu* (8).

The last case on the point is *Secretary of State v. Gangadhar Nandi* (19). It has distinguished *Daropadi v. Hira Lal* (4) and *Srinivasa Aiyangar v. Secretary of State* (2). *Secretary of State v. Shib Narain Hazra* (11) is in my favour.

Thirdly:—Section 29, clause 1.(b), which is the reproduction of section 6 of Act XV of 1877, is clear.

The Registration Act is a special Act, and the rule of 30 days is specially prescribed. Therefore, nothing in the Limitation Act can affect or alter the period of 30 days. *Vide Veeramma v. Abbiah* (20).

[SANDERSON, C. J.—Has the case in *Abdul Hakim v. Latifunnessa Khatun* (17) ever been dissented from?]

On the other hand *Khetter Mohun Chuckerbutty v. Dinabashy Shaha* (12) has been distinguished in *Girina Nath Roy v. Pitini Bibee* (21) and practically overruled by *Nagendro Nath Mullick v. Mathura Mahun Parhi* (10), and not followed in *Abdul Hakim v. Latifunnessa Khatun* (17). [The Vakil for the respondents was stopped.]

Maluvi A. K. Faizul Huq, in reply.

(4) 16 Ind. Cas. 149; 34 A. 496; 10 A. L. J. 3.

(5) 8 C. 910; 10 C. L. R. 333.

(6) 12 Ind. Cas. 33; 16 C. W. N. 20.

(7) 8 Ind. Cas. 794; 12 C. L. J. 464.

(8) 3 Ind. Cas. 34; 10 C. L. J. 517.

(9) 5 C. 110; 4 C. L. R. 371.

(10) 18 C. 368.

(11) 47 Ind. Cas. 502; 46 C. 199; 22 C. W. N. 802.

(12) 10 C. 265.

(13) 2 W. R. Act X Rul. 21.

(14) 5 W. R. Act X Rul. 41.

(15) 19 W. R. (P. C.) 5; 15 B. L. R. 60 note (P. C.).

(16) 21 W. R. 318; 13 B. L. R. 292 (P. C.); 1 I. A. 167; 3 Sar. P. C. J. 363.

(17) 30 C. 532; 7 C. W. N. 550.

(18) 14 Ind. Cas. 173; 1 C. W. N. 721.

(19) 45 Ind. Cas. 228; 27 C. L. J. 374; 45 C. 934.

(20) 18 M. 99.

(21) 17 C. 263.

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JUDGMENT.

SANDERSON, C. J.—The question which has been referred to the Full Bench is whether the case of *Abdul Hakim v. Latifunnessa Khotun* (17) was rightly decided. The above named case is reported in 30 Calcutta 532 under the name of *Abdul Hakim v. Latifunnessa Khotun* (17).

The question arose in a second appeal in a suit brought by the plaintiff to enforce registration of a conveyance alleged to have been executed in his favour by the defendants.

The document in question was presented for registration in the Sub-Registry office at Sealdah. As the defendants did not appear, registration was refused by the Sub-Registrar; against this order the plaintiff made an application to the Registrar on the 26th of January 1914; his application was rejected.

Thereupon on the 21st of February following, the plaintiff brought his suit in the Court of the Munsif at Alipore. On the 19th of June 1914, the Sealdah Sub-Registry office not being within the local limits of the jurisdiction of the Munsif at Alipore, the plaint was returned under the provisions of Order VII, rule 10, of the Code of Civil Procedure and was on the same day presented in the proper Court, namely, the Court of the Munsif at Sealdah.

By section 77 of the Indian Registration Act, 1908, it is provided that when the Registrar refuses to order the document to be registered under section 72 or section 76, any person claiming under such document or his representative, assign or agent may within thirty days after the making of the order of refusal institute in the Civil Court, within the local limits of whose original jurisdiction is situate the office in which the document is sought to be registered, a suit for a decree directing the document to be registered in such office, if it be duly presented for registration within thirty days after the passing of such decree.

The suit was not brought in the Court specified by the section within thirty days after the making of the order of refusal and so *prima facie* the suit could not be entertained.

It was urged, however, that the provisions of section 14 of the Indian Limitation Act of 1908 should be applied and

that the time during which the plaintiff was prosecuting the suit in the Court of the Munsif at Alipore should be excluded in computing the period of limitation prescribed by section 77 of the Indian Registration Act, 1908.

If the case of *Abdul Hakim v. Latifunnessa Khotun* (17) was rightly decided, section 14 of the Indian Limitation Act would not apply to the present case and the plaintiff's appeal should be dismissed.

Section 29 (b) of the Indian Limitation Act provides as follows:—Nothing in this Act shall affect or alter any period of limitation specially prescribed for any suit appeal on application by any special or local law now or hereafter in force in British India.

It is not denied that the Indian Registration Act, 1908, is a special law within the meaning of section 29 (b) and that the thirty days prescribed by section 77 of the Indian Registration Act, 1908, is "a period of limitation specially prescribed" by such special law. The question, therefore, remains whether the provisions of section 14 of the Indian Limitation Act, 1908, if applied to this case, would "affect or alter" the period of limitation specially prescribed by the Indian Registration Act.

It was argued on behalf of the plaintiff that the true construction of section 29 (b) was that, save as to the period of limitation, the other provisions of the Act of Limitation are applicable to cases falling under any special or local law.

These are not the words of the section, and it must be considered whether the application of the provisions of section 14 of the Indian Limitation Act, 1908, would "affect or alter" the period of limitation specially prescribed by the Indian Registration Act.

The words of section 29 (b) are plain and unambiguous and in my judgment they should be construed according to their natural significance.

In this case if the provisions of section 77 of the Registration Act alone were applied, the plaintiff would have had to institute his suit in the Court specified by the section within thirty days after the making of the order of refusal by the Registrar, i. e., within thirty days from the 26th January 1914. On the other

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hand if the provisions of section 14 of the Limitation Act, 1908, were applicable, the plaintiff would obtain an extension of the period of limitation until the 19th June 1914, provided he could show that he had been prosecuting his suit in the Alipore Court with due diligence and good faith.

Under such circumstances it seems clear to me that the applications of the provisions of section 14 of the Limitation Act, 1908, would affect, even if it did not alter, the period specially prescribed by the Registration Act.

It was argued on behalf of the respondent that the words "prescribed for any suit" in section 14 of the Indian Limitation Act mean "prescribed by this Act for any suit." Whether that be so or not (which I do not decide), there is a clear distinction between the words used in section 14, namely, "prescribed for any suit" and the words used in section 29 (b), namely, "specially prescribed for any suit by any special law," and in my judgment the words used in section 14 do not apply to the computing of the period of limitation "specially prescribed by the special law" contained in the Indian Registration Act, 1908.

The case relied upon by the learned Judges who referred this question to the Full Bench is *Khetter Mohun Ohuckerbutty v. Dinabashy Shaha* (12) decided in 1883. But on reading the judgment in that case it appears that no reference was made to section 6 of the Limitation Act of 1877. This fact, I find, is mentioned by Sir Francis Maclean, C. J., in his judgment in *Abdul Hakim v. Latifunnessa Khatun* (17), and he described the section which was not noticed "as of the highest importance in deciding this question."

I think the authority of the case in *Khetter Mohun Ohuckerbutty v. Dinabashy Shaha* (12) is much diminished by the omission to consider the effect of section 6 of the Limitation Act, 1877.

In 1889, in *Girija Nath Roy v. Patani Bibee* (21) the learned Judges said: "As regards the case of *Khetter Mohun Ohuckerbutty v. Dinabashy Shaha* (12) the decision is not easily to be reconciled with section 6, for the effect of that decision was undoubtedly to alter the period prescribed by the special Limitation Act." The learned Judge, however, did not consider

themselves bound by the case, as the one under consideration was a different one.

Then in 1903 came the decision in *Abdul Hakim v. Abdul Rahim (or Latifunnessa Khatun)* (17).

Since 1903 the authority of that decision in this Court has not been doubted.

The Indian Limitation Act and the Registration Act, which are now in force, were passed in the same years, namely 1908, five years after the decision in *Abdul Hakim v. Latifunnessa Khatun* (17). I cannot help thinking that if it was thought that a wrong interpretation had been placed in the above mentioned case upon the Limitation Act and the Registration Act of 1877, the material sections of which are similar to the section now under consideration, this would have been put right by the Legislature in 1908.

In my judgment, therefore, both upon the interpretation, which I think should be placed upon the material sections of the Indian Limitation Act, 1908, and of the Indian Registration Act, 1908, and upon the authorities in this Court, the question submitted to us should be answered in the affirmative and the appeal should be dismissed with costs.

WOODROFFE, J.—I agree.

MOOKERJEE, J.—The litigation which has culminated in this reference was commenced by the appellant under section 77 of the Indian Registration Act, 1908, to enforce registration of a conveyance. The document was in the first instance presented for registration to the Sub Registrar of Sealdah, who refused to register it on the ground of denial of execution. An application was thereupon made under section 73, sub section (1), to the Registrar at Alipore. This was dismissed on the 26th January 1914. On the 2nd February 1914, the plaintiff lodged a plaint in the Court of the Munsif at Alipore under section 77, sub section (1). The Munsif had no jurisdiction to entertain the suit, which should have been instituted in the Civil Court within the local limits of whose original jurisdiction was situated the office in which the document was sought to be registered. This was plainly the Court of the Munsif at Sealdah, and not the Court of the Munsif at Alipore within the local limits of whose original jurisdiction was situated, not the office in which the document was sought to be registered, but the office of the Registrar who

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had exercised jurisdiction under section 73, subsection (1). The Munsif accordingly returned the plaint for presentation to the proper Court. This order was made on the 19th June 1914, and on the same day the plaint was lodged in the Court of the Munsif at Sealdah. In these circumstances, the defendant contended that the suit was barred by limitation, inasmuch as it had been instituted in a Court of competent jurisdiction beyond the expiry of the period of thirty days prescribed by section 77, subsection (1). The plaintiff urged that he was entitled to the benefit of section 14 of the Indian Limitation Act, 1908. That section is in the following terms:—

"In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of Appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which from defect of jurisdiction or other cause of a like nature is unable to entertain it."

The Courts below have dismissed the suit as barred by limitation on the authority of the decision in *Abdul Hakim v. Latifunnessa Khatun* (17), which holds that section 14 of the Indian Limitation Act does not apply to a suit instituted under section 77 of the Indian Registration Act. The plaintiff has appealed to this Court. The appeal came in the first instance before Teunon and Greaves, J.J., who held, first, that there was a conflict of judicial opinion upon the question as was clear from an examination of the decisions in *Abdul Hakim v. Latifunnessa Khatun* (17) and *Khetter Mohun Chuckerbutty v. Dinabashy Shaha* (12) and secondly, that the case of *Abdul Hakim v. Latifunnessa Khatun* (17) had not been correctly decided. Under the rules of Court, consequently, the following question has been referred for decision by a Full Bench: "Whether the case of *Abdul Hakim v. Latifunnessa Khatun* (17) was rightly decided."

Section 29 of the Indian Limitation Act, 1908, provides that nothing in the Act shall affect or alter any period of limitation specially prescribed for any suit, appeal or application by any special or local law now or hereafter in force in British India. It has

not been disputed that the Indian Registration Act is a special law and that section 77 contained therein, which creates the right to bring a suit to compel registration of a document, also specially prescribes a period of thirty days as the period of limitation for the institution of such a suit. The question thus arises, whether the rule contained in section 14 of the Indian Limitation Act would, if applied to a suit under section 77 of the Indian Registration Act, affect or alter the period of limitation prescribed thereby. The appellant has contended that the answer should be in the negative. His argument in essence is that the period of thirty days prescribed by section 77 would remain untouched; although the plaintiff would be entitled in the computation of the period of 30 days to exclude the period of pendency of proceedings in another Court, such exclusion, it has been suggested, would not alter the period of limitation specially prescribed. But this interpretation, even if adopted, would be of no avail to the plaintiff, unless he could establish that the process of exclusion described would not affect the period of limitation specially prescribed. We have been invited in substance to restrict the application of the terms "affect" and "alter" to two classes of cases, namely, first, where the commencement of the period of limitation is postponed, and secondly, where the period provided in the Indian Limitation Act is different from that prescribed by the special or local law. I am not prepared to accept this narrow interpretation of section 29, subsection (1), clause (b). We are bound to adhere to the grammatical and ordinary sense of the words, as Lord Wensleydale observed in *Grey v. Pearson* (22), unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the Statute, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further (*Vacher & Son, Limited v. London Society of Compositors* (23), *Inland Revenue Commissioners v. Herbert* (24)). On a plain reading of section (22) (1857) 6 H. L. C. 61; 26 L. J. Ch. 473; 3 Jur. (N. S.) 823; 5 W. R. 454; 10 E. R. 1216; 108 R. R. 19. (23) (1913) A. C. 107 at p. 117; 82 L. J. K. B. 232; 107 L. T. 722; 57 S. J. 75; 29 T. L. R. 73; (24) (1913) A. C. 326 at p. 332; 82 L. J. P. C. 119; 108 L. T. 850; 11 L. G. R. 865; 57 S. J. 516; 29 T. L. R. 592,

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29, I am of opinion that cases of the description now before the Court, where neither the commencement of the period of limitation is postponed nor the length of the period modified, but a portion of the time which has elapsed is eliminated, may well be deemed to furnish instances where the period of limitation has been "affected or altered." In all the three classes of cases, the result to the defendant is precisely the same, namely, he remains exposed to the risks of litigation for a much longer period than what is prescribed by the special Statute. The chief object of a Statute of Limitation is to quiet titles and extinguish State demands, and from this standpoint, the effect upon the defendant who is attacked is identical. See the observation of Lord St. Leonards in *Trustees of Dundee Harbour v. Donnell* (25) quoted in *Tara Nath v. Iswar Chandra Das* (26). *Prima facie*, then the interpretation is reasonable that section 29, sub-section (1), clause (b), excludes the application of section 14 to suits instituted under section 77 of the Indian Registration Act. Besides, we cannot, in section 14, construe the words "any suit" as meaning "any suit, including a suit for which a period of limitation has been specially prescribed by any special or local law." This conclusion, as will presently be seen, is consistent with principles which have been well-recognised in this Court for a long series of years.

The question was raised as early as 1864, with regard to the applicability of the provisions of the Indian Limitation Act, 1859, to the Bengal Rent Act, 1859. A Full Bench of this Court in the case of *John Poulson v. Modhoooodun Paul* (13) came to the conclusion that suits for arrears of rent under the Rent Act were not affected by the Limitation Act. Norman, J., relied upon the observations of Wood, V. C., in *Fitzgerald v. Champneys* (27): "The Legislature having had its attention directed to a special subject and observed all the circumstances of the case and provided for them, does not intend by a general enactment afterwards to dero-

gate from its own act, where it makes no special mention of its intention so to do." The same view was adopted in *Dinonath Panday v. Roghoonath Panday* (14) and was re-affirmed by a Full Bench in *Nogendro Nath Mullick v. Mathura Mahun Parhi* (10), where it was held that section 14 of the Indian Limitation Act, 1877, was not applicable to suits for arrears of rent under the Bengal Rent Act, 1859. The Court overruled the contention that section 14 embodied a general principle of law and there was nothing inconsistent if that equitable rule was applied to rent suits. These views are in conformity with two decisions of the Judicial Committee, viz., *Unnoda Persaud Mookerjee v. Krishto Coomar Moitra* (15), and *Mohummud Buhadoor Khan v. Collector of Bareilly* (16). In *Unnoda Persaud Mookerjee v. Krishto Coomar Moitra* (15) the question arose whether the period of limitation applicable to an action for rent brought under the Rent Act, 1859, was affected by the provisions of the Indian Limitation Act, 1859. The answer was in the negative, and Sir Montague Smith who delivered the opinion of the Judicial Committee quoted with approval the observations of Wood, V. C., mentioned above. In *Mohummud Buhadoor Khan v. Collector of Bareilly* (16) the Court was called upon to consider whether the exceptions in favour of minority and other legal disabilities contained in the Indian Limitation Act, 1859, were applicable to suits under section 20 of Act IX of 1859, which authorised the institution of suits to contest the forfeiture of the properties of rebels. The plaintiffs were infants when the confiscation took place and the period prescribed for the institution of a suit expired before they attained their majority. Morgan, C. J., and Robert, J., held that the suit was barred by limitation, because in their opinion, the plaintiffs, notwithstanding that they were minors at the time of the confiscation, could claim no exemption from the operation of section 20 and as more than one year had elapsed from the time of the seizure, the suit could not be maintained. This view was confirmed by the Judicial Committee. Sir Montague Smith, in overruling the contention that a saving with respect to parties under disabilities must be taken to be, by equitable construction, implied in Act IX of 1859, observed as follows:

(25) (1852) 1 Macq. H. L. C. 321.

(26) 11 Ind. Cas. 164; 16 C. W. N. 398; 14 C. L. J. 598.

(27) (1861) 2 J. & H. 31; 10 L. J. Ch. 777; 7 Jur. (N. S.) 106; 5 T. 232; 9 W. R. 850; 10 E. R. 15; 134 R. R. 104.

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"It is impossible that any Court can add to the Statute that which the Legislature has not done. The limitation is enacted in plain and absolute terms. The Legislature has not thought fit to extend the period which it has prescribed to persons under disability. Where such enlargements have been intended, they are found in the Acts containing the limitation, as in the General Act. This Act contains no such saving, and their Lordships would be legislating and not interpreting the Statute if they were to introduce it. It was said that the clauses in the General Statute, Act XIV of 1859, relating to disabilities might be imported into this Act, but this cannot properly be done. Act XIV is a Code of Limitation of general application. This Act is of a special kind and does not admit of those enactments being annexed to it."

Let us now examine the decision in *Abdul Hakim v. Latifunnessa Khatun* (17). Maclean, C. J., and Mitra, J., held that the decision of the question whether section 14, Indian Limitation Act, was applicable to a suit under section 77 of the Indian Registration Act was governed in principle by the Full Bench case of *Nogendra Nath Mullick v. Mathura Mahun Parhi* (10), which itself followed in principle the decisions of the Judicial Committee in *Unnola Persaud Mookerjee v. Krishto Coomar Moitra* (15) and *Mohummud Euhadoor Khan v. Collector of Barilly* (16). They were pressed to follow the contrary view taken in the earlier decision of this Court in *Khetter Mohun Chuckerbutty v. Dinabashy Shaha* (12). Mitra, J., pointed out in the course of argument that the attention of the Court had not, on that occasion, been invited to the provisions of section 6 of the Indian Limitation Act, 1877, which corresponds to section 29 of the Indian Limitation Act, 1908. Indeed, the correctness of the decision in *Khetter Mohun Chuckerbutty v. Dinabashy Shaha* (12) had been doubted earlier in *Girija Nath Roy v. Patani Bibee* (21). With all respect I am unable to follow the decision in *Khetter Mohun Chuckerbutty v. Dinabashy Shaha* (12). On the other hand, the judgment of Maclean, C. J., in *Abdul Hakim v. Latifunnessa Khatun* (17) appears to me to be unassailable and is in conformity with the decision of a Full Bench of the Madras High Court in *Veeramma v. Abbiah* (20).

It is not necessary for our present purpose to consider in detail the numerous judicial decisions which involve the question of the applicability of one or other of the sections of the Indian Limitation Act to cases under local and special laws, such as the Provincial Insolvency Act, the Indian Companies Act, the Land Acquisition Act and the Bengal Tenancy Act. Many of these cases are noticed in *Secretary of State v. Shib Narain Hazra* (11) and they disclose a divergence of judicial opinion which cannot be reconciled. To take one instance, the decisions are by no means uniform upon the question whether section 5 of the Indian Limitation Act is applicable to suits under section 77 of the Indian Registration Act. In *Ahad Baksh v. Shikhs Babar Ali* (18) Jenkins, C. J., was inclined to adopt the view that section 5 was not applicable, but he felt himself bound by previous decisions. Cases of that type, however, are, as was pointed out in *Surendra Nath Nag v. Gopal Chunder Ghosh* (7), governed by the principle embodied in section 10 of the General Clauses Act, 1897 [*Matabbar Mollah v. Shoshi Bhushan Ghatak* (6)]. Reference may also be made to the decisions in *Secretary of State v. Gangadhar Nanda* (19) and *Secretary of State v. Shib Narain Hazra* (11), where the cases of *Daropadi v. Hira Lal* (4) and *Srinivasa Aiyangar v. Secretary of State* (2) were distinguished and it was ruled that section 15, subsection 2, of the Indian Limitation Act did not extend the period of limitation prescribed by section 104H of the Bengal Tenancy Act.

I am fortified by another circumstance in the conclusion that section 14 of the Indian Limitation Act does not apply to suits under section 77 of the Indian Registration Act. The decision of Maclean, C. J., in *Abdul Hakim v. Latifunnessa Khatun* (17) was pronounced on the 31st March 1903. At that time the Indian Registration Act, 1877, and the Indian Limitation Act, 1877, were in force. Since then, both the Statutes have been recast and re-enacted in 1908, but the Legislature has introduced no alteration with a view to nullify the effect of the decision in question; consequently, a well-known rule of interpretation becomes applicable. It is a well-settled principle of construction that the

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Legislature is presumed to know not only the general principles of law but also the construction which the Courts have put upon particular Statutes, and, therefore, where a section of an Act, which has received a judicial construction, is re-enacted in the same words, such re-enactment must be treated as legislative recognition of that construction *Jogendra Ohundra Roy v. Slam Das* (23), *Gokul Bagdi v. Debendra Nath Sen* (29), *Nandlal v. Bank of Bombay* (30)]. The Legislature knows what the law is and has the power to alter the phraseology, if it transpires that its true intention has not been given effect to in judicial decisions; the absence of such action on the part of the Legislature during a period of time may well be taken to indicate that the Courts have rightly ascertained its intention, specially if, in the interval, the Statute has been amended in other respects. The case before us is much stronger, as we have here a legislative affirmance of the judicial interpretation of this provision of the law.

I hold that the provisions of section 14 of the Indian Limitation Act cannot be applied in computing the period prescribed under section 77 of the Indian Registration Act; the question referred to the Full Bench must, accordingly, be answered in the affirmative and the appeal dismissed with costs.

[**CHATTERJEA, J.**—The question referred to the Full Bench is whether the case of *Abdul Hakim v. Latifunnessa Khatun* (17) was rightly decided, and arises out of a suit for registration of a document under the following circumstances.

The plaintiff presented a document, said to have been executed by the defendant, for registration in the Sealdah Sub Registration office. Registration was refused by the Sub-Registrar as the defendant did not appear. The plaintiff appealed to the District Registrar, which was rejected on the 26th January 1914. The plaintiff thereupon brought a suit on the 21st February 1914 in the Court of the Munsif of Alipore. The Sealdah Sub-Registry not being within the jurisdiction of the Alipore Munsif's

Court, the plaint was returned on the 19th June for presentation to the proper Court, and was presented on the same day in the proper Court, viz., the Court of the Munsif of Sealdah. The Courts below concurred in dismissing the suit on the ground of limitation. On second appeal to the High Court, Tennon and Greaves, JJ., relying upon the decision in the case of *Khetter Mohun Ohuckertully v. Dinabashy Shaha* (12) and differing from the case of *Abdul Hakim v. Latifunnessa Khatun* (17), have referred the question whether the latter case was rightly decided.

Now section 29 of the Limitation Act prescribes that nothing in the Act shall "affect or alter any period of limitation specially prescribed for any suit, appeal or application by any special or local law now or hereafter in force in British India." Section 77 of the Registration Act (Act XVI of 1908), which is a special Act, prescribes a special period of 30 days for a suit for registration of a document. *Prima facie*, therefore, the provision of section 14 of the Limitation Act does not apply to a suit brought under section 77 of the Registration Act. It is contended, however, that the provision of section 14 of the Limitation Act does not affect or alter the period prescribed by section 77 of the Registration Act. The period of 30 days remains the same, only the time during which the suit was pending in the Alipore Court, which had no jurisdiction to try the suit, is excluded in computing the period of 30 days prescribed by the Registration Act. I am of opinion, however, that the application of section 14 does "affect" the period prescribed by section 77 of the Registration Act, although the "period prescribed" may not be altered. The suit, which according to the provisions of section 77 of the Registration Act had to be brought in the proper Court within 30 days of the date of the order of refusal to register, i.e., on the 26th January 1914, is extended by the period during which it was pending in the Alipore Court, viz., from the 21st February to 26th June 1914. The period fixed by the special law (the Registration Act) is affected, because there is no doubt that the period prescribed by that Act is extended.

(28) 1 Ind. Cas. 168; 36 C. 543; 9 C. L. J. 271.

(29) 11 Ind. Cas. 453; 14 C. L. J. 136.

(30) 5 Ind. Cas. 457; 12 Bom. L. R. 316.

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In the case of *Unnoda Persaud Mookerjee v. Krishto Oommar Moitra* (15) the Judicial Committee, in considering the question whether the provision of section 14 of Act XIV of 1859, the Limitation Act then in force, was applicable to suits under Bengal Rent Act X of 1859, observed that according to a well-established rule for the construction of Statutes it should be presumed that the Legislature did not intend by the general enactment to interfere with a special legislation. Their Lordships referred to the rule of construction expressed by Lord Hatherly in *Fitzgerald v. Champneys* (27): "The reason is that the Legislature, having had its attention directed to a special subject and observed all the circumstances of the case and provided for them, does not intend by a general enactment afterwards to derogate from its own Act, where it makes no special mention of its intention to do so." In *Mohummud Buhador Khan v. Collector of Bareilly* (16), which was a case relating to a claim to recover confiscated property for which special provision was made by Act IX of 1859, the Judicial Committee, referring to the contention which had been urged before the High Court, viz., that a saving with respect to parties under disabilities must be taken to be equitable construction implied in the clause, observed: "Their Lordships, however, think that it is impossible that any Court can add to the Statute that which the Legislature has not done. The limitation is enacted in plain and absolute terms. The Legislature has not thought fit to extend the period which it has prescribed to persons under disability. Where such enlargements have been intended they are found in the Acts containing the limitation, as in the General Act. This Act contains no such saving, and their Lordships would be legislating and not interpreting the Statute if they were to introduce it. It was said that the clauses in the General Statute, Act XIV of 1859, relating to disabilities, might be imported in this Act, but this cannot properly be done. Act XIV is a Code of Limitation of general application. This Act is of a special kind and does not admit of those enactments being annexed to it."

It is contended that the Registration

Act, unlike Act X of 1859, is not a code complete in itself and, therefore, the general provision, contained in Parts II and III of the Limitation Act should be held applicable. It was held, however, in *Veeramma v. Abbiah* (20) that the Registration Act is a complete code in itself, and that, therefore, the general provisions of the Limitation Act (the provisions of section 7) are not applicable. It is to be observed that the Registration Act prescribes special periods for the proceedings to be taken under it, including a suit for registration of documents, and it appears that the intention of the Legislature was to reduce to the shortest limits the time within which the parties aggrieved by the registration authorities might take action.

I may refer in this connection to the case in *Abu Baker v. Secretary of State* (31), where a Full Bench of the Madras High Court held that the provisions of section 12 of the Limitation Act affect the special period prescribed by the Madras Forest Act V of 1882, which prescribed a period of 30 days for appeal.

It appears that the only case in which the provisions of sections 14 of the Limitation Act have been applied to a suit under the Registration Act is the case of *Khetter Mohun Ohuckerbutty v. Dinabashy Shaha* (12) relied upon by the referring Judges, but the provisions of section 6 of Act IX of 1871, which corresponds to section 29 of the present Limitation Act, was not at all considered or referred to. The learned Judges did not give any reasons but proceeded upon the ground that the question had been decided in more than one case, the only case expressly referred to being the case of *Golap Chand Nowluckha v. Krishto Ohunder Dass Biswas* (1) in which the provisions of section 5 of the Limitation Act were applied to a suit for rent.

The case of *Khetter Mohun Ohuc'erbutty v. Dinabashy Shaha* (12) was followed in the Bombay High Court in *Gurocharya v. President of Belgaum Town Municipalities* (32) in a case under section 86 of Bombay Act VI of 1873 (Municipalities

(31) 5 Ind. Cas. 884; 34 M. 505; 7 M. L. T. 132; 20 M. L. J. 283

(32) 8 B. 529.

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Act). Sarjent, C. J., held that the question whether the general provisions of Act XV of 1877 are applicable to cases provided for by special Acts was rightly decided in the affirmative by the Calcutta High Court in *Gopal Chandra Nowluckha v. Krishto Chunder Dass Biswas* (1), followed in *Nijabutoolla v. Wazir Ali* (5), *Khetter Mohun Chuckerbutty v. Dinabashy Shaha* (12). The only reason given by the learned Chief Justice was that had the Legislature intended to entirely exclude cases under special Acts from the operation of the Act of 1877, it would scarcely have used the qualified language it has employed in section 6 of that Act. Evidently the words "affect or alter the period so prescribed" in section 6 were referred to, but the question whether the application of section 14 of the Limitation Act would affect the limitation prescribed by the special Act does not appear to have been considered. In our Court, however, in the case of *Girija Nath Ray v. Patani Bibee* (21), in dealing with the question whether the provisions of sections 6 and 7 of the Limitation Act were applicable to a suit for rent under Bengal Rent Act VIII of 1869, Tottenham and Ghose, JJ., observed with reference to the case of *Khetter Mohan Chuckerbutty v. Dinabashy Shaha* (12) that the decision "is not easily to be reconciled with section 6, for the effect of that decision was undoubtedly to alter the period prescribed by the special Limitation Act. We do not, however, consider ourselves bound by that decision, for the present case is an entirely different one."

The case of *Khetter Mohan Chuckerbutty v. Dinabashy Shaha* (12) was referred to in the order of reference in the case of *Nagendra Nath Mullick v. Mathura Mahun Pahari* (10), where a Full Bench of this Court held that the provisions of section 14 are not applicable to suits for arrears of rent under Act X of 1859 as that code is a complete code in itself, though it is not referred to in the judgment of the Full Bench. Lastly in the case of *Abdul Hakim v. Latifunnessa Khatun* (17), where the question of the applicability of section 14 of the Limitation Act to a suit under the Registration Act had to be considered, Maclean, C. J., (Mitra, J., concurring) observed that the case was governed in principle by the Full

Bench case of *Nagendra Nath Mullick v. Mathura Mahun Pahari* (10), and pointed out that in *Khetter Mohun's case* (12) section 6 of the Limitation Act, which is of the highest importance in deciding the question, is not even referred to, and that the decision in that case did not meet with the approval of the Judges who decided the case of *Girija Nath Ray v. Patani Bibee* (21).

The learned Pleader for the appellant relied upon the fact that the provisions of section 5 of the Limitation Act have been applied to suits under section 77 of the Registration Act and referred to the cases *Nijabutoolla v. Wazir Ali* (5), *Matabbar Mollah v. Shoshi Bhushan Ghatak* (6), *Ahad Baksh v. Sheikh Babar Ali* (18), *Surendra Nath Noy v. Gopal Chunder Ghosh* (7), *Hossein Ally v. Donzelle* (33). The last case, however, was under the Bengal Rent Act VIII of 1859 and decided without reference to the provisions of section 5 of the Limitation Act. The case of *Ahad Buksh v. Sheikh Babar Ali* (18) was a case under the Registration Act, but was decided by the Court of Appeal without reference to the provisions of section 5 of the Limitation Act. Jenkins, C. J., pointed out that in some cases the Court professed to follow *Mayer v. Harding* (35) but went further than is sanctioned either by that case or the maxim on which the whole doctrine rests, but in view of previous decisions [in *Hossein Ally v. Donzelle* (34), *Shoshee Bhushan Rudro v. Gobind Chunder Roy* (35), *Jary Mohun Aich v. Anunda Charan Biswas* (36)] and of the legislative sanction accorded to the rule there laid down by the General Clauses Acts of 1867 and 1897, he applied the principle to the case, and I agreed with the decision. It is true that the decisions in the first two cases *Nijabutoolla v. Wazir Ali* (5) and *Matabbar Mollah v. Shoshi Bhushan Ghatak* (6), were based upon the ground that the general provisions of the Limitation Act applied to special and local Acts, but the decisions may be supported on the principle that, where parties are prevented from doing a thing in Court on a particular

(33) 5 C 906; 6 C. L. R. 239.

(34) (1867) 2 Q. B. 410; 9 B. & S. 27n; 16 L. T. 429; 15 W. R. 816.

(35) 18 C. 231.

(36) 18 C. 631.

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day not by any act of their own, but by the act of the Court itself, they are entitled to do it at the first subsequent opportunity. The observations in *Surendra Nath Nag v. Gopal Ohunder Ghosh Kundu* (7) were obiter.

The question, whether section 29 (1) merely applied to the period of limitation prescribed and does not necessarily make part III relating to computation of the period inapplicable to a special period of limitation prescribed by a special or local law, was considered in a recent case, *Secretary of State v. Shib Narain Hazra* (11), where Richardson, J., reviewed many of the cases on the point and held that both parts II and III of the Limitation Act are inapplicable to special periods of limitation. See also *Secretary of State v. Gangadhar Nanda* (19).

It is unnecessary to refer to the other cases in which the question of the applicability of the general provisions of the Limitation Act to special and local Acts has been considered; the decisions are not uniform. So far as the question of the applicability of section 14 of the Limitation Act to suits under section 77 of the Registration Act is concerned, the only case is that of *Khetter Mohun Ohuckerbutty v. Dinabashy Shaha* (12) and it was, as stated above, disapproved in *Giriji Noth Roy v. Patani Bibee* (21) and expressly dissented from in *Abdul Hakim v. Latifunnessa Khatun* (17), and it is to be observed that the Registration Act and Limitation Act of 1908 did not alter the law, although the said Acts were passed 5 years after the decision in *Abdul Hakim v. Latifunnessa Khatun* (17). On these grounds, I answer the question referred to us in the affirmative.

NEWBOULD, J.—I agree.

Appeal dismissed.

PATNA HIGH COURT.

MISCELLANEOUS APPEAL No. 15 OF 1919.

SECOND APPEAL No. 49 OF 1919.

August 6, 1919.

Present:—Sir Dawson Miller, Kt., Chief Justice, and Mr. Justice Foster.

RAMDHAN TEWARI—APPELLANT

versus

BISHUN PRAGASH NARAIN SINGH—

RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 17—“Appear,” meaning of—Court, whether bound to wait for Pleaders—Practice.

The word “appear” in rule 17 of Order XLI of the Civil Procedure Code does not simply mean that the party or his Pleader are physically present in Court and, therefore, can be seen by the eye, but it has a much more technical meaning, that is to say, that they are actually present in Court for the purpose of conducting the case. [p 717, col. 1.]

It is desirable, if possible, to accommodate parties to some extent if their Pleaders happen to be absent in another Court and have a chance of attending within a short time so as not to disturb the business of the Court, but a Judge is not bound to wait. [p. 717, col. 2; p. 718, col. 1.]

Appeals from a decision of the District Judge, Champaran, dated the 12th November 1918, confirming a decision of the Munsif, Motihari, dated the 16th May 1918.

Mr. Murari Prasad, for the Appellant.

Mr. Harnarain Prasad, for the Respondent.

JUDGMENT.

MILLER, C. J.—These are two appeals which have been tried together. The first is an appeal from an order of the District Judge of Muzaffarpur, dated the 6th November 1918 dismissing the appellant's appeal for default of appearance. The other is an appeal from an original order by the same Judge refusing to restore the appeal dismissed on the 6th November. The latter order was made on the 12th November, that is some six days later, in which, after hearing the parties, the learned Judge came to the conclusion that there was no excuse for the absence of the Pleader and the application was accordingly rejected.

The facts of the case upon which the appeal from the order of the 6th November depends appear, as far as can be gathered from the petition and from the order itself, to be these: that when the case was called on, the appellant, who happened to be himself present in Court but was not himself conducting the case, stated that his Pleader was absent. It does not appear from the order where the

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Pleader was at that particular moment and there being no appearance by anybody in order to conduct the appeal, the learned Judge dismissed it. Certain supplementary facts have been brought to our notice by reference to the petition in this appeal. The petition is verified, if it can be called verification, by an affidavit made by a servant of the appellant. That petition says that the petitioner is a poor man and could not engage more than one Pleader, that on the day fixed when the case was called on the petitioner went to bring his Pleader who was engaged before the Subordinate Judge in another place, and that he could not appear promptly before the District Judge. Whether he did appear or not subsequently or whether he had any possible chance of appearing in the course of a short time or whether he had any intention of appearing is not stated in the petition.

These shortly are the facts, and the order dismissing the case for want of appearance would certainly on the face of it clearly appear to be an order made under Order XLI, rule 17, of the Civil Procedure Code, which provides in effect that where the appellant on the day fixed for hearing does not appear when the appeal is called on, the Court may make an order that the appeal be dismissed; but it has been contended that in the circumstances of this case the order could not have been an order made under the rule just mentioned, because the appellant did in fact appear and spoke to the learned Judge stating that he would go and fetch his Pleader and that circumstances such as that are not contemplated in Order XLI, rule 17, and that it is only in a case where nobody puts in any appearance at all in Court on behalf of an appellant that the rule can have any application. We have been referred to two cases which have dealt with this question. The first was a decision of two Judges of this Court in the case of *Jugeshar Rai v. Railal Bahadur* (1). In that case, on the date fixed for hearing in the trial Court, the plaintiff was present and his application for adjournment was presented for the purpose of filing a list of witnesses and documentary evidence. That application was rejected and on the same day the learned Munsif who tried the case made an order to this effect:—

"No further step is taken. The case is dismissed with costs."

From that decision an appeal was preferred and the learned District Judge held that no appeal lay to him. He accordingly dismissed the appeal making no order as to costs. Against that order of the District Judge this High Court was moved in revision, and the learned Judges who heard the application came to the conclusion that the learned District Judge was in error in holding that no appeal lay to him, because they said one at least of the plaintiffs was present when the case was taken up for hearing. Therefore, it could not be held to be a dismissal for default and the District Judge should have taken up the case on appeal and determined whether the application for adjournment was properly refused or not. It does not appear from the somewhat scanty statement of the facts in that case whether the plaintiff who appeared was there for the purpose of conducting his own case or not and, therefore, so far as that decision goes it is impossible to hold that it governs the facts of the present case.

In another case also decided by a Division Bench of this Court, viz., *Lalji Sahu v. Lachmi Narain Singh* (2), pretty much the same question had to be determined, but in that case the facts are more clearly stated and they appear to me to bear greater analogy to the present case than the facts stated in the case of *Jugeshar Rai v. Railal Bahadur* (1). In that case the plaintiff happened to be in Court when the case was called on and his Pleader was absent. It appears, however, that the plaintiff himself was not conducting his case in person and owing to the absence of his Pleader, the Court dismissed the claim and declined to entertain an application by the plaintiff for restoration under Order IX, rule 9, of the Civil Procedure Code, on the ground that it had no jurisdiction. The matter came up before the High Court in revision under the latter Order. The case, however, deals with the question of whether a dismissal of a case for default under such circumstances as existed there was in fact a dismissal for default, or whether it was a case where there was no default of appear-

(1) 45 Ind. Cas. 189; 4 P. L. W. 366.

(2) 47 Ind. Cas. 27; 3 P. L. J. 355.

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ance and which the Judge ought to have determined on the merits. The learned Judges of this Court dealt with that question in this way. They said: "A party may appear in two ways, either in person or by Pleader. If he is not appearing in person, the mere fact that he is standing in Court does not amount to an appearance within the real meaning of the word. It could not be suggested for instance that if, when a case was called on, a litigant stood up at the back of the Court and applied for a few minutes' time to bring his Pleader he would be appearing in the true meaning of the word." Then the learned Judges quoted certain cases where a different view had been taken, but came to the conclusion that that was not the proper view and that the proper view was what they had themselves expressed and which was supported by a decision of the Madras High Court in the case of *Gopala Row v. Maria Susuya Pillai* (3). Incidentally they point out that the Calcutta High Court seem to have gone still further.

It seems to me, if and in so far as there is any conflict between the two cases which I have just referred to, and I do not think there necessarily is, that the last case of *Lalji Sahu v. Lachmi Narain Singh* (2), is the decision which we ought to follow. Order XLI, rule 17, as well as Order IX, rule 8, and rules of similar import refer to the word 'appear,' and it seems to me quite clear that that word as used in these rules does not simply mean that the party or his Pleader are physically present in Court and, therefore, can be seen by the eye, but it has a much more technical meaning, that is to say, that they are actually present in Court for the purpose of conducting the case. Now it is quite clear in the present instance that the party himself, although he happened to be present in Court as an interested spectator, was not there for the purpose of conducting his own case, nor did he ever for a moment attempt to do so. Hence I am of opinion that there was a default of appearance in the present case such as is contemplated by Order XLI, rule 7, and that the order made on the 6th November 1918 was clearly an order made under that rule and it disposed of the appeal.

(3) 30 M. 274; 17 M. L. J. 225.

With regard to the other appeal, the only question we have to consider is whether the learned Judge properly considered the question before him. The application then before him was an application under Order XLI, rule 19, which provides that where an appeal is dismissed under certain of the previous rules of the same Order, including rule 17, and it is proved that the appellant was prevented by sufficient cause from appearing when the appeal was called on for hearing, the Court shall re-try the appeal on such terms as to costs or otherwise as it thinks fit. The actual words of the order made which is the subject of the present appeal are these:—

"Heard. Absence of a Pleader is no excuse. This application is accordingly rejected."

All the learned Judge had before him in order to determine whether the non-appearance of the Pleader on the occasion in question was justified or not was the petition which I have referred to earlier and the affidavit made by the petitioner's servant, and the affidavit is certainly very unsatisfactory. It is an affidavit of a servant who does not state that he was present in Court and knew what had taken place, but merely states that the facts alleged in the petition were true. There was no affidavit by the petitioner himself or by the Pleader, nor was any evidence apparently called, and I think that in these circumstances we cannot say that the Judge was not justified in dismissing the application on the ground that he was not satisfied that the absence of the Pleader had been justified by the evidence before him. It is quite true that in the very short order which was made he does not deal with it in that way but merely says that the absence of the Pleader is no excuse, but, at the same time, as this is an appeal from an original order, we are entitled to consider the material which the learned Judge had before him, and I cannot help thinking that what was really in his mind was that there was nothing in the evidence before him to show anything more than that the Pleader was in fact absent and that there was no justification made out why he was not present when the case was called on. Speaking for myself I think it is desirable,

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if possible, to accommodate parties to some extent if their Pleaders happen to be absent in another Court and have a chance of attending within a short time so as not to disturb the business of the Court, but a Judge is not bound to wait and it does not appear from the circumstances of the present case that the Pleader would have been able to return and conduct the case at any period during that day. In fact it is not even alleged in the petition and as I have already said, the only affidavit verifying the petition is that of the appellant's servant which is certainly not of a satisfactory nature. In these circumstances, therefore, we do not feel justified in reversing the decision arrived at by the learned District Judge dismissing the application for restoration of the appeal. These appeals are dismissed with costs.

Foster, J.—I agree.

Appeals dismissed.

CALCUTTA HIGH COURT.
APPEAL FROM APPELLATE DECREE No. 2406
OF 1917.

May 27, 1919.

Present:—Mr. Justice Chatterjea and
 Mr. Justice Duval.

MANMATHA NATH KAR AND OTHERS
—PLAINTIFFS—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA
IN COUNCIL—DEFENDANT—RESPONDENT.

Bengal Tenancy Act (VIII B. C. of 1885), s. 104 H
(4)—Settlement of fair rent by Court—Matters to be
taken into consideration.

In settling a fair rent under section 104H, sub-section (4), of the Bengal Tenancy Act what the Court has to consider is the rent of other holdings of the same class comprised in the same settlement rent roll; the mere fact of the villages being neighbouring does not necessarily show that they are comprised in the same settlement rent roll. [p. 719, col. 1.]

Appeal against the decree of the District Judge, Midnapur, dated the 11th August 1917, modifying that of the Subordinate Judge, 2nd Court of that District, dated the 15th of February 1915.

Babus Sib Ch. Palit and Khirode Narain Bhuian, for the Appellant.

Babu Ram Ch. Mitra, for the Respondent.

JUDGMENT.—This appeal arises out of a suit under section 104H of the Bengal Tenancy Act relating to two plots of land, one measuring 303 *bighas* 2 *cottas* 14 *chittaks* and the other measuring 9 *bighas* 16 *cottas* 9 *chittaks*. The former is claimed by the plaintiffs as an occupancy holding and the latter as their *lakheraj*.

The plaintiffs were recorded as tenure-holders in respect of the first plot of land and the second plot was entered as *mal* land in the Record of Rights and the rent was settled on the basis of the plaintiffs being tenure-holders. The plaintiffs prayed in this suit for a declaration that they were occupancy *raiyyats* and not tenure-holders in respect of the first plot of land, that the assessment of rent under section 7 of the Bengal Tenancy Act was wrong and that the original rent was fair and equitable and that the second plot (9 *bighas* and odd) is *lakheraj*.

The Court of first instance found that the second plot of land was *lakheraj*, that the first plot of land constituted an occupancy holding of the plaintiff, that the rent settled was incorrect and that the entry as regards the rent of the first plot should be corrected by substituting the amount which the plaintiffs had been paying prior to the publication of the Record of Rights.

On appeal, the learned District Judge held that 7 *bighas* 6½ *cottas* of land out of the second plot were *mal*, that the remaining lands of that plot were *lakheraj*, that the plaintiffs were occupancy *raiyyats* and that the fair rate of rent was Rs. 1-8 per *bigha*, and he made a decree accordingly.

The plaintiffs have appealed to this Court.

Two contentions have been raised on behalf of the appellants. The first is that the assessment of rent by the learned District Judge at the rate of Rs. 1-8 per *bigha* has been made on an erroneous ground.

Section 104H, sub-section (4), provides that "If it appears to the Court that the entry of rent settled is incorrect, it shall settle a fair rent", and sub-section (6) provides that "in settling a fair rent under sub-section (4) the Court shall be guided

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by the rents of the other tenures or holdings of the same class comprised in the same settlement rent roll, as settled under sections 104A to 104F."

The learned Subordinate Judge observed: "The plaintiffs are occupancy *raiyyats* and the presumption is that the existing rent is fair until the contrary is proved. The defendant has, I find, failed to prove the contrary. The rent roll of the Mouzas within which the land is situate has not been proved. The rent rolls of his Mouzas of Pargana Paharpur have been produced. These Mouzas do not appear to be adjoining Mouzas. So I cannot act on these rent rolls."

The learned District Judge on appeal said: "The rent (12 annas a *bigha*) that the plaintiffs were paying prior to the recent settlement was fixed in the year 1876, 40 years ago, and the appellant-defendant has proved that in some of the neighbouring villages the *raiyyats* were paying rent for similar lands at the rate of Re 1.8 a *bigha*. The plaintiffs themselves are realising rent from their under-tenants at the rate of Rs. 2.4 or more a *bigha*. I am of opinion, therefore, that one rupee eight annas will be a fair rate of rent for all culturable land."

The learned District Judge referred to rent paid for similar lands in neighbouring villages, but what the Court has to consider is the rent of other holdings of the same class comprised in the same settlement rent roll and the mere fact of the villages being neighbouring does not necessarily show that they are comprised in the same settlement rent roll. The case must, therefore, go back to the lower Appellate Court, in order that fair rent may be settled having regard to the provisions of sub section (6) of section 104H.

The next contention relates to the *lakheraj* land. The learned District Judge, it appears, appointed a Commissioner to find out whether the land claimed as *lakheraj* fell within plots Nos 20, 21 and 22 of the Survey Map of 186, and the Commissioner found that 7 *bighas* $6\frac{1}{2}$ *cottas* of the lands in dispute were identical with the lands lying within the said plot, namely, plots Nos. 20, 21 and 22. Now these plots admittedly were *mal* lands. The finding of the learned District Judge in so far as 7 *bighas* $6\frac{1}{2}$ *cottas* are concerned will, therefore, stand.

In the result, the decree of the lower Appellate Court, so far as the 303 *bighas* and the 7 *bighas* $6\frac{1}{2}$ *cottas* are concerned, will be set aside and the case sent back to that Court in order that fair rent may be settled in respect of the 303 *bighas* and odd *cottas* as also in respect of 7 *bighas* $6\frac{1}{2}$ *cottas* of the land mentioned above. Costs will abide the result.

Case sent back.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 721 OF 1917.

June 20, 1919.

Present:—Mr. Justice Walmsley and Justice Sir Syed Shamsul Huda, KT.

JARIP SARDAR, AND ANOTHER—
DEFENDANTS—APPELLANTS

versus

JOGENDRA NATH CHATTERJEE

AND OTHERS—PLAINTIFFS—RESPONDENTS.

Ganti tenure—Settlement holder, whether can question ganti tenure created by previous settlement holder.

Where the settlement holder of an estate executes a *kabuliyat* agreeing to respect the rights of the *gantidar* tenants of the estate, he is bound to recognise the *ganti* tenure and cannot question its existence. [p. 720, col. 1.]

Appeal against the decree of the District Judge, Khulna, dated the 29th January 1917, affirming that of the Additional Subordinate Judge of that district, dated the 5th May 1916.

Dr. Sarat Chandra Basak (with him Babu Mukunda Behari Mullick), for the Appellants.

Babus Ram Charan Mitra and Sarat Chandra Roy Chowdhury, for the Respondents.

Babu Biraj Mohan Majumdar, for the Deputy Registrar.

JUDGMENT.

SHAMSUL HUDA, J.—The defendants Nos. 3 to 6 are the appellants before us. The plaintiff brought his suit for a declaration that defendants Nos. 1 to 3 have no *ganti* interest in the disputed *Mahul* and that the entry in the Record of Rights was incorrect and that such entry, so far as

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it recognises the existence of a *ganti* right in the names of defendants Nos. 1 to 3 and the predecessors of defendants Nos. 4 to 7, may be ordered to be expunged. He made other prayers in the plaint to which it is unnecessary to refer.

The facts of the case are set forth in the judgment of the Court below and need only be briefly stated. It appears that the Mehal in respect of which the suit is instituted was settled for a term of years with one Prannath Dhar. Prannath had created a *ganti* interest in favour of some of the defendants or their predecessors. His interest in the Mehal was sold on the 10th January 1906 by reason of his default in payment of Government revenue and was purchased by the plaintiff in the present suit.

It appears that shortly after the plaintiff's purchase on the 23rd June 1906, the Settlement Officer settled the rent payable for the Mehal and the settlement was made on the basis of the rent payable by the *gantidars*. The settlement holder, that is, the plaintiff in this suit, executed a *kabuliyat* in the year 1908 and in that *kabuliyat* he agreed to respect the recorded rights possessed by the under-tenure holders, rights of the village headman and others in the said estate. It cannot be denied that the right of the *gantidars* was a right that was at the time recorded.

The question that arises for our considerations is this:—(Can the plaintiff, having agreed to respect the right of the *gantidar* tenants, now ask for a declaration that no *ganti* right existed? It seems to me that on the authority of the two cases, *Tapanidhi Raghunath Puri v. Pitambar Gajendra Mahapaty* (1) and *Chandramoni Mohanti v. Manmatha Nath Mitter* (2), he is bound to recognise the *ganti* tenure and cannot question its existence.

The learned Judge has decreed the plaintiff's suit on the findings that the *gantidars* were never in possession and exercised no right as *gantidars*. In my opinion that finding does not dispose of the question. It is not said that the

plaintiff has acquired any title by adverse possession. If he cannot question the title of the *gantidars* by reason of the *kabuliyat* which he executed, it seems to me that he cannot get a declaration that the *ganti* right does not exist.

It has been argued before us that some of the *gantidars* did on certain occasions renounce all claim to the *ganti*. The answer is that the suit is not based on the ground of abandonment. There could be no abandonment by some of the *gantidars* only. No issue was raised on this point.

On behalf of the respondents reliance has been placed on the cases of *Gour Chandra Saha v. Mani Mohan Sen* (3), *Jahandar Baksh Mallick v. Ram Lal Hazra* (4) and *Jamna Das v. Ram Autar Pandey* (5). We have examined these cases and, in our opinion, they do not affect the present question.

It has also been argued before us that the original *gantidars* have parted with their *ganti* interest in favour of defendants Nos. 8, 9 and 10 and, therefore, the original *gantidars* have no rights to prefer any appeal to this Court as they have no longer any interest left in the *ganti*. In my opinion that question cannot be gone into. The defendants explain in their written statements that these sales were merely colourable transactions and the purchasers were mere *benamdars*. No issue was raised on the question and such controversy cannot, for the first time, be raised in second appeal. I, therefore, think that the decision of the Courts below decreeing the plaintiff's suit cannot be supported and must be set aside. I would accordingly decree this appeal with costs and dismiss the suit of the plaintiff with costs of all the Courts.

WALMSLEY, J.—I agree.

Appeal dismissed.

(3) 32 C. 463.

(4) 5 Ind. Cas. 565; 11 C. L. J. 364; 14 C. W. N. 470; 37 C. 449.

(5) 13 Ind. Cas. 304; 16 C. W. N. 97; 11 M. L. T. 6; 9 A. L. J. 37; (1912) M. W. N. 32; 15 C. L. J. 68; 14 Bom. L. R. 1; 21 M. L. J. 1153; 34 A. 63; 39 I. A. 7. (P. C.).

(1) 5 C. L. J. 67.

(2) 5 Ind. Cas. 301; 11 C. L. J. 68.

BALASUBRAMANIA SASTRI v. PONNUSAMI IYER.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1387 OF 1917.

April 29, 1919.

Present:—Mr. Justice Oldfield and

Mr. Justice Phillips.

BALASUBRAMANIA SASTRI—

PLAINTIFF—APPELLANT

versus

PONNUSAMI IYER, MINOR BY GUARDIAN,

SUBBALAKSHMI AMMAL—LEGAL

REPRESENTATIVE OF DEFENDANT No. 2—

RESPONDENT.

Hindu Law—Temple—Archaka excluded from office till payment of fine—Suit by archaka to recover damages—Damages, measure of—Delay in bringing suit, effect of—Voluntary payments, whether income.

Where an archaka of a temple is excluded from his employment till he pays a certain amount of fine imposed upon him by the trustees, he is under no obligation to pay the fine under protest and thus reduce the amount of damages recoverable from the trustees by shortening the period of his unemployment. [p. 725, col. 1.]

Where the trustees of a temple eject an archaka from the temple they do so at their own risk, and they cannot be heard to say that a delay in taking steps to test the propriety of their conduct involved a lack of diligence on the part of the archaka, which should mitigate or deprive him of the right to damages. [p. 725, col. 1.]

Payments made to archakas for performing archakai in a temple are voluntary, in the sense that their amount and the making of them is at the devotee's option. Where it is in the contemplation of the parties that such payments would be received by an archaka, an action will lie to claim them as damages from the trustees of the temple. [p. 725, col. 1; p. 726, col. 1.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Chingleput, in Appeal Suit No. 202 of 1916 (Appeal Suit No. 10 of 1916, District Court, Chingleput), preferred against the decree of the Court of the District Munsif, Conjeevaram, in Original Suit No. 558 of 1914.

This second appeal coming on for hearing on the 7th to 9th August 1918, the Court delivered the following

JUDGMENT.—The lower Appellate Court has held that defendants were entitled to insist on plaintiff paying the fine imposed on him before he could be allowed to return to work and to the enjoyment of the profits of his employment, such payment to be under protest and subject to plaintiff's right to recover the amount he paid by suit. The importance of this is with reference to plaintiff's claim

to compensation for loss of earnings from the date of his exclusion from his employment until the date of his plaint.

The first answer to this claim is that defendants had no right to exclude plaintiff from his employment until the fine was paid. Defendants contend first that plaintiff was bound to mitigate the damage he would sustain by making all reasonable exertions, including paying the fine, to return to work or to obtain other work suitable to him. If this is based on the general law relating to damages we cannot accept it. For no case has been shown us, in which the reasonable exertion to be taken by the plaintiff included anything resembling the payment demanded here or anything outside work, such as the plaintiff had done or might reasonably be required to do. The alternative case put forward by defendants is that plaintiff's duty to pay his fine under protest in order to return to work rests on the custom of the temple. On the existence of such a custom we can find no discussion of evidence or proper finding in the lower Appellate Court's judgment. We must, therefore, call on it now to find on the evidence on record on the issue whether an Archaka is bound by the custom of the temple to pay under protest any fine inflicted on him and the trustee is entitled to exclude him from the temple until he does so.

The next question raised in the appeal is whether the plaintiff, who was bound to make exertions to mitigate the damage he sustained, took adequate steps to do so by endeavouring to obtain other employment, which he could reasonably be expected to accept, within a reasonable time. It is argued here that an Archaka excluded from his own temple cannot be expected to take up other employment of any description. The lower Appellate Court must submit a finding on the question whether this is the case. Fresh evidence may be taken.

Lastly in its paragraph 9 the lower Appellate Court refers to an admission of plaintiff that his earnings consisted in the voluntary offerings of devotees at the temple. But we cannot find any statement by him that such offerings were voluntary. The lower Appellate Court must now submit a finding

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whether the offerings, of which plaintiff's income consisted before his exclusion, were voluntary. Fresh evidence will be allowed on this question also.

Findings are due in six weeks. Seven days are allowed for objections.

In compliance with the order contained in the above judgment, the Temporary Subordinate Judge of Chingleput submitted the following

FINDING.—In this suit the Dharmakarthha of Sri Kamakshi Amman temple by his guardian and power-of-attorney agent, 2nd defendant, fined an Archaka of the temple twice; on the first occasion the fine was 8 annas for taking a worshipper into a place prohibited by the 2nd defendant and on the second occasion Rs. 10 for using disrespectful language to him in a correspondence. The Archaka filed a suit to recover both these amounts as well as certain damages claimed by him for his being prevented from discharging his duties as Archaka. *Inter alia* the written statement of the trustee and the agent contained an averment to the effect that according to the custom of the temple if any servant is fined by the Dharmakarthha, such servant must pay the fine in the first instance and then set up his grievance, if any, for redress in respect of such fine. Though in paragraph 4 such a contention was specifically raised, no issue was framed by the learned District Munsif but nevertheless in paragraph 8 of his judgment we find the following: "The defendant's Pleader argued that plaintiff was not entitled to any damages because he would not have been prevented from performing his office in the temple if only he had paid the fines imposed on him and questioned their propriety afterwards; and he said it was the custom in the temple for its servants to pay the fines and then question the propriety of their imposition. *No such custom was proved before me and even if proved I should be slow in upholding such a custom, for the trustee may arbitrarily fine a temple servant a prohibitive amount and keep him out of his emoluments forever, if such a custom were to be recognised by the Courts of law.*"

2 In the usual course the matter came on appeal before this Court and my

predecessor in-office dismissed the appeal so far as this contention went. The matter went up in second appeal before their Lordships of the High Court, who in their judgment framed an issue to the following effect:—"Whether an Archaka is bound by the custom of the Kamakshi Amman temple at Conjeeveram to pay under protest any fine inflicted on him and the trustee is entitled to exclude him from the temple, until he does so." Their Lordships directed this Court to record a finding on this issue on the evidence on record. I am not, therefore, entitled to record any further evidence on this point. On a perusal of the oral and documentary evidence in the case I cannot find a single syllable either for or against the question raised in this issue, and it must be so because there was no specific issue framed in the first instance. In the absence of such evidence I can only record a finding in the negative on the issue remitted to me.

3. In respect of the two other issues on which I was directed to record findings after taking evidence adduced by the parties, the plaintiff re-examined himself and defendants examined 6 other witnesses. Before I proceed to discuss and record findings on the issues remitted to me by their Lordships, I must refer to a contention put forth by defendants' Vakil in respect of the burden of proof in this case. According to him it is on the plaintiff and not on him and, therefore, he says that plaintiff must begin the case. I referred to the plaint and the written statement (in the original pleadings) and I do not find a single averment to cover the issue now under consideration. The unsuccessful party for the purpose of second appeal was the plaintiff and in the memorandum of appeal I do not see any contention on his behalf to cover the points now under consideration. I must, therefore, in determining the question of burden of proof be guided only by what their Lordships say in their judgment. The defendants' Vakil lays stress on the wording of the issues and argues that on the language used in the issues the burden must be said to be on the plaintiff.

4. In determining this question I am bound to see what their Lordships meant.

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when remitting the issues to me. It is certainly clear that the argument which formed the basis for the issue, proceeded from the defendants' Vakil, because their Lordships say thus: "The next question raised in the appeal is whether the plaintiff, who was bound to make exertions to mitigate the damage he sustained, took adequate steps ———." I say that this contention was put forth on behalf of defendants because the succeeding sentence contains the contention of plaintiff. The succeeding sentence runs thus: "It is argued here that an Archaka excluded from his own temple cannot be expected to take up other employment of any description." If this is the contention advanced on behalf of plaintiff in respect of the subject-matter of the issue, it is not at all proper to say that it was he who advanced the contention that other avocations are left open to him and that he must make exertions to take advantage of such avocations to mitigate the damages he sustained. It is thus mathematically clear that the contention on which the particular issues were framed by their Lordships emanated from defendants and not from plaintiff. Such being the position, the sentence "who was bound to make exertions to mitigate the damage he sustained" may be taken either as an observation of their Lordships or may be an argument advanced on behalf of the defendants. If it amounts to an observation on the part of their Lordships I will take it as a direction and proceed to further trial. But if it is an argument advanced on behalf of defendants, it is no business of mine to presume that plaintiff is bound to make exertions to mitigate the damage he sustained and it will be one of the duties of the person alleging that statement to establish that ground also. Whatever it is, it will be impossible to ask a man who specifically pleaded before their Lordships that it is not possible for an Archaka excluded from his own temple to accept other employments elsewhere, to prove the issue remitted to me and as defendants according to my opinion are the individuals who are responsible for this issue, they are bound to begin the case and adduce evidence to enable me to record a finding on the issues. I, there-

fore, rule that it is defendants that must begin and not plaintiff.

5. In conformity with such direction the defendants examined six new witnesses. There are no documents filed. Of the six witnesses examined before me four are worshippers in the temple, one an Archaka in office in the temple, and another a temple servant of Jambukeswaran temple in Trichinopoly. One other point must be made clear before I begin to discuss the evidence. The words "other employment," which the plaintiff can reasonably be expected to accept, require further explanation. The defendants' Vakil seems to be of the impression that the language used in this issue would cover any kind of employment available in the world. At this stage defendants' Vakil interferes and adds "consistent with Brahminhood," yet he is the first man who suggested in the course of the cross examination the calling of trade for the plaintiff. If the calling of trade is consistent with Brahminhood in the term in which it is understood by Brahmins or by the class to which the parties belong, then all avocations, however degrading they may be in the social strata, may be said to be avocations for plaintiff to discharge when he is out of office as an Archaka. Certainly that is not the meaning with which the issue was framed and remitted to me for finding. The proper explanation for the words used in the issue is only to show other employments in the sphere of work in which plaintiff is placed and does not mean any kind of work available in the world. As plaintiff is an Archaka, the only way in which plaintiff can find other employment must be consistent with his Archaka duties or duties akin to such Archaka duties such as Paricharakam and other duties of a religious nature. We cannot travel beyond the region of religion to compel plaintiff to seek employment in branches of service which have no bearing of religion in it. So far as plaintiff is concerned, the witnesses examined on behalf of defendants say that he is not a Purohit and cannot discharge the duties of Purohit. The defendants' Vakil in a way suggests that Archakas, being also *ex officio* Paricharakas may also try employment as a cook or a drawer of water.

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He is mistaken in his suggestion. It may be that because the Paricharaka duty in the temple is part and parcel of Archaka duty also and because such duty is done in the temples and for gods, no degrading element may be attached to it or nobody would regard a Paricharaka doing service in the temple as one doing degrading duties. Nevertheless that is not the standpoint in which I should view it. When the defendants ask plaintiff to do duty as cook or draw water elsewhere than in the temple, it will be certainly degrading to the status of an Archaka and nobody can compel a man to degrade himself because circumstances placed him in a miserable position. However miserable it may be, one is not bound to lower himself in the social status and degrade himself in the eyes of others. So far as regards plaintiff's getting employment as Archaka elsewhere in Conjeeveram, unfortunately the plaint temple is an unique one where the Puja is according to the Smartha Vaideeka rituals as opposed to Agama rituals performed by Gurukkals. In other words, Smartha Brahmins like those who do Archaka duties in the plaint temple will not perform Puja in Siva temples where there is Lingam, and except the plaint temple there are no other temples in Conjeeveram where plaintiff can take service and do Puja. That line is, therefore, blocked for plaintiff. In his deposition he admitted that he knows no other craft except the Archaka work, that he is not possessed of wealth to start business as suggested by defendants' Vakil, nor has he got the necessary strength or stamina to undertake other duties even though they may be degrading.

For these reasons I find the 2nd issue for plaintiff and against defendants.

6. On the 3rd issue evidence was let in on behalf of defendants to show that the offerings are voluntary. They are certainly voluntary and can never amount to compulsory payments because the devotee, who when compelled to pay a certain sum for Archaka is entitled to keep back, if he is not inclined to pay that amount. Even if he has entered the temple nobody can compel him to remain there and perform Archana at the stipulated rate. There is evidence on behalf of defendants to show

that the offerings for Archaka by the devotees range from 3 pies to 6 annas and one of the Archakas went to the length of saying that an Archaka is bound to perform Archana for nothing. If all Archakas are only of the same spirit as defendants' witness No. 6, there will be no trouble in Hindu temples. It is because they are as a class recalcitrant and are not amenable to reason and control and want to exercise their authority in their own way under the assumption that they cannot be replaced by others, all the trouble arises. As I have already remarked the only sense in which the question can be viewed is that it can only be a voluntary offering judged from the standpoint of the devotee; and as the question referred is one from the standpoint of the devotee, I find that the offerings in the plaint temple on the evidence recorded by me are only voluntary and not compulsory.

This second appeal came on for final hearing on the 17th and 23th of April 1919 after the return of the finding of the lower Appellate Court upon the issues referred by this Court for trial.

Messrs. L. A. Govindaragava Aiyar and L. Venkatragava Aiyar, for the Appellant.—On the law of master and servant the plaintiff was not bound to pay the fine under protest. The fine may be prohibitive and the employer cannot rely on its non-payment in mitigation of damages.

The finding is that there is no custom of the temple requiring that the fine should be paid under protest.

The finding also is that an Archaka cannot seek employment of a different nature.

As to the income of the Archaka plaintiff being derived from voluntary offerings, the damages can fairly be assessed. It is only where the amount is so uncertain as to be incapable of proof that plaintiff cannot claim damages. In fact the District Munsif has assessed the amount.

Messrs T. R. Ramachandra Aiyar and M. N. Krishna Aiyar, for the Respondent.—Plaintiff took two years to lay his claim after his exclusion from employment. His laches disentitles him to any damages.

Voluntary payments cannot be the basis for an award of damages. Plaintiff's income consisted entirely of voluntary donations by

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worshippers. See *Krishnasami v. Krishnama Charyar* (1), *Ramessur Mookerjee v. Ishan Ohunder Mookerjee* (2) and the English cases, *Penn v. Spiers & Pond* (3), *Great Western Railway Company v. Helps* (4) and *Manubens v. Leon* (5).

JUDGMENT.—No objection has been argued to the lower Appellate Court's finding on the first point remanded. We, therefore, hold that the plaintiff was under no obligation to pay the fine under protest and thus obtain the right to continue in service.

The question was next of plaintiff's duty to mitigate the damage to himself by making reasonable exertions to find other employment. The lower Appellate Court has held that he was not in default in this matter; and we accept its finding. It is now argued that his delay of over two years in suing involved a lack of diligence, which should mitigate or deprive him of his right to damages. Defendants, however, ejected him from his employment at their own risk and cannot now be heard to say that he should have taken steps to test the propriety of their conduct sooner—see *Raghunath Singh v. Achutanand* (6).

There is lastly the finding that the offerings comprising the income for loss of which compensation is claimed are voluntary. In face of the evidence of 1st defendant's agent as defendants' witness No. 8: "Devotees pay anything they like. If the Archakas decline to do Archana, they cannot be compelled to do it..... Archakas do not generally perform *archanai* without immediate payment or prospective advantage. Payments vary for the different kinds of *archanai*," no other conclusion is possible. We proceed on the footing that the payments to Archakas are voluntary, in the sense that their amount and the making of them at all is at the devotee's option.

On this finding it is argued for defendants that no compensation can be claimed

(1) 5 M. 313.

(2) 10 W. R. 457.

(3) (1903) 1 K. B. 766; 77 L. J. K. B. 542; 98 L. T. 541; 24 T. L. R. 354.

(4) (1918) A. C. 14; (1918) W. O. & I. Rep. 287; 87 L. J. K. B. 230; 118 L. T. 235; 62 S. J. 120; 84 T. L. R. 118.

(5) (1919) 1 K. B. 208; 35 T. L. R. 94; 63 S. J. 102; 88 L. J. K. B. 311.

(6) 43 Ind. Cas. 374; 3 P. L. W. 283.

by plaintiff for their loss, and there are no doubt some expressions in Indian decisions to support the view that voluntary payments cannot be the basis of an award of damages. But, read carefully, they seem to us to be reconcilable with the result of the English authorities, to which we shall refer, that the question is only whether the amount of damages can be assessed, the voluntary character of the income being immaterial, if an assessment of its amount can be made. In *Krishnasami v. Krishnama Charyar* (1), it is no doubt said that "damages cannot be given for the injury suffered by reason of the loss of voluntary offerings, because the injury is too remote and uncertain to be safely measured." But in that case, the damages were claimed as accruing owing to the loss of prestige sustained by certain worshippers from the interruption of their performance of the temple services by persons, who attempted to join, as officiants, in their recital of the ritual and the consequent diminution of offerings to the former. The facts there differed from those before us, because there was no question of the exclusion of the plaintiffs from the right to perform services, for the performance of which they might be paid directly; and in any case the judgment proceeded: "It is possible that other causes wholly unconnected with the wrong may have influenced the persons, who might have made such offerings, to withdraw their donations." No such suggestion has been made here and no evidence consistent with it has been given. Again in *Ramessur Mookerjee v. Ishan Ohunder Mookerjee* (2) the Court held on facts, which are not fully stated, that no suit would lie to recover damages based on uncertain and merely voluntary payments, such as those in question. These are the strongest cases for defendants and they can be explained consistently with the English decisions next to be referred to, on the ground that the Court held that the income could not in fact be ascertained, its voluntary character being no doubt an obstacle in the way of ascertaining it. Those English decisions are *Penn v. Spiers & Pond* (3), *Great Western Railway Company v. Helps* (4) and *Manubens v. Leon* (5). The two first mentioned were no doubt decided with reference

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to the definition of "earnings" in the Workmen's Compensation Act; but we have not been shown how that affects the principle involved, which is that, although part of the income in question consisted in 'tips,' which like the payments here to plaintiff were voluntary, it was, as it admittedly is here, in the contemplation of the parties that it would be received and that, as plaintiff was prevented by defendants' action from receiving it, he was entitled to claim it as damages.

The remaining question then is as to the amount of those damages, which are to be measured by the income plaintiff may reasonably have been expected to receive. The lower Appellate Court did not give a finding regarding them. But the matter was inquired into fully by the District Munsif at the trial; and, as the only evidence there, that of plaintiff, was not attacked in cross-examination, we think that we can act on it. Adopting the District Munsif's finding on this point, we allow the appeal, set aside the decree of the lower Appellate Court and restore that of the District Munsif with costs throughout.

M. C. P.

Appeal allowed.

CALCUTTA HIGH COURT.
APPEAL FROM APPELLATE DECREE NO. 1725
OF 1916.

January 15, 1919.

Present: — Mr. Justice Chatterjea
and Mr. Justice Newbould

BABU RAM MONDAL — DEFENDANT
— APPELLANT

versus

DAKHINA SUNDARI NAMASUDRANI

AND OTHERS — PLAINTIFFS — RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 66, O. VI,
r. 17, O. XXI, rr. 84, 94—Auction sale—Purchaser,*

agreement by, to share property with others—Sale certificate—Joint purchasers, names of, whether can be entered in certificate—Specific performance—Amendment of plaint, when to be permitted.

An auction purchase of a *jote* was made by the defendant alone and the earnest money was paid by him alone but instead of paying the balance of the purchase-money from his own pocket, he obtained a portion of it from the plaintiffs under an agreement that the plaintiffs would be joint purchasers of the *jote* with him.

Held, (1) that the names of the plaintiffs could not be inserted in the certificate of sale, because the person who was declared to be the purchaser after the bids were concluded was the person in whose name the certificate was to be granted under Order XXI, rule 94, of the Civil Procedure Code; [p. 727, col. 2.]

(2) that there having been no agreement before the sale, the second clause of section 66 of the Code of Civil Procedure did not apply to the case but that the plaintiffs were entitled to claim specific performance of the contract. [p. 728, col. 1.]

Where the facts upon which a plaintiff would be entitled to maintain a suit for specific performance of a contract are all stated in the plaint, the plaintiff should be allowed to amend the plaint and add a prayer for specific performance of the contract, although the plaint originally contained no such prayer and the Courts below did not try such a case. [p. 728, col. 2.]

Appeal against the decree of the Subordinate Judge, 1st Court, Faridpore, dated the 26th of June 1916, affirming that of the Munsif, 2nd Court at Goalundo, dated the 20th November 1914.

Babu Gunada Charan Sen, for the Appellant.

Babu Khitish Chandra Neogi, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for recovery of possession of a $\frac{2}{3}$ rd share of certain lands which had been sold in execution of a decree for arrears of rent and purchased by the defendant.

It was alleged that there was an agreement between the plaintiffs and the defendant that they should purchase the property in the names of all the three persons on payment of the price in equal shares, that the defendant should take from the plaintiffs the price in respect of two shares and should himself pay from his own pocket his share of the money, that the defendant accordingly took the shares of the money from the plaintiffs but purchased the property in his own name only, and that the plaintiffs having subsequently come to know of it, the defendant took the

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advice of lawyers and agreed to put in a petition (admitting therein the plaintiffs' title) in the record of the execution case, and stated that there would be no difficulty in future, that he actually put in such a petition but subsequently did not allow the plaintiffs to take possession of their shares.

The defence was a total denial of these allegations.

The Court of first instance found that the allegations made in the plaint were true and accordingly decreed the suit.

On appeal the learned Subordinate Judge held that "originally the purchase was made by the defendant No. 1 alone and the earnest money was paid by him alone The agreement to give shares to the plaintiffs was arrived at after the defendant had made the purchase on his own behalf." He was, however, of opinion that this did not make any substantial difference in the position of the parties relating to the purchase. He says: "For the purchase was not complete until the balance of the purchase money was paid, and the defendant had not acquired any right until this was done and until the sale was made absolute. So when the defendant, instead of paying the balance of the purchase money from his own pocket, obtained a portion of it from the plaintiffs, not as a loan but after admitting them to be joint purchasers of the *jote*, he could not claim to be the sole purchaser of the *jote* and could not deny the plaintiffs' right in the purchase. If he obtained the certificate of sale in his own name alone, it would amount to an act of fraud." He accordingly held that the defendant was estopped from denying the plaintiffs' title to a $\frac{2}{3}$ share of the *jote*. In the result the decree of the Court of first instance was affirmed by the lower Appellate Court.

It is contended on behalf of the appellant that the suit is not maintainable, having regard to the provisions of section 66 of the Civil Procedure Code.

There is no doubt that the defendant was a person who claimed title under a purchase certified by the Court, and section 66, therefore, clearly applies to the case. The second proviso to the section says: "Nothing in this section shall bar a suit to

obtain a declaration that the name of any purchaser certified as aforesaid was inserted in the certificate fraudulently or without the consent of the real purchaser."

It is contended on behalf of the respondents that this case comes within the second clause, because it was fraudulent on the part of the defendant to have obtained a certificate in his own name instead of in the names of all the three persons, but we do not think that it can be brought under the second clause.

Order XXI, rule 84, says: "On every sale of immoveable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty-five per cent. on the amount of his purchase-money to the officer or other person conducting the sale, and in default of such deposit, the property shall forthwith be re-sold." Then, Order XXI, rule 94, says: "Where a sale of immoveable property has become absolute, the Court shall grant a certificate specifying the property sold and the name of the person who at the time of sale is declared to be the purchaser. Such certificate shall bear date the day on which the sale became absolute," so that the person who is declared to be the purchaser after the bids are concluded is the person in whose name the certificate is to be granted under rule 94. The names of the plaintiffs, therefore, could not be inserted in the certificate of sale.

There is no doubt that a petition was filed by the defendant in the execution case, in which it was expressly admitted that he had purchased the property on behalf of himself and the two plaintiffs and that he had taken their share of the money from them, but the fact that these statements were made in the petition filed by the defendant himself in Court on the day the balance of the purchase money was deposited negatives any case of fraud on the part of the defendant, as he made no secret of the fact that the purchase was made on behalf of all the three. The certificate, however, as we have already stated, could not be made in the names of all of them. The question is whether, under these circumstances, the suit can be maintained by the plaintiffs.

The case of a purchase by a member of a joint Hindu family from family funds

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stands on a different footing from the present case. In the case of *Bodh Singh Doodhuria v. Gunesh Ohunder Sen* (1) the Judicial Committee said that the provisions of the section cannot be taken to affect the rights of members of a joint Hindu family who by the operation of law, and not by virtue of any private agreement or understanding, are entitled to treat as part of their common property an acquisition, howsoever made, by a member of the family in his own name if made by the use of the family funds [see also the recent case of *Ganga Sahai v. Kesri* (2)]. The same principle applies, where the parties stand in the relation of partners and the purchase is made by a partner by the use of partnership funds.

In the present case, had it been found, as alleged in the plaint, that there was an agreement before the sale that the purchase would be in the names of the three persons, then the case could have been brought under sub-section (2) of section 66 of the Code. Then it might have been said that the name of the defendant had been inserted in the certificate of sale fraudulently or without the consent of the two plaintiffs. But the learned Subordinate Judge, as stated above, has found that there was no agreement before the sale. That being so, we do not think that the second clause of section 66 applies to this case.

We are referred to a decision of Sir Lawrence Jenkins, C. J., and D. Chatterjee, J., in *Noni Gopal Bosu v. Sures Ohunder Ghosh* (3). But there the agent of the real owner purchased the property, and it was, therefore, a case of an agreement prior to the sale.

In the face of the statements made in the petition filed by the defendant, a copy of which is on the record of the present case, the plaintiffs are, *prima facie*, entitled to claim specific performance of the contract. But there was no prayer for specific performance of the contract in the plaint, nor has such a case been tried by the Courts below. We think, however, that

(1) 12 B. L. R. 317; 19 W. R. 356; 3 Sar. P. O. J. 253.
(2) 80 Ind. Cas. 265; 19 C. W. N. 1175; 18 M. L. T. 207; 29 M. L. J. 329; 2 L. W. 837; 13 A. L. J. 999; 17 Bom. L. R. 998; 27 A. 515; 22 C. L. J. 508; (1915) M. W. N. 713; 42 I. A. 177 (P. C.).

(3) 30 Ind. Cas. 212; 18 C. W. N. cxxviii (128).

the ends of justice require that the plaintiffs should be allowed to amend their plaint with a prayer for specific performance of the contract, as the facts upon which they would be entitled to maintain such a suit are all stated in the plaint.

The learned Pleader for the appellant contends that if the plaintiffs are allowed to amend the plaint, the defendant should be allowed to put in a fresh defence and the case tried *de novo*. We think that this should be done.

We accordingly set aside the decrees of the Courts below, remand the case to the Court of first instance and direct that Court to allow the plaintiffs to amend their plaint and allow the defendant also to put in fresh written statement and then try the case according to law.

Costs will abide the result.

*Decrees set aside;
Case remanded.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1791 OF 1918.

September 26, 1919.

Present:—Mr. Justice Spencer and
Mr. Justice Krishnan.

TANGUTHUR NARASIMHAM—
DEFENDANT No. 1—APPELLANT

versus

SINGARAJU RAMIAH AND OTHERS—
PLAINTIFFS, DEFENDANT No. 2 AND LEGAL
REPRESENTATIVES OF DEFENDANT No. 3—
RESPONDENTS.

Madras Proprietary Estates Village Service Act (II of 1894), ss. 6, 15—Submission of nomination by proprietor—Limitation, commencement of—Formal submission of unsigned nomination by proprietor's agent, validity of—Premature submission of nomination, effect of—Power to withdraw before acceptance by Collector.

In the case of the creation of a new office under section 15 of the Madras Proprietary Estates Village Service Act the starting point for the six weeks allowed for submission of nomination by the proprietor is the day on which all the requisite steps have been completed under section 6, or, in other words, the day on which the last step is completed. [p. 730, col. 1.]

As the power of choice of the person to be appointed to a new office created under the Act is given to the proprietor under section 15, he must exercise

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it himself and is prohibited from delegating it to another. But once the choice is made, it is competent to his agent to act for him in formally embodying his nomination in the form prescribed and signing it for him and submitting it. [p. 731, col. 2.]

A proprietor is not prevented from submitting his nomination in advance of a new office being created. Such a submission would take effect when the office is created, if not rejected by the Divisional Officer. [p. 731, col. 2.]

A nomination prematurely made may be withdrawn and a fresh nomination may be made after the office is actually created. [p. 731, col. 1.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Nellore, in Appeal Suit No. 5 of 1918, preferred against the decree of the Court of the District Munsif, Kavali, in Original Suit No. 793 of 1915.

FACTS.—On the amalgamation of certain proprietary villages, the Deputy Collector presumably directed the Tahsildar to send notice to the proprietors to appoint a man to the village office. The agent of the proprietors at once sent in a nomination on their behalf. The Deputy Collector rejected such nomination as incompetent in an agent and appointed the plaintiff in the place. The proprietors subsequently sent in their formal nomination of their agent's nominee, the 1st defendant. The present suit was for a declaration that the 1st defendant was not legally appointed and that the plaintiff was so appointed. The lower Appellate Court decreed the same. Defendant No. 1 appealed.

Mr. Patanjali Sastri, for Mr. A. Krishnaswamy Aiyar, for Defendant No. 1.—What a man can do can be lawfully done on his behalf by his agent.

A new vacancy has been created under section 15 of Madras Act II of 1894, and the agent of the proprietors sent in a nomination on their behalf within the six weeks under section 9. If the Revenue Officer was dissatisfied with the nominee, he had to direct the proprietors to appoint another man under section 11, sub-section (1). In any case he had no power to make the appointment himself in the face of these legislative provisions.

The formal nomination sent in by the proprietors is only a ratification of their agent's act and it does not matter that

it was sent out of time.

Mr. V. Ramesam, for the Plaintiff.—The nomination sent by the agent was premature. Ordinarily the District Collector should take the initiative in issuing the notice to the proprietors. Hence the notice by the Tahsildar was incompetent and of no effect. See section 9. The nomination was also incomplete.

The nomination of the proprietors was too late as the six weeks had elapsed, and an appointment had been made as on default.

JUDGMENT.—Plaintiff sues to declare that he is the properly appointed Karnam of Vinjamin under the Madras Proprietary Estates Village Service Act, Act II of 1894, and that the appointment of the 1st defendant to that office is *ultra vires* and invalid.

This is a case to which section 15 of Act II of 1894 applies. Plaintiff was appointed by the Deputy Collector of Atmakur acting under clause (3) of that section. Unless that appointment can be held to be a valid one, plaintiff's suit must fail, and it will be unnecessary to consider whether the order of the District Collector setting aside that appointment and appointing the 1st defendant instead, which was confirmed by the Revenue Board, was *ultra vires* or not. The burden is on the plaintiff to establish the validity of his appointment in this case.

The Deputy Collector could act and make his own nomination under clause (3) only if the proprietor failed to submit his nomination to the office within a period of six weeks from the creation of the new office, if clause (1) applied or from the date of the Collector's notice under clause (2) if that clause applied. It is contended for the 1st defendant (appellant) that there was a proper submission of his name within time made by the proprietors and that it was, therefore, not open to the Deputy Collector to appoint his own nominee.

The procedure for the creation of a new office is laid down in section 6 of the Act. After the necessary preliminary steps are taken and the Board's sanction is obtained, the section directs that a notification about the grouping of the villages in connection

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with the creating of the new office shall be published in the District Gazette as well as in the village in question and a copy of it given to the proprietor. We are of opinion that in the case of the creation of a new office under section 15, clause (1), the starting point for the six weeks will be the day on which all the requisite steps have been completed under section 6 or, in other words, the day on which the last step was completed.

Having decided the starting point generally, we must see whether there was in this case a valid submission within the requisite period of a name for the office by the proprietors. The 1st defendant relies on Exhibit X as the proper submission for the purpose. It is dated 9th October 1914, and it recites that notice was given to the proprietors on 15th September 1914, that is, within six weeks prior to its date. It is not signed by the proprietors, but it purports to have been made by them and is signed by a person as their "agent and power of attorney holder." The 1st defendant is nominated in it for the office of the Karnam of Vinjain.

Several objections have been taken to its validity which we have to consider. To understand them fully, it is necessary further to mention that the notice recited in Exhibit X was sent to the proprietors by the Tahsildar of Udayagiri apparently under the orders of the Deputy Collector. The District Collector sent again to the proprietors what is described as "a formal notice" on 7th November 1914; these notices are not now produced. After the receipt of the second notice the proprietors sent another nomination Exhibit XI signed by one of them, wherein they again nominated the 1st defendant and in doing so referred to their previous nomination of him which their agent had submitted under their orders given to him by telegram Exhibit V and letter Exhibit IV.

Exhibit X was treated as "of no value" by the Deputy Collector as, according to him, "the proprietors' agent had no power to send such nominations or this office to give such notice of the changes in the village offices," and he refers to section 1 of Act IV of 1900, and section 15 (2) of Act II of 1894, as his authority. It

may at once be observed that section 1 of Act IV of 1900 was in effect repealed by section 2 of the Madras Limited Proprietors Act, Act IV of 1911. Even otherwise section 1 would have had no bearing on the present case. Evidence makes it clear in this case that the choice in favour of the 1st defendant was really exercised by the proprietors and not by the agent. See Exhibits IV and V and the recital in Exhibit XI. It is a general principle of law that what can be done by a person can be done for him by a duly authorized agent, unless there is an express or implied prohibition against it. As the power of choice of the new officer is given to the proprietor under section 15 of Act II of 1894 and he has to exercise his own choice, there is an implied prohibition against his delegating that power. But we have not been referred to any section or rule or any other consideration preventing an agent from acting for the proprietors in formally embodying their nomination in the form prescribed for it and signing it for them and submitting it. If the Deputy Collector had any doubt of the agent's power to act on the principals' behalf, he should have called for proof; but we think he was not right in rejecting Exhibit X on the ground that it was not signed by the proprietors. It was further argued that as the proprietors themselves treated Exhibit X as invalid and submitted a fresh nomination, Exhibit XI, the former cannot be relied upon any more. But in Exhibit XI the proprietors refer to Exhibit X and confirm their first nomination and only purport to send Exhibit XI because they were made to understand that Exhibit X was not properly signed. If Exhibit X were otherwise valid, we think Exhibit XI cannot be taken as affecting its validity.

The next objection to Exhibit X is that it was sent in reply to an invalid notice, as it is argued that the notice sent in September was not a valid one because it was sent by the Tahsildar and not by the District Collector. The notice issued by the Tahsildar is not before us and we are not satisfied that it was an improper notice, which presumably it was not, being an official act. But even if it

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was an unauthorised notice, we do not think it will materially affect the case. Taking the notice by the Collector of the 7th November as the proper notice, it would merely follow that the nomination under Exhibit X was submitted a little too soon. So far as we can see, there is nothing to prevent a proprietor submitting his nomination in advance in anticipation of a new office being created. Such a submission, if received and kept on the file and not rejected by the authorities, would take effect when the office is created and the time for appointment comes. Section 15 (3) only provides for the latest date by which the submission should be made. It may be open to the proprietors to withdraw a nomination made prematurely and substitute a new nomination, but they did not do so in the present case. Such a power to withdraw may exist even with reference to a nomination made after the creation of the office till the nominee is accepted and appointed by the Divisional Officer. The power to withdraw, therefore, does not, in any way, affect the validity of a nomination made. The argument that Exhibit X was premature is thus of no force. It is not suggested that there was any starting point for the six weeks earlier than the Tahsildar's notice.

We think, therefore, that Exhibit X was a proper nomination of the 1st defendant and in sufficient compliance with the law and was within time, and it should have been accepted and acted upon by the Deputy Collector in the circumstances of this case. His nomination of the plaintiff to the Karnam office was, therefore, *ultra vires* and the plaintiff's suit based on it must fail.

The second appeal is, therefore, allowed and the decrees of the lower Courts reversed and the plaintiff's suit dismissed with costs throughout.

M. C. P.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 317 OF 1917.

June 20, 1919.

Present:—Justice Sir Ernest Fletcher, Kt.,
and Mr. Justice Cuming.

SWORUP MANDAL AND ON HIS DEATH HIS
HEIRS AND LEGAL REPRESENTATIVES PAN-
CHORAM MANDAL AND OTHERS—
DEFENDANTS—APPELLANTS

versus

AYAN RAI KOWRA AND ON HIS DEATH TWO
OF HIS HEIRS AND LEGAL REPRESENTATIVES
DURGA ROY KOWRA AND OTHERS
—RESPONDENTS.

*Appeal, second—Discretion of Court, exercise of,
interference with, when permissible.*

Where two Courts fully acquainted with the circumstances of a case, and before whom evidence could be, but was not, led, exercise a discretion, the High Court will not interfere with the exercise of such discretion. [p. 723, col. 1.]

In the course of the trial of a suit the case for the plaintiff was closed and the case of the defendants was reached late in the afternoon on a certain date. The junior Pleader for the defendant was absent at the time and the senior Pleader expressed his inability to go on with the case. The defendant was thereupon told that he should examine his own witnesses, which he declined to do. Upon this the Munsif declared the evidence closed and fixed the next morning for arguments. The next morning the Munsif was asked to vary his order of the previous day and record the defendant's evidence. He refused the application and proceeded to adjudicate on the case. The lower Appellate Court upheld the view taken by the first Court:

Held, that under the circumstances of the case, the High Court would not interfere with the discretion of the two lower Courts, who knew the circumstances of the case and before whom evidence could be given as to the Pleader's inability to go on with the defendant's case. [p. 723, col. 1.]

Appeal against the decree of the Subordinate Judge, Khulna, dated the 16th of November 1916, affirming that of the Munsif, 1st Court at that place, dated the 24th of September 1915.

FACTS appear from the judgment.

Dr. Jadunath Kanjilal (with him Babu Bhudhar Halder), for the Appellants.—Under the rules of the High Court, the sittings of Courts are regulated from 11 to 5—"all Courts shall ordinarily rise at 5 P. M." It is a matter of great hardship.

[Babu Surendra Chandra Sen, for the Respondent.—It was a deliberate attempt to force the hand of the Court to accept further evidence next day.]

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It was such a late hour. Another Pleader could not be easily available. My Pleader was ill. In the lower Court there was an affidavit by the client himself. My Pleader retired at 2 p. m., the other Pleader got ill. The case was heard at 5.45 p. m. It is not quite possible for me to compel Biswanath Babu, Pleader, to swear an affidavit. Would it not be reasonable to put off the case when one Pleader retired at 2, another was ill and it was so late as 5.45 p. m.? The Court should have taken evidence next day. There is no counter-affidavit, no suggestion to the contrary by the other side.

Babus *Surenāra Ohandra Sen, Debendranarain Bhattacharjya* and *Biraj Mohon Mojumdar*, for the Respondents.—If the Pleader had really been ill, the Munsif would certainly have accommodated him. It was merely a dodge. The defence Pleader was given to understand that defence would be taken up that day.

Dr. J. N. Kanilal in reply, submitted that he had no opportunity to adduce evidence. How could he conduct his case? It was an unusual hour to procure another Pleader.

JUDGMENT.

FLETCHER, J.—This appeal is preferred by the defendant against the decision of the learned Subordinate Judge of Khulna, dated the 16th November 1916, affirming the decision of the second Munsif of the same place. The suit was brought for the purpose of establishing the plaintiff's title and recovery of possession of certain land. The question raised at the hearing of the present appeal has nothing to do with the merits of the case at all. The point taken is this; on the 9th September 1915, the trial of the case was proceeding in the Court of first instance and late in the afternoon—although I am told by my learned colleague that it is common in the Court of the Munsif—the plaintiff's case was closed as regards evidence and the case of the defendant was reached. According to the statement of the learned Vakil for the appellant, one of the junior Pleaders who had been engaged by the defendant had left the Court at that time for the purpose of attending a certain revenue case. I do not know why the junior Pleader should leave this case to attend a certain revenue case. But he left it in the charge, so I gather,

of a gentleman called Mr. Biswambhar Nandi, who is a senior Pleader practising in the Courts there. The case being called on, Mr. Nandi, according to the record, expressed his inability to go on with the case at that time, and he having expressed his inability to go on with the case, the defendant was told that he should examine his witnesses himself, whereupon he said that he could not. Upon this the Munsif declared the evidence closed and fixed the next morning for the argument of the case. The next morning, the Munsif was asked to vary the order made on the previous day and allow the defendant not only to examine the two witnesses said to have been present in the Court premises on the 9th September, but to examine also three additional witnesses who were not present on the previous day. The Court refused that application and proceeded to adjudicate on the case. An appeal was then preferred to the Court of the Subordinate Judge, and the learned Subordinate Judge upheld the view taken by the Munsif. The present case comes before us in second appeal, and we are asked to interfere with the discretion of two Judges who knew the circumstances of the case and before whom evidence could be given as to the illness of Mr. Nandi. Mr. Nandi presumably is a regular practitioner before these two learned Judges and I have no doubt that if he had informed the Judges what the nature of his complaint was and if they were satisfied that his illness was of the nature that is suggested before us, they would have given their best consideration to it. The fact that Mr. Nandi was attacked in the Court of the Munsif suddenly by illness would have been known to the learned Munsif himself. On the record there seems to be nothing except the petition preferred to the Munsif as to the illness of Mr. Nandi. The grounds of appeal to the lower Appellate Court stated that the Pleaders of the defendant were attacked with illness and that one of them left the Court at 2 o'clock and the other one was unable to continue the case at 5.45 p. m. That Dr. Jadunath Kanjilal says is a slip. At the same time neither the defendant nor any one else has come forward with an affidavit or otherwise stating that Mr. Biswambhar Nandi was attacked with a certain illness

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at 5.45 p.m. on the 9th September 1915, and was, therefore, unable to proceed with the case. If such had been the fact, no doubt it would have been stated by Mr. Nandi to the Munsif that he felt unwell and was unable to go on with the case and the Munsif would have adjourned the case.

Then we are asked that we should adjourn the case in order to get Mr. Nandi to file an affidavit that at 5.45 p.m. on the 9th September 1915 he felt unwell and was unable to proceed with the case, which was valued at Rs. 54. I do not think we should invite Mr. Nandi to put himself in that position. We are told by Dr. Kanjilal that he is a Pleader of considerable practice and to invite him to recollect in a case valued at Rs. 54 only instituted in the Court of the second Munsif at Khulna that he suddenly fell ill at 5.45 p.m. on the 9th September 1915, would be, I think, putting an undue pressure on his recollection. There were ample opportunities in the lower Courts and before this to obtain from Mr. Nandi his own statement as to what, in fact, did happen, and having regard to the view of the two learned Judges of the Courts below, I do not think that we should interfere in a case of this nature even if we had the jurisdiction, which it must not be taken that I assent to, on the ground that it has been established that the case of the defendant was closed owing to the unfortunate illness of his Pleader Mr. Nandi. The appeal fails and must be dismissed with costs.

COMING, J.—I agree.

Appeal dismissed.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 164 OF 1919.
July 25, 1919.

Present:—Mr. Ashworth, A. J. C.

Musammal GUMANI—PLAINTIFF—APPELLANT
versus

[BANWARI AND OTHERS—DEFENDANTS—RESPONDENTS.

Court Fees Act (VII of 1870), ss. 7 (IX), 12—Civil Procedure Code (Act V of 1908), O. VII, r. 1—Suit dismissed for insufficiency of stamp—Appeal, whether lies—Suit for redemption or foreclosure for adjudged sum—Appeal—Court-fee payable.

An appeal lies from an order of a Court dismissing a suit or appeal on the ground that the plaint or memorandum of appeal is insufficiently stamped, where a question of law such as the interpretation of the Court Fees Act is involved. [p. 736, col. 1.]

In a suit for redemption or foreclosure of a mortgage where the question raised in appeal is the right to redeem or foreclose for an adjudged sum, the Court-fee payable on the memorandum of appeal will be governed by section 7, clause IX of the Court Fees Act, that is to say, will be according to the value of the principal mortgage money. If, however, the memorandum of appeal challenges the amount to be paid or received by the appellant, the fee will be assessed on the difference between the sum awarded (as payable or receivable) by the lower Court and that maintained as due in the memorandum of appeal. [p. 735, col. 2.]

Appeal against the decree of the District Judge, Gonda, dated the 11th March 1919, confirming that of the Subordinate Judge, Gonda, dated the 30th November 1918.

Mr. S. N. Roy, for the Appellant.

Mr. Har Dayal, for Respondent No. 3.

JUDGMENT.—This appeal arises out of a suit for foreclosure by the plaintiff-appellant. The principal money secured by the mortgage was Rs. 400. The plaintiff claimed Rs. 2,136, asking for a decree for this amount and in default for a decree for foreclosure. The defendants *inter alia* pleaded that the mortgage was fictitious and without consideration. They also denied execution. The Court of first instance dismissed the suit on a finding against the genuineness of the bond and the giving of consideration. The plaintiff appealed to the District Judge. She paid a Court-fee on the Rs. 400, principal mortgage money. The District Judge took the view that the Court-fee should be paid on Rs. 2,136 and gave the appellant two weeks' time to make good the deficiency. A day after the expiry of this period of two weeks the appellant put in an application saying that she could not pay the whole Court-fee ordered, but that her claim should be limited to a claim for Rs. 600, for the present, and that she was willing to pay another Rs. 15. The learned District Judge interpreted this to mean that the appellant wanted to have the appeal heard by instalments and dismissed the suit.

In appeal to this Court it is urged that the District Judge misunderstood the appellant's meaning. What the appellant meant was that she wanted to be allowed to limit her

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claim to Rs. 600, reserving the right to appeal against the decision of the District Judge as to the Court-fee payable. Granting that this was her meaning, I am of the opinion that such a claim could not be permitted. If the appellant had asked to amend her grounds of appeal so as to show that she only claimed Rs. 600 this might have been permitted, but she could not be allowed at the same time to reserve the question of the sufficiency of the Court-fee.

The main question for this Court to decide is whether the lower Court was right in holding that the appellant must pay a Court fee on Rs. 2,136, and not merely on Rs. 400. The Court-fee payable was an *ad valorem* fee under Schedule I, Article 1, of the Court Fees Act. The value of the subject matter in dispute in the original suit was the value of foreclosure to the plaintiff. Under section 7, clause IX, this value was to be computed according to the principal money expressed to be secured by the instrument of mortgage, *i. e.* Rs. 400. The question is whether section 7, clause IX, will apply to appeals. It has been held in "*Reference under the Court Fees Act*" (1) that section 7, clause IX, applies only to suits and not to appeals. This decision was followed by one of the Judges in *Mahadeo Prasad v. Gorakh Prasad* (2) and again in *Nepal Rai v. Debi Prasad* (3). On the other hand we have a ruling of Sir John Edge in *Pirbhu Narain Singh v. Sita Ram* (4) that section 7, clause IX, will apply where it is impossible to value the subject-matter. There appears to be no decision of this Court.

In the Madras ruling Sir Arnold White, the Chief Justice, based his decision on the premise that the question was whether section 7, clause IX, or Article 1 of the First Schedule of the Act was applicable for determining the fee payable in respect of a memorandum of appeal in foreclosure or redemption suits. Section 7, clause IX, provides that the amount of fee payable in redemption and foreclosure suits shall be computed according to the principal money expressed to be secured by the instrument of

mortgage. Article 1 of Schedule I runs as follows:—

<i>Ad valorem</i> fees.		
1. Plaint or memorandum of appeal (not otherwise provided for in this Act).	When the amount or value of the subject-matter in dispute does not exceed.	Amount.

Now neither of these two enactments have any effect unless read with section 6 of the Act, the material portion of which is—

"No document of any of the kinds specified as chargeable in the First or Second Schedule shall be filed unless in respect of such document there be paid a fee on amount not less than that indicated by either of the said schedules as the proper fee for such document."

This section again, if read alone with section 7, clause IX, would have no effect. We must refer to Article 1 of the First Schedule in order to make any fee payable. It does not, therefore, appear to me to be a question whether Article 1 or section 7, clause IX, is applicable but whether Article 1, so far as it deals with a memorandum of appeal, is or is not governed by section 7, clause IX. Sir Arnold White expressed the opinion that the word "Suits" in section 7, clause IX, could not be construed as including appeals. This opinion was based on the fact that section 7, clause IV (f), provides that the fee for accounts shall be according to the amount at which the relief sought is valued in the *plaint or memorandum of appeal* and also on the fact that section 16, which provided for payment of an additional fee where respondent in appeal took objection to unappealed part of the decree, "seems to show that the general policy of the Legislature was to make the value of the subject-matter in dispute in appeal the criterion for the purpose of computing the fee in appeal." As a conclusion he held that Article 1 did not apply to appeals in foreclosure and redemption cases owing to the words in that article "unless otherwise provided for." With all respect I cannot concur with this reasoning. Neither in section 6 nor in the schedules nor in any other part of the Act is the term "suit" used in

(1) 29 M. 367; 16 M. L. J. 287.

(2) 30 A. 547; 4 M. L. T. 484; A. W. N. (1908) 247; A. L. J. 531.

(3) 27 A. 447; 2 A. L. J. 105; A. W. N. (1905) 40.

(4) 13 A. 94; A. W. N. (1890) 231.

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contradistinction to the term appeal. See section 17 which runs:—

"Where a suit embraces two or more distinct subjects, the plaint or memorandum of appeal, &c."

The terms that are used in contradistinction to one another are the words plaint and memorandum of appeal, the Court-fee being chargeable on documents and not proceedings. A plaint is a document filed in one stage of the suit, a memorandum of appeal is a document filed in another stage. A suit is the general name given to proceedings whether in the Original or Appellate Court. The words in Article 1 "not otherwise provided for in the Act" appear to refer to special provision made by other articles in the schedules. The argument of Sir Arnold White, so far as it is based on the language of section 7, clause IV (f), or on section 16, appears to me to be inconclusive. The provision in the former that in suits for accounts the fee will be payable according to the amount at which the relief sought is valued in the plaint or memorandum of appeal does not indicate that a "suit" means only the proceedings in the Original Court unless the context showed the contrary. It was necessary to refer to the valuation both in the plaint and the memorandum of appeal because otherwise there might have been doubt which valuation was to be the basis of the fee. This provision, if anything, appears to go against Sir Arnold White's view. Again, section 16 (now repealed) merely indicated that the fee payable in appeal may be different from that payable in the original suit and does not appear to support Sir Arnold White's argument in any way. It is impossible to avoid the conclusion that Sir Arnold White's reasoning and the fact that his conclusion has been followed by the Courts, was largely induced by the difficulty and harshness in particular cases of adopting the conclusion that a memorandum of appeal should be stamped in a foreclosure and redemption suit with the same stamp as the original plaint, regardless of the effect on the relief in question of the Original Court's judgment. This difficulty, however, will not arise if section 7, clause IX, be construed to be applicable only where the question raised by the plaint or memorandum of appeal is the right to redeem or foreclose, apart from the right to redeem or foreclose for an adjudg-

ed sum. I do not think that this construction involves doing any violence to the language of the section. If this construction is adopted, the plaint must always be stamped according to the value of the principal mortgage money, because it must always ask for a decision that the mortgage is one that may be foreclosed or redeemed. In the case of memorandum of appeal if it impugns the lower Court's decision against redemption or foreclosure, the Court-fee will be again assessed according to the principal mortgage money. If the memorandum of appeal challenges the amount to be paid or received by the appellant, the fee will be assessed on the difference between the sum awarded (as payable or receivable) by the lower Court and that maintained as due in the memorandum of appeal. If such a memorandum of appeal maintains that the mortgage is not liable to be redeemed or foreclosed, it will be construed to mean that the appellant maintains that he is not liable to pay anything. Where the lower Court decides against redemption or foreclosure but goes on to fix the amount payable or receivable on the assumption that its decision against redemption or foreclosure may be quashed by the Appellate Court, the operative part of the lower Court's decree must be deemed to be the decision against redemption or foreclosure. The construction of the Act in this way is in accordance with general equity and common sense and does not appear to be in conflict with the decisions of this Court. See *Mohammad Husain v. Syed Jahan Begam* (5), *Ram Adhin v. Hanuman* (6), *Ram Phal v. Deputy Commissioner, Bahraich* (7), *Basudeo Ban v. Sri Krishna Gir* (8).

Another question that arises in this appeal is whether an appeal lies against the order of the lower Court dismissing an appeal for failure of the appellant to pay the Court-fee held due on the memorandum of appeal. In *Rup Singh v. Mukhraj Singh* (9) it was held, following the ruling in *Ajoodhya Pershad v. Gunga Pershad* (10), that although section 12 of the Court Fees Act prohibited a Court

(5) 2 O. C. 87.

(6) 9 O. C. 153.

(7) 2 Ind. Cas. 600; 12 O. C. 130.

(8) 5 Ind. Cas. 941; 13 O. C. 62.

(9) 7 A. 887; A. W. N. (1885) 260.

(10) 6 C. 249; 6 C. L. R. 567.

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of Appeal taking up the question of the correctness of the lower Court's view as to the Court fee payable, nevertheless the Code of Civil Procedure, by providing for an appeal where a plaint or memorandum of appeal was rejected, must be deemed to override section 12 of the Court Fees Act. This ruling was again followed in *Muhammad Sadik v. Muhammad Jan* (11), where it was admitted that section 12 was inconsistent with the intention of the framers of the Code of Civil Procedure that there should be an appeal in every case falling within section 54 (now Order VII, rule 11, of the Code of Civil Procedure). These rulings appear to me to ignore the well-known rule that a subsequent general enactment does not affect a prior special enactment by implication. Lord Selborne in the case of *Seward v. Vera Cruz* (12) stated as follows:—

"There is a well-known rule which has application to this case, which is that a subsequent general Act does not affect a prior special Act by implication. That this is the law cannot be doubted, and the cases on the subject will be found collected in the Third Edition of Maxwell on the 'Interpretation of Statutes.' The general maxim is *generalia specialibus non derogant*, i. e., 'special provisions will control general provisions.' When the Legislature has given its attention to a separate subject and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject matter and its own terms."

Nearly all the High Courts have, however, drawn a distinction between a case where the valuation depends merely on a question of fact and one where it depends on a question of law, declaring that section 12 does not bar an appeal in the latter case: see *Studd v. Mati Mahto* (13), *Balkaran Rai v. Gobind Nath Tiwari* (14) and *Dada v. Nagesh* (15). Although it appears to me that the words in the section: 'Every question relating to valuation for the purpose of determining the

(11) 11 A. 91; A. W. N. (1898) 286.

(12) (1884) 10 App. Cas. 59 at p. 68; 54 L. J. P. 9; 52 L. T. 474; 33 W. R. 477; 5 Asp. M. C. 386; 49 J. P. 324.

(13) 28 C. 334.

(14) 12 A. 129; A. W. N. (1893) 39.

(15) 23 B. 486.

amount of any fee' are so wide as to include questions both of law and fact, it does not appear desirable to depart from a view so established and general. An appeal was allowed in the case already referred to, *Ram Phal v. Deputy Commissioner, Bahraich* (7). Accordingly I allow this appeal, holding that the memorandum of appeal in the lower Court was properly stamped, and direct that the appeal be re-admitted under its original number and decided on its merits. Costs will abide the result.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 246
OF 1917.

August 12, 1919.

Present:—Justice Sir Asutosh Mookerjee, Kt.,
and Mr. Justice Panton.

BEJOY KRISHNA MOOKERJEE
DEFENDANT—APPELLANT

versus

LAKSHMI NARAIN JIU (IDOL) AND
OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Putni Taluks Regulation (VIII of 1819), ss. 8, 10, 13, 14—"Day," meaning of—Putni sale—Payment to officer of zemindar before sale, effect of—Notice, defective—Sale, validity of—Purchaser, position and rights of—Purchaser, whether necessary party to suit—Possession, whether can be given on reversal of sale—Appeal—Finding of fact, when can be disturbed.

A finding by a trial Court based solely on oral evidence adduced before it ought ordinarily not to be disturbed by a Court of Appeal. [p. 737, col. 2; p. 738, col. 1.]

The term "day" in the Putni Regulation, 1819, means a day reckoned in the manner prevalent in Bengal, that is, from sunrise to sunrise. [p. 737, col. 2.]

A payment to the officer of a zemindar of the full amount due for arrears of rent, made between 8 and 10 P. M. on the evening of the day antecedent to a sale under the Putni Regulation, is a valid payment and a sale held after such payment is made, is without jurisdiction. [p. 738, col. 2.]

A defective notice under section 8 of the Putni Regulation is fatal to the validity of the sale [p. 739 col. 2.]

A notice which omits to specify the lots to be sold and does not set out the order in which the sale is to take place, is a defective notice. [p. 739, col. 2.]

Where the purchaser at a sale under the Putni Regulation is a stranger to the proceedings, he is entitled, on the sale being set aside, to be indemnified against all loss at the charge of the zemindar or other person at whose instance the sale may have been made, such loss being measured by costs of litigation and interest on the purchase-money. [p. 740, col. 1.]

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Section 14 of the Putni Regulation contemplates that the purchaser is to be made a party to a suit to set aside a *putni* sale. If the purchaser has purchased on behalf of another or on behalf of himself and others, he must be deemed to represent all such persons and if it was he who took delivery of possession under section 15 of the Regulation, it is immaterial that a plaintiff asks not merely for reversal of the sale but also for restoration of possession on such reversal. [p. 740, col. 1.]

Appeal against the decree of the Subordinate Judge, Burdwan, dated the 4th October 1917.

Mr. S. R. Das and Babus Bejoy Kumar Chatterjee, Mohesh Chandra Banerjee and Pramatha Nath Banerjee, for the Purchaser Defendant-Appellant.

Dr. Dwarka Nath Zitter, and Babus Biraj Mohan Mozumdar, Satindra Nath Mookerjee and Bijan Kumar Mookerjee, for the Putnidars Plaintiffs-Respondents.

Babus Basanta Coomar Bose, Bepin Behary Ghose and Sarat Kumar Mitter, for the Zemindar Defendant-Respondent.

JUDGMENT.—This is an appeal by the second defendant in a suit instituted under section 14, clause 1 of the Putni Regulation, 1819, for reversal of the *putni* sale. Putni Mahal Sajnore appertains to Touzi No. 11 of the Burdwan Collectorate and is situate partly within Burdwan district and partly within Birbhum district. In respect of this *putni*, Rs. 6,928 is annually payable as rent by the plaintiffs to the first defendant, the Maharaja of Burdwan. Default was made in payment of rent for the Bengali year 1321, with the result that proceedings under the Regulation were instituted by the Zemindar. The *putni* was sold by the Collector of Birbhum on the 15th May 1915, corresponding to 1st Jaist 1322. The appellant offered the highest bid and became the purchaser for Rs. 14,500. On the 8th May 1916, the plaintiff instituted the present suit for reversal of the sale. The Subordinate Judge has found, *first*, that the arrears due had been paid by the plaintiffs to the officer of the Zemindar at Burdwan on the day previous to the sale and that no arrears were due when the sale was held at Birbhum on the 15th May 1915; *secondly*, that the notice required to be stuck up at a conspicuous part of the Collector's *katchari* was defective and misleading and was not served in accordance with section 8, clause 2, and section 10, paragraph 1, of

the Regulation; *thirdly*, that the evidence of service of the notice at the *katchari* in the Moffasil is most unsatisfactory. On these grounds, the Subordinate Judge has decreed the suit, set aside the sale and directed that possession be restored to the plaintiffs, the purchase money to be refunded to the purchaser. He has also held that, in the circumstances disclosed, each party should bear his own costs. The purchaser defendant has appealed to this Court, and on his behalf the conclusion of the Subordinate Judge upon each of the three points mentioned has been rigorously attacked.

The first point involves the questions of the time of the payment and of its legal effect. It is not disputed that a sum of Rs. 4,158-10-6 was paid by the manager of the plaintiffs to the officer of the Zemindar defendant and was accepted by the latter as the full amount due; but the controversy has centered round the question of the precise time when the payment was made. The Subordinate Judge has held, on the evidence of the Deputy Manager of the Burdwan Raj and on the testimony of other witnesses, that the payment was made between 8 P. M. and 10 P. M. on the evening of the day antecedent to the sale. Mr. Das has criticised this evidence severely and has invited us to hold that the money was paid after midnight, probably a short while before morning. The payment must have been made before 6 A. M., as a telegram was sent at that hour to the Am-Muktear of the Zemindar at Suri, asking him to strike off the proceedings. Mr. Das has pressed his view on the Court in order to lay the foundation for an argument that a payment made after midnight is equivalent to a payment on the following day, that is, the day of sale, and that a payment so made is inoperative to stop the sale. It is plain, however, that when the Regulation mentions Bengali months and dates throughout, the Legislature must have intended that a day should be reckoned in the manner prevalent in Bengal, that is, from sunrise to sunrise. In this view, it becomes immaterial to decide, whether the money was paid between 8 P. M. and 10 P. M. in the evening or later on in the night. There are slight discrepancies in the evidence on this point: but Dr. Dwarkanath Mitter has rightly contended that in a matter of this description, where the issue involves a simple question of fact to be decided chiefly, if not solely, on oral

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evidence, a Court of Appeal should be slow to set aside the finding of the trial Judge who had the witnesses before him: *Bombay Cotton Manufacturing Co. v. Motilal* (1), *Dominion Trust Co. v. New York Life Insurance Company* (2).

On the whole, we are not satisfied that the time of payment has been erroneously ascertained by the Subordinate Judge. The question next arises what was the legal effect of the payment actually made. Mr. Das has contended that there was in reality no unqualified payment, but only a conditional deposit. This argument is rested on the following endorsement made in the *challan* at the time of payment:—

"The amount being untimely paid, extra telegram is sent. The Raj Sarkar is not responsible, if the telegram does not reach the Raj *katchari* at Suri in time, or reaches it at a late hour, with the consequence that the lot is sold in auction sale; the amount will be received back without any objection and without interest."

We do not think the sum paid and accepted, though with a qualification, can be deemed a deposit. The intention of both parties was that the sum should be taken as an immediate payment; it was on such assumption alone that the Burdwan Raj could have directed the Am-Muktear at Suri to strike off the proceedings. No doubt, there was an arrangement that if a sale took place, in either of the contingencies mentioned, the sum would be returned; but that does not indicate that the acceptance of the money was postponed to await the event. It is not necessary for us to determine, what would have been the exact position of the *putnidar*, if either of the two contingencies contemplated had happened; whether in that event he would have been entitled to sue for reversal of the sale on the ground that the arrears had been paid, need not to be discussed. The fact is that neither of the contingencies contemplated happened; on the other hand, events took a turn which neither party had anticipated. The telegram reached the Raj *katchari* at Suri in due time, but through a mistake the code letter attached to the name of the sender was omitted. The consequence was that the Am-Muktear, when he received the telegram,

(1) 29 Ind. Cas. 229; 42 I. A. 110; 39 B. 386; 28 M. L. J. 593; 17 M. L. T. 40; (1915) M. W. N. 788; 2 L. W. 521; 17 Bom. L. R. 455; 21 C. L. J. 528; 19 C. W. N. 617 (P. C.).

(2) (1919) 1 App. Cas. 254; 88 L. J. P. C. 30.

hesitated to take action thereon. He telegraphed to Burdwan to make sure of the genuineness of the instructions. The Collector granted a short adjournment but the message in reply was not received within the time allowed. In these circumstances, we must hold that the sale took place after a valid payment had been made to the officer of the Zemindar. The sale held under such circumstances must be deemed to be a sale without jurisdiction. This view has been repeatedly held with regard to sale for arrears of revenue: *Byjnath v. Seetul Pershad* (3), *Harkhoo Singh v. Bunshidhur Singh* (4), *Balkishen Das v. Simpson* (5), *Mahomed Jan v. Ganga Bishun Singh* (6), *Haji Buksh Ilahi v. Durlav Chandra* (7). The principle has been applied to the case of a sale under the Public Demands Recovery Act: *Janakdhari Lal v. Mohant Gossain Lal* (8), and has been regarded as equally applicable to sales under the Putni Regulation: *Shuroop Chunder v. Pertab Chunder Singh* (9), *Ramsona v. Nabakumar Sinha* (10). This position is clear from section 14, clause (1), which contemplates a sale, only if the balance claimed by the Zemindar on account of the rent of the *putni* remains unpaid upon the day fixed for the sale of the tenure. The second paragraph of the clause clearly contemplates that the fact that there was no balance due, may be urged as a ground in support of a suit for reversal of the sale. We need not accordingly discuss, whether a sale can be stopped by the *putnidar* by offer of the money to the Zemindar at the moment of sale. But it is clear that he cannot stop the sale at that stage by a deposit in the Collectorate. This was ruled by the majority in *Kristo Mohun v. Aftabooddeen* (11),

(3) 10 W. R. 66 (F. B.); 2 B. L. R. 1.

(4) 25 C. 876; 2 C. W. N. 360.

(5) 25 C. 833; 25 I. A. 151; 2 C. W. N. 513; 7 Sar. P. C. J. 363.

(6) 10 Ind. Cas. 272; 38 C. 537; 13 C. L. J. 525; 15 C. W. N. 443; 8 A. L. J. 480; 13 Bom. L. R. 413; 21 M. L. J. 1148; 9 M. L. T. 446; (1911) 2 M. W. N. 277; 38 I. A. 10 (P. C.).

(7) 16 Ind. Cas. 821; 39 C. 91; 16 C. L. J. 620; 23 M. L. J. 206; 16 C. W. N. 842; 12 M. L. T. 385; (1912) M. W. N. 1005; 4 Bom. L. R. 1063; 10 A. L. J. 452; 39 I. A. 177 (P. C.).

(8) 1 Ind. Cas. 871; 37 C. 107; 11 C. L. J. 254; 13 C. W. N. 710.

(9) 7 W. R. 218.

(10) 10 Ind. Cas. 90; 13 C. L. J. 404; 16 C. W. N. 805.

(11) 15 W. R. 560.

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which is an authority for the proposition that payment to stop the sale may be made into Court, either by a subordinate Talukdar under section 13 or by a *putnidar* who has applied for a summary investigation under section 14, clause (2).

The second point raises the question, whether the notice to be stuck up at a conspicuous part of the Collector's *katchari* was served in accordance with the Regulation. Section 8, clause (2) requires the Zemindar to present a petition to the Collector containing a specification of the balances due to him on account of the expired year from the *putnidars*. This petition must be stuck up in some conspicuous part of the Collector's *katchari* with a notice that if the amount claimed be not paid before the 1st Jaist following, the tenure of the defaulter will on that day be sold by public sale in liquidation. This must be read with section 10, which provides that at the time of sale the notice previously stuck up in the *katchari* shall be taken down and the lots be called up successively in the order in which they may be found in that notice. It is plain that section 10 contemplates a self-contained notice which comprises not only a specification of the arrears and a notification that the sale will be held on the 1st Jaist if the amount claimed be not paid before that date, but also a statement of the lots proposed to be sold in the order in which the sale will be held. Judged by this test, the notice in this case does not fulfil the requirements of the Regulation. The notice does not specify the lots to be sold (except one property which is not the subject-matter of this suit), and, it necessarily follows, does not set out the order in which the sale was to take place. The notice was framed on the assumption that the requisite information might be obtained from the petition which also is required to be stuck up under section 8, clause (2). The view we take as to the contents of a notice under section 8 is in conformity with that adopted by this Court in the cases of *Rajnarain v. Anant Lal* (12), *Bejoy Ohand v. Atuly Charan Bose* (13) and *Hariharnath Das v. Rajanikanta* (14). We have examined the

records of the last two cases and have found that the notices which were then pronounced defective were of the same form as the notice in this case. It is difficult to understand why notwithstanding those decisions, the same defective form should continue to be used, leading inevitably to expensive litigation and cancellation of sales. It may further be pointed out that the importance of strict conformity with the requirements of the Regulation in respect of the notice mentioned in sections 8 and 10 has been emphasised on more than one occasion by this Court as also by the Judicial Committee: *Maharani of Burdwan v. Krishna Kamini Dasi* (15), *Ahsanulla v. Haricharn* (16) affirming the decision of the High Court in *Ahsanulla v. Hurri Ohurn* (17), *Rajnarain v. Anant Lal* (12), *Hurro Doyal Roy v. Mahomed Gazi* (18), *Maharaja of Burdwan v. Tarasundari Debi* (19). We are of opinion that the notice under section 8 was defective and this by itself is a fatal objection to the validity of the sale.

The third point raises the question of the service of the notice required to be served by section 8 at the *katchari* of the defaulter. The Subordinate Judge has held that the alleged service of the notice in the *Moffusil* is not satisfactorily made out. His conclusion is that the notice was duly served at the *Sudder katchari* of the Zemindar but not duly served at the *katchari* of the Collector or in the *Moffassil katchari* of the *putnidar*. We have examined the evidence and have arrived at the conclusion that the proof of service in the *Moffussil* is by no means above suspicion; there is considerable doubt as to the genuineness of the signatures on the receipt and some of the witnesses do not fall within the category of substantial persons: *Ram Sebuk v. Monmohini Dossee* (20).

The conclusion follows that the sale must be set aside, not only because no arrears remained unpaid upon the day fixed for the sale, but also because two of the notices prescribed by the Regulation

(15) 14 C. 365; 14 I. A. 30; 4 Sar. P. C. J. 772.

(16) 20 C. 86; 19 I. A. 191; 6 Sar. P. C. J. 252.

(17) 17 C. 474.

(18) 19 C. 699.

(19) 9 C. 619; 10 I. A. 19; 13 C. L. R. 34; 4 Sar. P. C. J. 414.

(20) 2 I. A. 71; 23 W. R. 113; 14 B. L. R. 391; 2 Sar. P. C. J. 432; 3 Suth. P. C. J. 72.

(12) 19 C. 703.

(13) 32 C. 953; 3 C. L. J. 46.

(14) 15 Ind. Cas. 537.

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have not been duly served. Mr. Das has argued that the Court is bound to take into account the fact that the purchaser at the sale is a stranger to the proceedings and he has pressed us to take the view that in such circumstances the sale should be maintained and damages paid to the *putnidar* by the Zemindar. This contention cannot possibly succeed in view of the provisions of the Regulation: *Mobaruck Ali v. Ameer Ali* (21). A sale under the Putni Regulation stands on an entirely different basis from a sale for arrears of revenue. Section 14 does not restrict the right of suit to narrow and specified grounds. The validity of the sale may be successfully challenged on proof that the conditions prescribed by the Regulation have not been fulfilled, and the numerous decisions in the reports show that the Court has exacted conformity, on the part of the Zemindar, with the statutory requirements. The purchaser, though a stranger, is only entitled to be indemnified against all loss at the charge of the Zemindar or other person at whose instance the sale may have been made; such loss would ordinarily be measured by costs of litigation and interest on the purchase money: *Mobaruck Ali v. Ameer Ali* (21), *Bykunt Nath Singh v. Mahtab Ohand* (22), *Bejoy Ohand v. Amrita Lal* (23).

Mr. Das has finally argued that the suit was not properly constituted, inasmuch as the members of the joint family of which the purchaser was a member had not been added as parties. There is no force in this contention. Section 14 contemplates that the purchaser is to be made a party. If the purchaser has purchased on behalf of another or on behalf of himself and others, he must be deemed to represent all such persons, and as it was he who took delivery of possession under section 15, it is immaterial that the plaintiff asks not merely for reversal of the sale but also for restoration of possession on such reversal.

The decree of the Subordinate Judge must consequently be confirmed, subject, however, to variation in two respects.

The purchaser defendant will obtain from the Zemindar defendant (a) interest on the purchase money Rs. 14,500 at the rate of 6 per cent. per annum from the date of the payment (23rd May 1915) to the date of reversal of the sale, that is, the date of the judgment of the lower Court (4th October 1917), and (b) costs in the lower Court; these sums will carry interest from 4th October 1917 to date of realisation; subject to these modifications, the appeal will stand dismissed. The appellant will pay to the plaintiffs-respondents the costs of this appeal and will recover from the Zemindar respondent half the costs of the appeal.

*Appeal dismissed;
Decree varied.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 1 OF 1919.

September 16, 1919.

Present: — Mr. Justice Seshagiri Aiyar and Mr. Justice Moore.

P. L. P. L. PALANIAPPA CHETTY
— PETITIONER—APPELLANT

versus

V. S. S. P. SUBRAMANIAN CHETTY

AND OTHERS—RESPONDENTS.

*Provincial Insolvency Act (III of 1907), ss. 43, 46, 93
—Inventory, failure to file—Creditor who sets Court in motion, whether 'person aggrieved'—Right of creditor to ask for commitment.*

The duties imposed by the provisions contained in section 43 of the Provincial Insolvency Act are of a disciplinary character, and if a debtor fails to carry them out, the person, if any, who is really aggrieved is the Court to which proper assistance has not been rendered by the debtor and not any person who sets the Court in motion. [p. 742, col. 1.]

A creditor, therefore, has no right to ask for the committal of the debtor for the latter's failure to file an inventory. [p. 742, col. 1.]

Appeal against the order of the District Court, Ramnad, dated the 15th September 1917, in Interlocutory Application No. 165 of 1917, in Insolvency Petition No. 37 of 1914, on the file of the Official Receiver, Ramnad, (Insolvency Petition No. 15 of 1914 on the file of the said District Court, Ramnad).

FACTS.—Appeal under section 46 of the Provincial Insolvency Act against an order of the District Judge rejecting an application under section 43 praying that the insolvent be sent to jail.

(21) 21 W. R. 252.

(22) 17 W. R. 447; 9 B. L. R. 87.

(23) 27 C. 308.

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Messrs. T. M. Krishnaswami Aiyar, A. Ramaswami Aiyar and K. Rajah Aiyar, for the Respondent.—No appeal lies as the appellant is not a "person aggrieved" under section 46, sub-clause (2). See *Iyappa Nainar v. Manikka Asari* (1), followed in *Ladu Ram v. Mahabir Prasad* (2), *Digendra Chandra Basak v. Ramani Mohan Goswami* (3).

Mr. Patanjali Sastri, for the Appellant.—A person who is refused something which he is authorised to ask under a Statute is a "person aggrieved." *Alagappa Chettiar v. Nagaratna Mudaliar* (4), following *Sidebotham, Ex parte; Sidebotham, In re*, (5) and other English cases. Compare section 104 (2) of the English Bankruptcy Act of 1883 and sections 108, 154, 156 of the Act of 1914. The same view has been held in *Official Assignee of Madras v. Rama Chandra Iyer* (6), *Thiruvengkata Chariar v. Thangayi Ammal* (7), *Hanseswar Ghosh v. Rakhal Das Ghose* (8). The case in *Iyappa Nainar v. Manikka Asari* (1) went on the notions of Criminal Jurisprudence. *Digendra Chandra Basak v. Ramani Mohan Goswami* (3) hesitates to follow *Iyappa Nainar v. Manikka Asari* (1). Further, there were full enquiries of which there was none in this case.

Mr. T. M. Krishnaswami Aiyar, for the Respondent.—In order to render the petitioner a "person aggrieved," the intention must be to get at some property concealed by the debtor or otherwise to benefit the estate of the debtor. Nothing is gained by getting the debtor sent to jail. So *Iyappa Nainar v. Manikka Asari* (1) applies.

[SESHAGIRI AIYAR, J.—A creditor can appeal if his application for getting the debtor adjudicated an insolvent is rejected, even though the estate is not affected either way by such rejection.]

Such petitions, being for administration of the estate, stand on a different footing as the Court is bound to assist the creditors.

(1) 27 Ind. Cas. 241; 40 M. 630.

(2) 37 Ind. Cas. 996; 39 A. 171; 15 A. L. J. 31;

(3) 48 Ind. Cas. 333; 22 C. W. N. 958.

(4) 42 Ind. Cas. 789; 33 M. L. J. 612; 6 L. W. 445; (1917) M. W. N. 677; 22 M. L. T. 371.

(5) (1880) 14 Ch. D. 458; 49 L. J. Bk. 41; 42 L. T. 733; 28 W. R. 715.

(6) 5 Ind. Cas. 974; 31 M. 134; 7 M. L. T. 214; (1910) M. W. N. 147.

(7) 2 Ind. Cas. 294; 39 M. 473; 17 M. L. T. 432; 29 M. L. J. 753.

(8) 20 Ind. Cas. 633; 18 C. L. J. 353; 18 C. W. N. 366.

No creditor has a right to get the debtor sent to jail. Hence there is no right infringed.

Mr. Patanjali Sastri, in reply.—I have a right to apply under section 43 to ask the Court to take action if my allegations are proved. The Court's refusing to hear me is an infringement of my right.

JUDGMENT.—This is an appeal against the order of the District Judge of Ramnad dismissing an application presented by the appellant before us under section 93 of the Provincial Insolvency Act.

A preliminary objection was taken by Mr. Krishnaswami Aiyar that the appellant is not a person "aggrieved" within the meaning of section 46 of the Provincial Insolvency Act, and, therefore, that this appeal does not lie. He cited *Iyappa Nainar v. Manikka Asari* (1), which is a decision directly in point. Some of the reasons given by the learned Judges in that case do not commend themselves to us, but we think that the conclusion of the learned Judges is right. Section 43 of the Provincial Insolvency Act, which enables the Court to call upon the insolvent to produce his books and to give inventories of his properties, etc., was intended to facilitate the work of the Court in finally adjudicating on the extent of the properties which are to be distributed among the various creditors. By the failure of the insolvent to produce his books, etc., it is the Court that is aggrieved. It is true, as was contended by Mr. Patanjali Sastri, that the creditor is undoubtedly interested in seeing that the books are produced and that the proper inventory is taken. That is the reason why he is given the privilege of setting the Court in motion. If the language of section 13 is compared with that of section 43 to which Mr. Krishnaswami Aiyar drew our attention, the position is fairly clear. The language in section 13 is "the Court may, either of its own motion or on the application of any creditor, make one or more of the following orders," etc., there is no corresponding provision in section 43 which entitles the creditor to set the Court in motion. No doubt, ordinarily the Court which has other duties to perform should not be expected to *suo motu* make enquiries of the kind mentioned in section 43. On that account, the

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would avail itself of any assistance that may be given to it by the creditor who brings to its notice the delinquencies of the debtor, but that would not give a right to the creditor to say that the debtor must be committed to jail, and that by not sending him to jail he is in any way aggrieved. We think that, as was pointed out in *Thiruvengkata Ohariar v. Thangayi Ammal* (7) and in *Alagappa Ohettiar v. Nagaratna Mudaliar* (4), the correct definition of the expression "person aggrieved" is that given in *Sidebotham, Ex parte; Sidebotham, In re* (5). Mr. Patanjali Sastri contended that in the present case the creditor whose application was refused would come within the definition as given by Lord Justice James. He particularly drew our attention to this language in that definition, namely, "a person who has suffered a legal grievance or who has been wrongfully refused something." The word "wrongfully" indicates that there is a right which has been violated and as we pointed out at the outset, a creditor has no right to set the Court in motion although the Court may avail itself of the assistance which he may render. We are in agreement with the statement of the law as laid down in *Ladu Ram v. Mahabir Irasad* (2), wherein it is pointed out that the duties imposed by the provisions contained in section 43 are of a disciplinary character and that the person, if any, who is really aggrieved is the Court to whom proper assistance has not been rendered by the debtor and not any person who sets the Court in motion. We express no opinion on the merits of this case as the matter has not been argued before us.

The preliminary objection that there is no appeal to this Court must be upheld and the appeal is rejected with costs.

M. C. P.

Appeal rejected.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2905 OF 1916.

July 4, 1919.

Present:—Mr. Justice Chatterjea and Mr. Justice Panton.

PROBHAT CHANDRA SEN AND ANOTHER
—DEFENDANTS NOS. 1 AND 2
—APPELLANTS

versus

HARI MOHAN DHUPI AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Hindu Law—Akhra, whether can be owned by community as a whole—Suit by community with respect to akhra, maintainability of—Civil Procedure Code (Act V of 1908), O. I, r. 8.

The fact that a community has owned an *akhra* and its properties from time immemorial through *panchayats*, points to a legal origin although no grant is set up; that community, therefore, has a right to hold and manage the property and to maintain suits with respect to the *akhra* through *panchayats*. [p. 748, col. 2.]

Appeal against the decree of the Subordinate Judge, 1st Court, Dacca, dated the 23rd of November 1916, affirming that of the Munsif, 1st Court at that place, dated the 6th of October 1915.

FACTS appear from the judgment.

Sir Rash Behari Ghose (with him Babu Kshitish Oh. Neogy), for the Appellants.—The defendants are appellants. This appeal arises out of a suit for the recovery of possession of an *Akhra* of certain deities together with the lands, buildings, etc., on declaration of title of the plaintiffs, Dhobi community of Narainda in the town of Dacca.

The question is, whether a community which is not a corporation can own property. My submission is that a Dhobi community cannot be a juristic person according to law. A deity may be a juristic person, but not a Dhobi community. The suit must, therefore, fail.

Secondly, the community, cannot claim adverse possession either by prescription or by long possession, the community being a fluctuating community.

Thirdly, the community, including men, women and children, cannot be treated as a corporation, it being a fluctuating community.

Under Order I, rule 8, Civil Procedure Code, the plaintiffs may institute the suit

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but the cardinal point is, whether they had any status to represent the community.

Fourthly, the Dhobi community claim the land as a property of the deity Kalachand, though they do not possess the character of Shebait.

The defendants, father and son, claim the same by purchase as well as by the right of Shebait.

Fifthly, documents which are not admissible in evidence were admitted by the lower Court. The entry in Chitta is for the similar reason inadmissible in evidence.

Sixthly, the question is, whether a person can represent a class.

Salmond's Jurisprudence, 4th Edition, 279, referred to.

"A legal person....." page 293.

Seventhly, there may be any number of joint tenants and tenants in common, but there cannot be any undefined number of fluctuating body.

Goodman v. Mayor of Saltash (1).

Also page 277 of Salmond's with heading 'Legal Status of Unborn Person.' *Rivers v. Adams* (2).

'A corporation never dies.' A trustee may die but another will come in next day. But this is not the case where the community is fluctuating.

[CHATTERJEA, J.—In *Lutchmeput Singh v. Sadaulla Nushyo* (3) that case is referred to. *Navroji v. Kharsedji* (4) referred to.]

That case is distinguishable. It is not a suit for ejectment as understood by English Law.

This is a suit for recovery of possession, where the plaintiff can only succeed if he can prove his title.

The whole object was to vindicate the rights of management and not for possession.

Navroji v. Kharsedji (4) referred to.

In that case the learned Judge confines himself within the facts of that particular case and does not establish a general proposition of law. The present suit is based

on ownership alone, while that case is not so.

An undefined, indefinite, fluctuating number of persons can have no right.

If the English Law on this point is based on any technicality, the Court of this country is not bound to follow it but otherwise it must.

In the case of a corporation one person would be the owner in the eye of law.

The same would be the result in the case of trustees.

There would be no continuity in the case of a fluctuating community.

Dhunput Singh v. Paresh Nath Singh (5), *Maharaj Bahadur Singh v. Paresh Nath Singh* (6).

Civil Procedure Code, by Woodroffe, page 539, New Edition, referred to.

In *Dhunput Singh v. Paresh Nath Singh* (5) the only point was whether Order I, rule 8, was applicable and the present question was not decided there.

Some distinction must be drawn somewhere. A community cannot be allowed to be represented in any way which is not valid according to law.

The documents produced by Dhobis are no evidence in this matter.

It was a mere tenancy-at-will and no statement made by Dhobis would be admissible in evidence.

Registered document of a conveyance in which the appellant was not a party is inadmissible in evidence.

As regards limitation there was no finding how the learned Sub Judge came to that finding against the appellant.

How is it possible to divide the point of law about possession by a fluctuating body?

Mr. B. Chuckerbutty (with him Babu Surya Kumar Guha), for the Respondents.—Custom in this country is transcendental law and there is a great difference of juristic ideas on this point in India and Europe. Even in Europe and particularly in Russia the legal conceptions are different.

It has been proved that the Akhra belongs to the plaintiffs.

[CHATTERJEA, J.—The question is whether the community is entitled to institute the suit.]

(1) (1881) 7 App. Cas. 633; 52 L. J. Q. B. 193; 48 L. T. 239; 31 W. R. 293; 47 J. P. 276.

(2) (1878) 3 Ex. D. 331 at p. 365; 48 L. J. Ex. 47; 39 L. T. 39; 47 W. R. 381.

(3) 9 C. 693; 12 C. L. R. 382.

(4) 23 B. 20, 5 Bom. L. R. 745.

(5) 21 C. 180.

(6) 31 C. 829.

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Without the law of the Companies Act in this country there are also other laws. A Mitakshara family is a fluctuating body and is also recognised in law as a corporate body.

As pointed out by Sir Henry Mayne in his book on 'Law and Customs', the village community in India has undergone different interpretations from that of Europe.

In *Navroji v. Kharsedji* (4) the case of the Parsi community has been referred to.

Findings of facts in second appeal must not be challenged.

The defendants are spoliators, intruders and robbers.

[CHATTERJEA, J.—The question is whether the property belongs to the community or to the Thakur.]

In this case there is no dedication to the deity. It was owned by the community.

It has been decided by both the Courts that this Akhra was managed by the community from generation to generation.

Navroji v. Kharsedji (4) referred to.

In the plaint the prayer for the Dhobi community is only to maintain the Akhra and to manage it.

There is an institution which belongs to the Dhobi community and the Panchayat is entrusted with the power of management.

The Panchayats may be legally called trustees of the said estate in order to save it from thieves, robbers and spoliators.

The case of *Navroji v. Kharsedji* (4) has been followed in *Budree Das v. Ohooni Lal* (7).

In *Jivanji Jamshedji v. Burjorji Naserwanji* (8) all these cases have been referred to.

The present case is very much stronger than *Jivanji Jamshedji v. Burjorji Naserwanji* (8) in facts as well as in principles.

In *Navroji v. Kharsedji* (4) the principle has been explained and it is applicable in this case.

The Panchayat was appointed long before.

Sevatha Muthu Asari v. Rev. Musquita (9) referred to.

This was a case of the Roman Catholic community.

Maharaj Bahadur Singh v. Paresk Nath Singh (6) and Salmond's Jurisprudence, page 289, 4th Edition, and page 186, "owner less right—"referred to.

The documents adduced are perfectly good evidence and the lower Court was right in holding them as admissible.

Samaraddi v. Shama Charan Sen (10) referred to.

It is admissible as being a recital in the document.

As regards limitation it is a finding of fact that there was limitation as found by the lower Court.

Sir Rash Pehari Ghose, in reply.—I submit my learned friend has not been able to cite any authority to show that property can be owned in this country by any particular caste or castes. We are not dealing with any particular village community. In conceding that a village community can own land I mean that the village community as understood in Roman Law.

[CHATTERJEA, J.—From the decision of the Bombay cases it may be said that the village community can represent itself and institute a suit.]

I am not aware of any case in which the village community had set up such a right.

The main question is, whether the Dhobi community of that particular locality can own or has owned any land, whether they had any title to the land.

The decision of Sir Lawrence Jenkins is clearly distinguishable. That was not a suit for khas possession or declaration of title. That was a suit whether management could be made in a particular way.

The Bombay decision of Justice Chaudhary is clearly distinguishable.

The question before your Lordships was not raised at all.

So is the case of *Budree Das v. Ohooni Lal* (7) clearly distinguishable.

This is really a case of first impression.

The Dhobi community or their representatives do not claim under any grant. What they rely on is adverse possession from generation to generation.

You cannot acquire a title by prescription. I am using it in a legal sense.

A who is in possession is ousted by B who does not claim under A.

(10) 11 Ind. Cas. 637; 16 C. W. N. 251.

(7) 33 C. 789; 10 C. W. N. 581.

(8) 3 Ind. Cas. 770; 33 B. 499; 11 Bom. L. R. 726.

(9) 19 Ind. Cas. 824; 24 M. L. J. 642 at pp. 643, 646; (1918) M. W. N. 480; 13 M. L. T. 513.

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B may be ousted by *O* who does not claim under *B*.

It is essential to the acquisition of title that there must be a regular devolution of title.

This was decided by the Judicial Committee in *Basanta Kumar Roy v. Secretary of State for India* (11).

In order that a title may be acquired there must be a regular devolution of title. Suppose a man—a Dhobi—lives at a place, has he any interest in the land? There cannot be any question of succession.

The only title the plaintiffs have tried to establish is merely by adverse possession.

That is the only point found in their favour by the first Court.

The real point has not been appreciated by either of the Courts.

I do not dispute that their representative can bring the suit.

The first point is, whether they had any title in it.

[CHATTERJEA, J.—What would be the legal effect of such possession?]

They cannot rely on adverse possession unless they establish their title.

There are innumerable difficulties in recognising a fluctuating body as a juristic person.

In the plaint the plaintiff says that the land does not belong to the deity.

The lower Court says that it is neither party's case that the land belongs to the Thakur.

The question narrowed down comes to this—Are the Dhobi community as such entitled to own the property? Even if they have any right they have not been able to establish their title. Privity of the title has not been proved.

As regards admissibility of evidence the opposite party has cited *Samarajdi v. Shama Oharan Sen* (10).

I admit I speak with diffidence whether that case is applicable here.

He has to give boundaries distinctly. Merely a statement that the Dhobi Akhra is in the boundary line is not sufficient to prove the title.

The question thus comes to this: (1) whether the Dhobi community as such can

own property; (2) whether they have established their title—whether the evidence adduced is admissible on the point.

JUDGMENT.—This appeal arises out of a suit instituted by the plaintiffs as Panchayets and members of the Dhobi community of Narinda in the Town of Dacca for recovery of possession of an Akhra of certain Thakurs together with the lands, buildings and moveable properties appurtenant thereto on declaration of the rights of the said Dhobi community to the same.

It is alleged by the plaintiffs that the Akhra has been in existence on the Lakheraj land of Schedule (ka) from time immemorial for the worship of certain Thakurs, which has been installed by the ancestors of the Dhobi community of Narinda, that the Akhra and the adjoining lands, buildings and structures appertaining to the same have been in "the ownership, possession, management and control of the Dhobi community of Narinda in succession to their ancestors and that by virtue of adverse possession for a period far exceeding 12 years in succession to their ancestors from time immemorial the Dhobi community of Narinda have acquired an indefeasible right to the properties," and that "the Panchayets appointed by the Dhobi community have all along been vested with the right and ownership as also with the power of exercising acts of ownership and possession and of controlling and managing the said Akhra and all properties appertaining thereto as also the appointment and dismissal of the priest and Shebait for performing the worship of the deities." It is further alleged that one Hari Das Babaji was the former Pujari, but he was dismissed by the plaintiffs and the defendant No. 6 was appointed in his place, that the defendant No. 1 in 1905 purchased a *bari* to the north of the Akhra, and in collusion with the defendant No. 6, opened a passage over the Akhra; this led to disputes and criminal proceedings. The plaintiffs dismissed the defendant No. 6, appointed another person as Pujari in his place, and brought a title suit against the former for establishment of title to and possession of the Akhra and the properties belonging to it, which was decreed, but the defendants Nos. 1 to 5 in collusion with the defendant No. 6 offered resistance to plaintiffs obtaining

(11) 40 Ind. Cas. 337; 44 I. A. 104; 1 P. L. W. 593; 32 M. L. J. 505; 21 O. W. N. 642; 15 A. L. J. 398; 25 O. L. J. 487; 19 Bom. L. R. 480; (1917) M. W. N. 482; 6 L. W. 117; 22 M. L. T. 810; 44 C. 858, (P. C.).

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possession, which led to the institution of the present suit.

The defendants denied the title and possession of the Daobi community. They pleaded *inter alia* that the Akhra together with the properties appertaining thereto belonged to the Bairagis whom the plaintiffs called Pajaris, and not to the Dhobi community, that the Akhra site was in a Taluk which on a partition fell to the share of certain Ghoses who took a *kabuliyat* from Hari Das and subsequently allowed the defendant No. 6 to continue in possession as a tenant-at-will, and that the defendant No. 1 took a Miras settlement of the land from the Ghoses and purchased the huts of the Akhra from the defendant No. 6.

The Courts below concurred in holding that the Akhra and the properties belong to the Dhobi community and the suit has been decreed.

The defendants Nos. 1 and 2 have appealed. It is contended on behalf of the appellants that a community consisting of a fluctuating body of persons is not a juristic person, and cannot be owners of property. We have been referred to Salmond's Jurisprudence, 4th Edition, page 290, where the learned author in dealing with the "Uses and purposes of incorporation" says:—"With a single individual the law knows well how to deal, but common ownership is a source of serious and manifold difficulties. If two persons carry on partnership or own and manage property in common complications arise, with which nevertheless the law can deal without calling in the aid of fresh conceptions. But what if there are fifty or a hundred joint owners? With such a state of facts legal principles and conceptions based on the type of individual ownership are scarcely competent to deal. How shall this multitude manage its common interests and affairs? How shall it dispose of property or enter into contracts? What if some be infants or insane or absent? What shall be the effect of the bankruptcy or death of an individual member? How shall one of them sell or otherwise alienate his share? How shall the joint and separate debts and liabilities of the partners be satisfied out of their property? How shall legal proceedings be taken by or against so great a number? These questions and such as these are full of difficulty even in the case of a private partnership if the members are sufficiently numerous. The difficulty is still

greater in the case of interests, rights or property vested not in individuals, or indefinite associations of individuals but in the public at large or in indeterminate classes of the public."

Reference was also made to *Rivers v. Adams* (2). In that case it was held that a right claimed by the inhabitants of a parish to cut and carry away for use as fuel in their own houses faggots or baskets of the under-wood growing upon a common belonging to the lord of the manor is a right to a *profit a prendre* in the soil of another, and that such a right cannot exist by custom, prescription or grant unless it be a Crown grant which incorporates the inhabitants.

It is contended that an unincorporated body of persons can hold property jointly only by appointment of a trustee. The difficulties in the way of a fluctuating body of persons holding property jointly are many and are pointed out in the passage in Salmond's Jurisprudence quoted above, yet there are instances of a body of unincorporated persons jointly owning property in India. As observed by Mayne in Hindu Law, paragraph 222: "Individual property is the rule in the west, corporate property is the rule in the east." There are the village communities who own property in a manner not consistent with modern notions of individual ownership. Then there is the Mitakshara joint family.

Some of the objections pointed out by Salmond quoted above may be urged against them.

Ownership of property by a fluctuating body of persons is recognised in the Hindu Law. In Yajnavalkya, Chapter II, v. 187, it is stated "whoever appropriates what belongs to the community shall be made to forfeit his property and be banished the realm." The commentary in the Mitakshara on this verse is "whenever appropriates what belongs to the community, i.e., anything which is the common property of all the villagers collectively and the like bodies."

We have, however, to consider the law of property not as held down in Manu or Yajnavalkya, but as it is now recognised and administered.

That property may belong to a village is recognised by the Judicial Committee in the case of *Sivaraman Ohetri v. Muthaya Ohetri* (12). There a village tank was the common property of and used by all the inhabitants, of whom one family on the ground of improve-

(12) 12 M. 241; 16 I. A. 48; 5 Sar. P. O. J. 381.

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ments and additions made by their ancestor with the general acquiescence of the village claimed against the rest the exclusive right of repairing the tank at their own expense. It was held upon the evidence that the right belonged not to the plaintiff exclusively but to the village. It is to be observed, as pointed out in the judgment, that the plaintiffs did not assert that they were owners of the tank in any full or proper sense of the term, and the right in dispute was to contribute to the repairs of the tank. It was not an action for establishment of title to or possession of the property. But the fact that a property may belong to the village is recognised.

The right of resident cultivators of a village to a free pasturage over the waste lands of the village was upheld by the Judicial Committee in the case of *Bholi Nath Nundi v. Midnapore Zemindary Co.* (13), where Lord Macnaghten observed as follows: "It appears to their Lordships that on proof of the fact of enjoyment from time immemorial there could be no difficulty in the way of the Court finding a legal origin for the right claimed. Unfortunately, however, both in the Munsif's Court and in the Court of the Subordinate Judge, the question was overlaid, and in some measure obscured by copious references to English authorities, and by the application of principles or doctrines more or less refined founded on legal conceptions not altogether in harmony with eastern notions."

In the case of *Navroji v. Kharsedji* (4), a question arose as to the right of management of the Parsi Atash Behram (fire temple) belonging to the Parsi community. Sir Lawrence Jenkins, C. J., in dealing with the argument that the suit was based on ownership and that a fluctuating body of persons, such as the plaintiffs claimed to represent in that suit, was incapable of holding property observed: "we are not prepared to assent to the proposition that in this country a body such as we have represented before us is incapable of holding property, for even if we pass by the alleged ownership of property by a caste as not being definitely established, there can be no doubt that the village community is capable of property," and referred to Yajnavalkya, Chapter II, v. 187,

and the judgment of the Judicial Committee in the Madras case cited above. The suit, however, was not in the nature of ejectment. It was a suit to restrain interference with the management of trust property, and the learned Chief Justice said: "It is a mistake to say that the suit is based on ownership alone, from the plaint it is clear this is not so. The allegation in the plaint is not only that the Atash Behram is vested in the Parsi inhabitants of Udwada but that they have from time immemorial managed the same and exercised absolute authority in regard to the maintenance and administration thereof as a place of Zoroastrian worship and observances," and again: "It apparently is opposed to the notions of the Parsi community that the Iran Shah should be regarded as capable of, or the subject of, ownership, but even if there be difficulty or doubt as to its ownership, it is obvious that there must be some one entitled to protect from improper invasion that which for brevity we will call the temple property, and it appears to us that those who can predicate of themselves that they have exercised the management, authority and supervision alleged in the plaint are so entitled."

A later case in the Bombay High Court *Jivanji Jamshedji v. Burjorji Naserwanji* (8) however, was one for ejectment. It appears that the Parsi Panchayet at Bombay appointed a committee to manage the property of the Parsi Anjuman at Surat. The committee managed the property for a very long time—sixty years—with the authority and the acquiescence of the Parsi Anjuman. Subsequently the defendant having trespassed on the property the committee sued him in ejectment. The defendant contended that the plaintiffs had no right to sue for the recovery of the property as they were neither the owners nor the nominees of the Anjuman. It was held that the plaintiffs, being in possession for a long time with the authority and acquiescence of the owners, namely, the Parsi Anjuman at Surat, were entitled to recover possession from a trespasser, and the decision of Sir Lawrence Jenkins, C. J., in *Navroji v. Kharsedji* (4) was relied upon. But it was common case that the Parsi Anjuman was the owner, and the only question was whether the plaintiffs as the committee

(13) 31 C. 503; 8 C. W. N. 425; 14 M. L. J. 152; 31 I. A. 75; 8 Sar. P. C. J. 611.

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managing the property with the authority of the owner were entitled to succeed.

The cases of *Maharaj Bahadur Singh v. Paresh Nath Singh* (6) and *Budree Das v. Ohooni Lal* (7), cited on behalf of the respondents, do not throw any light upon the present question. The first was a suit for a declaration that the act of demolition by the defendants of certain steps in Pareshnath Hill (constructed by the plaintiffs Nos. 2 to 5 as representatives of the Digambari sect of Jains under permission obtained from the plaintiff No. 1, the owner of the hill) was wrongful and for injunction and damages. No question of title of the Jain community to any property arose in that case and it was not a suit in ejectment.

In *Budree Das v. Ohooni Lal* (7) the suit was brought by the plaintiffs, first, in their capacity as trustees of the Sitambari Panchayet Jain Temple, secondly, on behalf of themselves and other members of the Sitambari Jain community of Calcutta, and thirdly, in their individual capacity as members of such community for declaration that the defendants were not trustees of the temple and its properties and the plaintiffs were such trustees, that the defendants may be ordered to make over possession of the temple and properties to the plaintiffs as such trustees, and in the alternative for the appointment of new trustees and for other reliefs, and the question was whether the suit came within the purview of section 539 of the Civil Procedure Code. The question raised in the present case did not arise in either of the two cases cited above. In the latter case there was a prayer for an order to make over possession to the plaintiffs but only as trustees.

It appears, however, that the right of a fluctuating body of persons, such as the residents of a village, to property or to right of pasturage has been recognised by the Privy Council, and although there is no case in which the right of a particular caste or community to hold property (except in the case of *Jivanji Jamshedji v. Burjorji Naserwanji* (8) in which the right of the Parsi Anjuman to hold property was not disputed) has been decided, there are observations tending to show that such body of persons is capable of owning

property [see the observations of Sir Lawrence Jenkins, C. J., in the case of *Navroji v. Kharsedji* (4) cited above].

It is pointed out on behalf of the appellants that the right claimed by the plaintiffs is not based upon any grant, but upon prescription. A right by prescription (by adverse possession) cannot be acquired unless there is privity of title. In the case of a fluctuating body of persons, a body incapable of succession, there cannot be a prescription. See *Rivers v. Adams* (2). The Dhobi community of Narinda, Dacca, being a fluctuating body, there cannot be such a privity of title as is essential to the acquisition of a right by adverse possession.

The Courts below, however, have found that it has been satisfactorily proved that the Akhra was established generations ago by the Dhobi community of Narinda, that the Akhra and its properties belong to that community and that the Akhra has existed from time immemorial. Although a grant has not been set up, the fact of the right to the Akhra and its properties having been enjoyed by the Dhobi community from time immemorial points to a legal origin. It is found that the Panchayets of the Dhobi community manage the Akhra and its properties. The position of the Panchayets appears to be analogous to that of the plaintiffs in the two Bombay cases cited above.

Without deciding the broad question whether a particular caste or community can own property (a question not free from difficulty), we think that having regard to the facts found in the case, viz., that the Dhobi community of Narinda has been owning the Akhra and its properties from time immemorial through Panchayets, it must be held that they have a right to hold and manage property and maintain suits with respect thereto through Panchayets.

The plaintiffs, the present Panchayets, obtained leave to proceed with the suit on behalf of the Dhobi community after service of notice under Order I, rule 8 of the Civil Procedure Code. It is not disputed that the plaintiffs have the right to represent the community in the suit if the Dhobi community are owners and can hold property.

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Two other questions were also raised on behalf of the appellant. The first is that some of the matters mentioned in the judgment of the Court of Appeal below are not evidence against the defendants. The learned Subordinate Judge referred to the fact that a petition of the defendant No. 6 objecting to the name of Rakhai (who claimed under a deed of gift from Hari Das being recorded in the Municipal Registers in respect of the holding comprising the Akhra) was signed by the defendant No. 6 and verified by him and some Dhobis of Narinda, and said "that fact and the contents of the petition of objection show that the Dhobis were interested in the objection and in the Akhra and its properties and that the Panchayet of the Dhobi community had dismissed Haridas and appointed the objector as the Shebait." It is contended that any statements of the Dhobis in support of their title cannot be evidence against the defendants. But the learned Subordinate Judge did not use the fact or the petition of objection mentioned above in proof of the title of the plaintiffs, but only as showing that the Dhobis had dismissed Hari Das and were interested in the Akhra.

Objection is also taken to the Subordinate Judge's having used the description of boundaries given in the conveyance of strangers in favour of the plaintiffs. But there is some authority in support of the view that they are evidence. See *Abdullah v. Kunj Eehari Lal* (14), *Imrit Ohamar v. Sirdhari Pandey* (15), and the Court below refers to other ample evidence.

The last point taken is, that there is no finding on the question of limitation by the lower Appellate Court. But the Court of first instance decided the question in favour of the plaintiffs, and the question does not appear to have been raised or pressed before the Appellate Court.

The appeal must, therefore, fail and is dismissed with costs.

Appeal dismissed.

(14) 12 Ind. Cas. 149; 16 C. W. N. 252; 14 C. L. J. 467.

(15) 13 Ind. Cas. 120; 17 C. W. N. 103; 15 C. L. J. 7.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1361 OF 1918.

September 30, 1919.

Present:—Mr. Justice Spencer and
Mr. Justice Krishnan.

K. T. VENKATAPATHI NAYANI VARU
—PLAINTIFF—APPELLANT

versus

GADDAM CHOWDENNA (DECEASED) AND
ANOTHER—DEFENDANT AND HIS LEGAL
REPRESENTATIVE—RESPONDENTS.

Madras Estates Land Act (I of 1908), ss. 77, 192
—Rent suit in Revenue Court—Appeal—Dismissal of
suit by Appellate Court without adjudication on
merits but on ground of jurisdiction—Appeal, second,
whether lies—Revenue Court, power of, in adjudicating
on rent claims.

Where a suit for rent instituted in a Revenue Court is dismissed on appeal under section 77 of the Madras Estates Land Act only on the ground that the Revenue Court had no jurisdiction as to the questions raised in the pleadings but without any adjudication on the merits, the plaintiff has the right to prefer a second appeal to the High Court. [p. 750, col. 1.]

Venkata Ramayya Appa Row v. Veeraswamigadu, 45 Ind. Cas. 471; 41 M. 504; 34 M. L. J. 309; 23 M. L. T. 251; 7 L. W. 503; (1918) M. W. N. 327, distinguished.

In a suit for rent presented under the provisions of the Madras Estates Land Act, the Revenue Court is both competent and bound to decide for itself any question necessary for the disposal of the case, whether its decision on the point would finally determine the question between the parties so as to make it *res judicata* or not. [p. 750, col. 2.]

Venkata Ramayya Appa Row v. Veeraswamigadu, 45 Ind. Cas. 471; 41 M. 554; 34 M. L. J. 309; 23 M. L. T. 251; 7 L. W. 503; (1918) M. W. N. 327; *Sethurama Aiyangar v. Subbiah Pillai*, 42 Ind. Cas. 951; 41 M. 121; 33 M. L. J. 599, followed.

Frosumno Coomar Paul v. Koylash Chunder Paul, 8 W. R. 328; *Khugowlee Singh v. Hossein Bux Khan*, 15 W. R. 30 (P. C.); 7 B. L. R. 673; 6 M. J. 146; 2 Sar. P. C. 645; 2 Suth. P. C. J. 404 and *Mohammad Abdul Husun Khan v. Prag*, 38 Ind. Cas. 814; 15 A. L. J. 113; 21 M. L. T. 102; 20 O. C. 8; 19 Bom. L. R. 202; (1916) M. W. N. 232 & 456; 32 M. L. J. 388; 21 C. W. N. 582; 26 C. L. J. 165; 5 O. L. J. 34 (P. C.) distinguished.

Second appeal against the decree of the District Court, North Arcot, in Appeal Suit No. 27 of 1916, preferred against the decree of the Court of the Sub-Collector, Tirupathur, in Summary Suit No. 14 of 1915.

FACTS appear from the judgment.

Mr. P. R. Ganapathy Aiyar, for the Respondents, raised the preliminary objection that no second appeal lay. The decision of the lower Appellate Court is not a decree within the meaning of section 3, Civil Procedure Code. The Revenue

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Court dismissed the suit for rent on the ground that it had no jurisdiction to adjudicate on the matters mentioned in the plaint. See *Venkata Ramayya Appa Row v. Veeraswamigadu* (1). Section 100, Civil Procedure Code, has no application.

Mr. V. Ramesam, for the Appellant.—The decision of the lower Appellate Court is a decree. It has decided that the plaintiff cannot enforce his claim for rent. Against that decree there is a second appeal.

The lower Appellate Court was wrong in holding that it had no jurisdiction. It had only to go by the pleadings and it was bound to decide all questions necessary for the proper determination of the matters in dispute.

JUDGMENT.—A preliminary objection is taken that no second appeal lies. The decree of the lower Appellate Court has dismissed the plaintiff's suit for rent under section 77 of the Estates Land Act (Madras Act I of 1908), though it did so solely on the ground that the Revenue Court had no jurisdiction to decide the validity of the resumption relied on by the plaintiff for his claim, which was denied by the defendant, and no finding was arrived at on the merits of the claim. This is not a case falling under Chapter XLIII of the old Code of Civil Procedure (Act XIV of 1882) or the corresponding Order XLIII of the new Code (Act V of 1908), the applicability of which to suits in the Revenue Courts is excluded by section 192 of the Estates Land Act.

The decision in *Venkata Ramayya Appa Row v. Veeraswamigadu* (1) on the question of the maintainability of the second appeal, therefore, does not apply. It is, however, suggested that the decision of the lower Appellate Court will not fall within the definition of a decree in the Code of Civil Procedure and hence section 100 of the Code of Civil Procedure, which alone gives the right of second appeal to this Court, does not apply. We think this argument is unsound. The definition of a decree is wide enough to include the decree in the present case. The learned District Judge has adjudicated that so far as the trial Court as well as his own Court as a Court of Appeal from the Revenue Court are concerned, the right of the plaintiff to

(1) 45 Ind. Cas. 471; 41 M. 554; 34 M. L. J. 309; 23 M. L. T. 251; 7 L. W. 508; (1918) M. W. N. 327.

the rent claimed is not enforceable; that is conclusive so far as those Courts are concerned, so long as the decree stands. We must, therefore, overrule the preliminary objection.

On the merits the judgment of the learned District Judge cannot be supported. On the allegations of the plaintiff the suit was cognizable by the Revenue Court alone and that Court was, therefore, bound to decide for itself any question necessary for the disposal of the case, whether its decision on the point would finally determine the question between the parties so as to make it *res judicata* or not. The observations in *Venkata Ramayya Appa Row v. Veeraswamigadu* (1) are clearly in point and the decision in *Sethurama Aiyangar v. Subbiah Pillai* (2) is also exactly in point. The cases in *Prosunno Oommar Paul v. Koylash Ohunder Paul* (3), *Khugowlee Singh v. Hossein Bux Khan* (4) and *Mohammad Abul Husan Khan v. Prag* (5) cited by the learned Judge have no bearing on the question before us. Following the Madras rulings we must set aside the decree of the District Judge and remand the appeal to him for a fresh disposal according to law. Costs here will abide and follow the result.

There will be an order for refund of Court-fees paid in second appeal.

*Appeal allowed;
Case remanded.*

(2) 42 Ind. Cas. 951; 41 M. 121; 33 M. L. J. 599.

(3) 8 W. R. 328.

(4) 15 W. R. 30 (P. C.); 7 B. L. R. 673; 6 M. J. 146; 2 Sar. P. C. J. 645; 2 Suth. P. C. J. 404.

(5) 38 Ind. Cas. 814; 15 A. L. J. 113; 21 M. L. T. 102; 20 O. C. 8; 19 Bom. L. R. 202; (1917) M. W. N. 232 & 45^c; 32 M. L. J. 386; 31 C. W. N. 582; 26 C. L. J. 165; 5 O. L. J. 34 (P. C.).

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1086 OF 1918.

July 22, 1919.

Present:—Justice Sir Syed Shamsul Huda,
Kt.

SHEIKH NASARAT—PRINCIPAL DEFENDANT
—APPELLANT

versus

KALI DAS CHAKERBUTTY—PLAINTIFF—
RESPONDENT.

Bengal Tenancy Act (VIII B. O. of 1885), ss. 18, 20,

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147A—Raiyat holding at fixed rent—Sub-lease, whether transfer—Sub-lessee, whether can acquire occupancy right—Compromise decree not in accordance with law, effect of.

The grant of a sub-lease by a *raiya*t holding at fixed rent is a transfer of an interest in the holding within the meaning of section 18 of the Bengal Tenancy Act. [p. 751, col. 2]

A person holding under a *raiya*t at fixed rent is not debarred from acquiring a right of occupancy. [p. 751, col. 2.]

A tenant who has been in possession of a holding for a long time and has acquired a right of occupancy, cannot by any agreement contract himself out of that right, nor can a compromise decree not passed in accordance with the provisions of section 147A of the Bengal Tenancy Act have that effect. [p. 752, col. 1.]

Appeal against the decree of the Additional Subordinate Judge, Mymensingh, dated the 23rd of January 1918, reversing that of the Officiating Munsif, 4th Court at Netrakona, dated the 25th of January 1917.

Babu Ananda Charan Karkoon, for the Appellant.

Babu Sasanka Jiban Roy, for the Respondent.

JUDGMENT.—This is a suit for ejectment in accordance with the provisions of section 49 of the Bengal Tenancy Act. The plaintiff's case is that he is a *raiya*t and the defendant is his under *raiya*t, and that the defendant holds under a written lease the term of which has expired. The first Court held that the plaintiff was a tenure-holder and the defendant was an occupancy *raiya*t, and upon that view of the case dismissed the plaintiff's suit. In appeal the decree of the first Court was reversed.

It appears that in the Record of Rights the defendant is described as an occupancy *raiya*t. The learned Subordinate Judge who disposed of the appeal was of opinion that the presumption arising out of this entry had been rebutted by the fact that there was other evidence showing that the plaintiff was a *raiya*t at fixed rent and that the defendant was necessarily an under *raiya*t and liable to ejectment.

It is argued on behalf of the defendant-appellant that having regard to the provisions of section 18 of the Bengal Tenancy Act the plaintiff, even assuming that he was a *raiya*t, being a *raiya*t at fixed rent is in the position of a tenure-holder in relation to his sub-lessees. In support of

this contention reliance has been placed on section 18 of the Bengal Tenancy Act and on a decision of this Court reported as *Hari Mohan Pal v. Atal Kris'na Bose* (1). It was held in that case that a *raiya*t holding at fixed rent has authority to grant a permanent lease. It seems to me that if he has such authority, there is no reason why a person holding land under him be debarred from acquiring a right of occupancy. In this case the finding of the first Court is that the defendant has been in possession for a long time and that finding has not been displaced by the lower Appellate Court. It has been argued on behalf of the respondent that section 18 has the effect of placing a *raiya*t holding at a fixed rent in the same position as a tenure-holder only in respect of transfer and succession and that the grant of a sublease does not amount to a transfer. It seems to me that the grant of a sublease is a transfer of an interest in the holding and, therefore, section 18 applies. Upon this view of the case I hold that the Court below was wrong in holding that the presumption arising from the entry in the Record of Rights was rebutted by proof that the plaintiff was a *raiya*t at fixed rent.

It has also been argued on behalf of the respondent that there was a litigation in the year 1910 or 1911 between the plaintiff and the defendant, that in that suit plaintiff sought to evict the defendant from the holding, that the defendant accepted the position of Korfa tenant or under-*raiya*t and agreed to leave at the expiry of the term from that date, and in pursuance of that compromise there was the *kabuliyat* executed by the defendant in favour of the plaintiff upon which the present suit is based. It is contended that the compromise decree is binding on the parties. This compromise decree does not seem to have been relied upon by the plaintiff in the Court below. The document is not mentioned in the judgment of the lower Court, and the reason probably was that it was not shown that any decree was passed in conformity with section 147A of the Bengal Tenancy Act. The learned Judge who passed the decree does not appear to

(1) 23 Ind. Cas. 925; 19 C. W. N. 1127.

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have recorded in writing that in his opinion the terms of the compromise were such that if embodied in a contract they could be enforced under the Act. If the defendant had been in possession of the holding for a long time and had acquired a right of occupancy, it is clear that he could not by any agreement contract himself out of that right, nor could a compromise decree not passed in accordance with law have that effect.

On these grounds I decree this appeal and dismiss the plaintiff's suit with costs throughout.

Appeal dismissed.

CALCUTTA HIGH COURT.
APPEAL FROM APPELLATE DECREE No. 551
OF 1917.

May 28, 1919.

Present:—Mr. Justice Chatterjee
and Mr. Justice Duval.

PORAN (CHANDRA) MITTA (METTA IN
vakalatnamah) AND ANOTHER—PLAINTIFFS
—APPELLANTS
versus

INDRA SENI AND OTHERS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885, s. 8) (1)
—Raiyat holding under-lease, not for fixed period—
Surrender of holding, validity of—Registered instrument, whether necessary—Suit to recover holding from persons to whom it has been let, maintainability of.

A raiyat holding under a lease which is not for a fixed period can surrender the holding under section 86 (1) of the Bengal Tenancy Act. Such surrender need not be by an instrument, even though the tenant held under a registered lease. [p. 752, col. 2.]

When a raiyat surrenders his holding and the surrender is accepted by the landlord who enters into possession, the tenant cannot sue to recover the holding from persons to whom the landlord has let it after the surrender. [p. 753, col. 1.]

Appeal against the decree of the District Judge, Midnapore, dated the 30th of January 1917, affirming that of the Munsif, 2nd Court at that place, dated the 29th of July 1915.

Babu Peary Mohon Chatterjee, for the Appellants.

Babus Atulya Chandra Bose and Nitish Chandra Lahiri, for the Respondents.

JUDGMENT.—The question involved in this appeal is whether the plaintiffs are entitled to recover the lands which were surrendered by them in favour of the landlord and which the latter settled with the defendants.

The land constituted a *raiya* holding, and though it was held under a lease, it was not for a fixed period. Under section 86, clause (1), therefore, the *raiya* could surrender the holding. He did in fact surrender it and the surrender was accepted by the landlord.

There is no doubt that a surrender can be effected without an instrument at all [see the cases of *Khankar Abdur Rahman v. Ali Hafez* (1) and *Brojonath Sarma v. Maheswar Gahani* (2)]. This proposition is not disputed. But the learned Pleader for the appellant contends that as the original lease was a registered one, the surrender must, under the provisions of section 92, proviso 4, of the Evidence Act, also be a registered instrument. He relies upon the case of *Sarat Chandra Sinha v. Naritya Gopal Biswas* (3), where it was held that the lease having been a registered one, oral evidence was not admissible to prove a surrender and abatement of rent. But in that case possession was not given up. The landlord sued to recover possession on the allegation that there was an oral surrender of a portion of the tenancy and a reduction of rent, and it was accordingly held that the original lease having been a registered one, oral evidence was not admissible to prove the surrender and the subsequent variation in the rent. Besides it does not appear what the nature of the tenancy was in that case.

In the present case, as stated above, the tenancy was a *raiya* holding. It is found by both the Courts below that the plaintiffs and their co-sharers surrendered the holding and gave up possession in favour of the landlord, who accepted the surrender, and entered into possession and let out the lands to the defendants who have since then been in possession.

(1) 28 C. 256; 5 C. W. N. 351.

(2) 46 Ind. Cas. 100; 28 C. L. J. 220.

(3) 8 Ind. Cas. 47; 13 C. L. J. 284.

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We think in the circumstances the plaintiffs are not entitled to succeed.

The appeal accordingly fails and is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 13 OF 1918.

December 4, 1918.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

GANTASOLA JAGANNADHAN

AND OTHERS—RESPONDENTS—APPELLANTS

versus

THATAVARTHI RAMABRAHMAM

AND OTHERS—PETITIONERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 89—Private sale after Court auction but before confirmation—Right of purchaser and judgment-debtor to set aside sale—"Owning the property," meaning of.

A purchaser at a private sale from a judgment-debtor after the Court auction but before its confirmation is entitled to apply to set aside the sale under Order XXI, rule 89, Civil Procedure Code, but the judgment debtor who has parted with his rights is debarred from so applying [p. 754, col. 1.]

The words "owning the property" in rule 89, Order XXI, of the Civil Procedure Code mean owning on the date of the application and not owning on the date of the Court auction sale. [p. 754, col. 1.]

Ishar Das v. Asaf Ali Khan, 13 Ind. Cas. 134; 34 A. 186; 9 A. L. J. 19, not followed.

Anantha Lakshmi Ammal v. Kunnanchankarath Sankaran Nair, 18 Ind. Cas. 579; 24 M. L. J. 205; (1913) M. W. N. 101; 13 M. L. T. 123, *Adapa Subbarayadu v. Tippabhotla Lakshminarasamma*, 22 Ind. Cas. 193; 38 M. 775; 15 M. L. T. 98; (1914) M. W. N. 147; 1 L. W. 59, followed.

Per Spencer, J.—When both the judgment-debtor (who has sold the property after Court auction) and the private purchaser jointly apply to set aside the sale, there is no reason to refuse their joint application. The right to apply depends on whether the judgment-debtor has actually sold his interest unconditionally on the sale being set aside and has thus divested himself of all further interest in the property or has only agreed to sell it on that condition. [p. 755, col. 1.]

Appeal against the order of the District Court, Kistna, in Execution Appeal No. 731 of 1917, in Execution Petition No. 60 of 1916, in Original Suit No. 3 of 1912.

FACTS appear from the judgment.

Mr. Chenchiah (for Mr. T. Prakasam), for the

Appellants:—The auction-purchaser has no *locus standi* to apply to set aside the sale under Order XXI, rule 89, Civil Procedure Code. He is not a person owning such property at the date of the sale, as his purchase was after the sale. The judgment debtor also could not apply as he has parted with his interest in the property.

Ishar Das v. Asaf Ali Khan (1), *Pandurang Laxman Uphade v. Govinda Dada Uphade* (2).

Mr. Krishnaswami Aiyar, for the Respondents:—The private purchaser after the Court auction sale does come within the expression "person owning such property." It has to be noted that at the date of his sale the auction sale was not confirmed. The person "owning such property" in Order XXI, rule 89, means owning the property on the date of the application.

Anantha Lakshmi Ammal v. Kunnanchankarath Sankaran Nair (3), *Adapa Subbarayadu v. Tippabhotla Lakshminarasamma* (4).

In any event there is no objection to both the judgment-debtor and his vendee applying.

JUDGMENT.

SADASIVA AIYAR, J.—The decree holder and the Court auction-purchasers are the appellants before us.

The application under Order XXI, rule 89, to the lower Court to set aside the Court auction sale was made jointly by the judgment debtors and persons who purchased the property from them privately after the Court auction sale.

The short question for decision in this case is whether a private purchaser from the judgment-debtor after the date of the Court auction sale but before the Court auction sale was confirmed can apply under Order XXI, rule 89, (old section 310-A) to have the Court auction sale set aside and if he cannot come in, can the judgment-debtor do so.

The question may also be formulated *in extenso* as four separate questions thus:—

1. Does such a private purchaser come within the meaning of the expression "person

(1) 13 Ind. Cas. 134; 34 A. 186; 9 A. L. J. 19.

(2) 37 Ind. Cas. 211; 40 B. 557; 18 Bom. L. R. 571.

(3) 18 Ind. Cas. 579; 24 M. L. J. 205; (1913) M. W. N. 101; 13 M. L. T. 123.

(4) 22 Ind. Cas. 193; 38 M. 775; 15 M. L. T. 98; (1914) M. W. N. 147; 1 L. W. 59.

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owning such property" in Order XXI, rule 89? In other words, does the fact of the existence of the unconfirmed Court auction sale prevent the subsequent private purchaser from "owning the property," that is, becoming the owner thereof by such purchase?

2. Even if he is a person "owning the property," as he did not own the property on the date of the Court auction sale, is he disentitled from claiming the benefit of the provisions of Order XXI, rule 89? In other words, does the expression "owning such property" in Order XXI, rule 89, means "owning property on the date of the application" or "owning it on the date of the Court auction sale?"

3. Further, do the words "by virtue of a title acquired before such sale" in Order XXI, rule 89, govern the expression "owning such property" or only the expression "holding an interest therein?"

4. Is the judgment-debtor who has sold away his rights after the Court auction sale debarred from applying under Order XXI, rule 89, because he had no interest on the date of the application and is the private purchaser from him also debarred, because he owned no interest on the date of the Court auction sale or "by virtue of a title acquired before such sale?"

Very learned arguments were advanced by Mr. Chenchiah for the appellants on all these questions and numerous cases were quoted. I am free to admit that many of the arguments were cogent and do raise considerable difficulties and doubt.

But this is pre-eminently a question where the principle of *stare decisis* should be followed and we have got the well-considered decision of this Court in *Anantha Lakshmi Ammal v. Kunnanchankarath Sankaran Nair* (3) (Benson and Sundara Aiyar, JJ.) to the effect that the private purchaser can come in under Order XXI, rule 89, and that the phrase "by virtue of a title acquired before such sale" does not govern the words "person owning such property." We have also got the decision of this Court in *Adapa Subbarayudu v. Tippabhotlallakshmi Narasamma* (4) that the judgment-debtor who has sold away his property cannot apply, as he had no interest in the property on the date of the application.

There are, doubtless, observations in *Ishar Das v. Asaf Ali Khan* (1) and *Pandurang Laxman Uphade v. Govinda Dada Uphade* (2) differing from the opinion expressed in the above decisions of this Court. I may add that those two decisions themselves in *Ishar Das v. Asaf Ali Khan* (1) and *Pandurang Laxman Uphade v. Govinda Dada Uphade* (2) take different views on some of these points. While *Ishar Das v. Asaf Ali Khan* (1) takes the rather startling view (formulated in my 4th question above) that neither the judgment-debtor nor the private purchaser is entitled to apply, *Pandurang Laxman Uphade v. Govinda Dada Uphade* (2) takes the no less startling view that the judgment-debtor who has absolutely no legal rights in the property on the date of the application to set aside the Court auction sale is still entitled to apply. I do not think it necessary to deal in detail with the several weaknesses (if I may say so with great respect) in the reasoning in the decision in *Pandurang Laxman Uphade v. Govinda Dada Uphade* (2). I do not also think it necessary to deal with the other Calcutta decisions quoted by the learned Advocate, the most important of which was dissented from in *Anantha Lakshmi Ammal v. Kunnanchankarath Sankaran Nair* (3).

I would, following the views enunciated in the decisions of this Court, answer the four questions thus:—

1st question:—The private purchaser does come under the expression "person owning such property." The unconfirmed Court auction sale does not prevent the judgment-debtor from parting with the ownership by private sale.

2nd question.—I think the words "owning the property" means owning on the date of the application and not "owning on the date of the Court auction sale."

3rd question.—The words "by virtue of a title" do not govern the expression "person owning such property" but only the expression "holding an interest therein."

4th question.—The judgment-debtor who has sold away his rights is debarred, but not the private purchaser from him.

The appeal is, in the result, dismissed with costs of the private purchaser, respondent.

SPENCER, J.—Whether the judgment-debtor or the purchaser from such judgment-debtor, after the auction sale has been

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held but before it has been confirmed, is the person who should apply under Order XXI, rule 89, to have the sale set aside on deposit of the purchase-money depends, in my opinion, on whether the judgment-debtor has actually sold his interest unconditionally on the sale being set aside and has thus divested himself of all further interest in the property or has only agreed to sell it on that condition. When both the judgment-debtor and the private purchaser jointly apply, I can see no reason to refuse their joint application. I would not go so far as the learned Judges in *Ishar Das v. Asaf Ali Khan* (1) have gone on this point in declaring that neither can apply under rule 89. I prefer to follow the decision of this Court in *Anantha Lakshmi Ammal v. Kunnanchankarath Sankaran Nair* (3), which decided that a purchaser could apply. An application, such as this is, obviously is for the benefit of the judgment debtor who takes the last chance of saving his property or some benefit from what is left of it, and I consider that the objection raised in *Ishar Das v. Asaf Ali Khan* (1) to property being saved for the benefit of persons other than the judgment-debtor is thus avoided [see also the observations in *Panturang Laxman Uphade v. Govinda Dada Uphade* (2) in the judgment of Batchelor, J.]. The object of obtaining good bids at auction sales there considered to be an object of the Legislature in enacting this rule can usually be ensured by allowing the decree-holder to bid at the auction.

I agree that the appeal be dismissed with costs.

M. C. P.

Appeal dismissed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 224 OF 1919.

July 7, 1919.

Present:—Mr. Justice Newbould.

SOUDAMINI GHOSE—PLAINTIFF—

PETITIONER

versus

TENIRAM MAHALDAR AND OTHERS—

DEFENDANTS—OPPOSITE PARTIES.

Probate and Administration Act (V of 1881), ss. 82

92—*Executor, suit for rent by—Co-executors, whether must be joined as plaintiffs.*

Probate of a Will was granted to the two executors named therein. One of them instituted a suit for rent and joined his co-executor, who resided out of the jurisdiction of the Court in which the suit was brought, as defendant:

Held, that there was no flaw in the frame of the suit on the ground that the two executors did not both join as plaintiffs. [p. 756, col. 2.]

Appeal against the order of the Court of the Additional District Judge, Jessore.

FACTS appear from the judgment.

Dr. Sarat Ohandra Basak (with him Babu Kshetra Mohan Ghosh), for the Petitioner.—The plaintiff is the petitioner, who instituted a suit for rent which has been dismissed by both the Courts. Plaintiff brought this suit in his capacity of executor. There was another executor also who joined with the plaintiff in obtaining the probate of the testator's Will. The ground of dismissal was that one of two executors could not bring a suit alone in that capacity. I submit that that view is not correct. One of several executors can bring such a suit. See sections 82 and 92 of the Probate and Administration Act, which clearly entitle one of several executors to bring an action for the proper management and benefit of the testator's estate. Then the Courts below also erred in overlooking the fact that the co-executor did not reside within the limits of British India. Hence Order XXXI, rule 2, Civil Procedure Code, would be applicable. The cases *Lachman Das v. Chaturbhuj Das* (1) and *Satya Prashad Pal Chowdhury v. Motilal Chowdhury* (2) relied on by the Courts below are clearly distinguishable. The suit is, therefore, perfectly maintainable.

Babu Hemendra Nath Sen, for Opposite Party.—I submit the Courts below were right in their view. All the executors must join whenever any suit is to be brought in relation to the estate of the testator. That is also supported by the English Law. See Williams on Executors (10th Edition), page 752. The cases cited by the lower Courts apply to this case.

Dr. S. C. Basak briefly replied.

JUDGMENT.—This Rule arises out of a suit for rent which has been dismissed

(1) 28 A. 252; 3 A. L. J. 49; A. W. N. (1906) 16.

(2) 27 C. 683.

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by both Courts on the ground that the plaintiff as one of two executors who obtained probate can not sue alone. No Indian case bearing on this point has been cited by either party. The Court of first instance relied on the decision of the Allahabad Court in *Lachman Das v. Chaturbhuj Das* (1) and the lower Appellate Court relied on the case of *Staya Prasad Pal Chowdhry v. Motilal Pal Chowdhry* (2). But neither of these cases is relevant to the point that arises in this case. Section 82 of the Probate and Administration Act provides: "After any grant of probate ...no other than the person to whom the same shall have been granted shall have power to sue or prosecute any suit or otherwise act as representative of the deceased." Section 92 of the same Act provides: "When there are several executors...the powers of all may, in the absence of any direction to the contrary in the Will...be exercised by any one of them who have proved the Will."

For the petitioner it is contended that section 82 empowers one of two persons to whom the probate has been granted to bring a suit and section 92 also empowers one such person to exercise the powers of all under section 82. For the opposite party it is contended that section 82 means that where more persons than one have taken probate, no person other than those persons can bring a suit and that section 92 is only applicable to the case where several executors have been appointed and only one of them has proved the Will. Reference has been made to the English Law on the subject and we find in Williams on Executors, 10th Edition at page 725, that if there are several executors appointed by the Will they must all join in bringing actions at law: if one of several executors will prove the Will and sue alone the defendant may apply to the Court to order that the other executor or executors should be joined as co-plaintiffs. But in a footnote it is pointed out that this rule is subject to showing that the party whose joinder is claimed is alive and within the jurisdiction. In the present case evidence has been given, and it is not disputed on behalf of the opposite party, that the co-executor is in the service of the Nepal Gov-

ernment, that is to say, he is out of the jurisdiction of the Court in which the suit was brought.

Having regard to this fact and also that the provisions of Order XXXI, rule 2, had been complied with, since the other executor has been made a party to the suit and joined as a defendant, I am of opinion that there is no flaw in the frame of the suit on the ground that the two executors did not both join as plaintiffs.

The result is that this Rule is made absolute and the decree of the lower Appellate Court is set aside and the case remanded to him for hearing on the other points that arise in the appeal before him and disposal according to law.

Cost of this Court will abide the result. Hearing fee is assessed at one gold mohur.

Rule made absolute.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 996 OF 1918.

January 5, 1920.

Present :—Mr. Justice Tudball and Mr. Justice Rafique.

JHANDI LAL—PLAINTIFF—
APPELLANT
versus

SHIAM LAL AND OTHERS—DEFENDANTS
—RESPONDENTS.

Pre-emption suit—Decree fixing time for payment—Appeal—Payment not made—Appellant, whether entitled to hearing on merits.

Where in a pre-emption decree the plaintiff is directed to pay the pre-emption price within a specified time, but, without doing so, he prefers an appeal against the amount fixed, the fact that he has not complied with the terms of the decree as to payment, is no ground for dismissing the appeal without going into the merits. [p. 756, col. 1.]

Second appeal from the decision of the Subordinate Judge, Agra, dated the 3rd May 1918.

Mr. Narain Prasad Asthana, for the Appellants.

Mr. Riza Ali, for the Respondents.

JUDGMENT.—This second appeal arises out of a suit for pre-emption. The pro-

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erty, according to the sale-deed, had been sold for the sum of Rs. 700. The plaintiff, who is the appellant before us, maintained that the actual price paid was only Rs. 300 and sought to pre-empt on the payment of that sum. The Court of first instance held on the evidence that Rs. 700 had actually been paid by the vendee. It, therefore, gave the plaintiff a decree conditional on his paying into Court the sum of Rs. 700 within a period of 60 days. The plaintiff, being dissatisfied with this decision as to consideration, appealed to the lower Appellate Court. He did not pay the sum of Rs. 700 into Court within the 60 days. While the appeal was pending, he asked the Appellate Court by a miscellaneous application to grant an extension of time. This the Court refused to do, and rightly refused. It could not vary the decree of the first Court on a miscellaneous application. It could only vary that decree by hearing and deciding the appeal. When the appeal came up for hearing, the lower Appellate Court directed the appeal to be struck off without going into the merits at all. The sole basis for its order was that the plaintiff had failed to pay the sum of Rs. 700 into Court within the period of 60 days allowed by the Court of first instance. The plaintiff, therefore, comes here on second appeal. The decision of the Court below is obviously incorrect. The matter is already covered by a decision of this Court in the case of *Khurshed-un nissa v. Alim-un nissa* (1). The Appellate Court ought to have gone into the merits of the appeal, as the appeal was directed solely towards the condition laid down by the Court of first instance. If the Appellate Court had found on hearing the appeal that a sum less than Rs. 700 had been the actual consideration, it would naturally have extended the time for payment. The appellant is entitled to a decision on the question of the amount of consideration. We do not think it necessary to send the case back to the lower Appellate Court for a decision on the point. The evidence is on the record before us and it will save time and expense for us to take up the issue and decide it ourselves. The Court of first instance rightly laid the onus upon the defendants of proving the actual con-

sideration paid in view of the evidence produced by the plaintiff in respect to the market value. The defendants produced the document with its endorsement. One of them went into the witness-box, and an attesting witness was also called. It was clearly established that Rs. 675 at least was paid in the presence of the Sub-Registrar. The evidence of the plaintiff's own witnesses shows that the profits of the property are approximately Rs. 28. So that the vendee was buying his property at a profit of 4 per cent. only. This is by no means an unusual occurrence in this country and in this Province, more especially where the land is cultivated by the owner thereof. We think that the decision of the Court of first instance was correct and that the sum of Rs. 700 was actually paid by the vendee for the property. In this view, therefore, the appeal to the Court below was bound to fail. We are asked to extend the time. To extend the time now would be to vary the decree of the Court below, and we can see no justice in doing so, for that would be equal to allowing the appeal in part. The plaintiff clearly was not ready with his money when he sued, as he ought to have been, and litigation of this description is not to be encouraged. We, therefore, dismiss the appeal. The respondent will have his costs in both this and the lower Appellate Court.

Appeal dismissed.

CALCUTTA HIGH COURT.
APPEAL FROM APPELLATE DECREE No. 1246
OF 1918.

June 20, 1919.

Present:—Mr. Justice Newbould.
ABINASH CHANDRA CHOUDHURY
—PLAINTIFF—APPELLANT

versus
OSMAN BISWAS—DEFENDANT—
RESPONDENT.

*Civil Procedure Code Act V of 1908, s. 115—
Revision—Error of law—High Court, interference by
—Rent, suit for, dismissal of, on ground that whole
holding was not described in plaint, whether error of
law.*

(1) 17 Ind. Cas 863; 10 A. L. J. 421.

MURUGAPPA MUDALIAR v. MUNUSWAMI MUDALI.

The High Court will not interfere under section 115, Civil Procedure Code, with a mere error of law.

The dismissal of a suit for rent on the ground that the holding of which rent is claimed consisted of two plots but only one was described in the plaint, is an error of law.

Appeal against the decree of the Additional District Judge, Jessore, dated the 26th March 1918, affirming that of the Munsif, 1st Court at Magura, dated the 20th July 1917.

Babu Nirodbandu Roy, for the Appellant.

Babus Surendra Chandra Sen and Hemendra Chandra Sen, for the Respondent.

JUDGMENT.—This second appeal is against a decree dismissing a rent suit and the appeal is valued at Rs. 15-1-1 ganda. The learned Pleader for the appellant has been unable to show that any of the questions mentioned in section 153 of the Bengal Tenancy Act that would make this decree appealable to this Court has been decided in the lower Courts and I must, therefore, hold that no appeal lies.

The appellant has also obtained a Rule but there has been no error of jurisdiction to justify me in exercising my revisional powers. Reference has been made to the case of *Raichandra Lal Goswami v. Hira Lal Bag* (1). That case is clearly distinguishable, as the Munsif dismissed the case before the date fixed for hearing without taking any evidence. Here the case has been decided after full trial and dismissed on the ground that the holding for which the rent was claimed consisted of two plots but that only one had been described in the plaint. If any error was committed by the lower Appellate Court, I do not say that any error was committed, that error was an error of law and not of jurisdiction.

The appeal is dismissed with costs. The Rule is discharged.

I make no order as to costs in the Rule.

Appeal dismissed; Rule discharged.

(1. 13 C. W. N. 19 (xix) notes.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1066 of 1917.

September 30, 1919.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Moore.

P. MURUGAPPA MUDALIAR (DEAD) AND OTHERS—DEFENDANT NO. 2 AND LEGAL REPRESENTATIVES OF DEFENDANT NO. 3—APPELLANTS

versus

MUNUSWAMI MUDALI, MINOR, BY GUARDIAN, A. VENKATACHELLA MUDALIAR AND OTHERS—PLAINTIFFS
Nos. 2, 3 AND 4 AND DEFENDANT
No. 1—RESPONDENTS.

Contract Act (IX of 1872), ss. 134, 139, applicability of, to negotiable instruments—Principal and surety—Endorsement of promissory note—Suit against debtor, endorser and surety—Release of debtor during trial, whether exonerates surety—Negotiable Instruments Act (XXVI of 1881) s. 39.

The general rule regulating the relationship of principal and surety contained in sections 134 and 139 of the Contract Act applies to all cases of contract, including those relating to negotiable instruments. [p. 759, col. 1.]

In a suit on a promissory note endorsed over by the payee to the plaintiff against the debtor, endorser and another surety, the plaintiff exonerated the principal debtor:

Held, that there was a reservation of the plaintiff's intention to prosecute his remedies against the other two and that a decree could be passed against them. [p. 760, col. 1.]

Section 134 of the Contract Act does not, in terms, depart from the rule of English Law as to the reservation of remedies against the sureties. [p. 760, col. 1.]

Second appeal against the decree of the District Court, Chingleput, in Appeal No. 13 of 1916, preferred against the decree of the Court of the Additional District Munsif, Chingleput, in Original Suit No. 3 of 1914, (Original Suit No. 7 of 1913 on the file of the District Munsif, Conjeevaram.)

FACTS appear from the judgment.

Mr. *Krishnaswami Iyengar*, for the Appellants.—When the claim against 1st defendant was withdrawn, the 2nd and 3rd defendants were exonerated from liability. The rule laid down in section 134 of the Contract Act applies to contracts on negotiable instruments. The lower Appellate Court is wrong in saying that the section does not apply to the Negotiable Instruments Act. The English Law as to the reservation of rights against the surety should not be introduced in section 134. The language of

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the section does not warrant such introduction.

Under Order IX, rule 5, it is open to the plaintiff to bring a fresh suit within the period of limitation.

Mr. T. M. Krishnaswami Aiyar, for the Respondents:—The release of 1st defendant does not affect the plaintiff's right to continue the suit against 2nd and 3rd defendants. They are not discharged. Especially, where in the progress of the suit the claim against one defendant only was withdrawn, the plaintiff must be deemed to have reserved his right to proceed against the other defendants. *Bateson v. Gosling* (1.)

Section 134 of the Contract Act is not inconsistent with the rule of English Law.

JUDGMENT.—The suit was brought on a promissory note executed by a deceased agent of 1st defendant to the 3rd defendant. The latter endorsed it to the plaintiffs. The 2nd defendant executed an agreement, Exhibit B, at the time of the endorsement of the note undertaking to be liable for the amount of the note. The suit was against all the three defendants on the note. In the course of the suit plaintiff withdrew his claim against 1st defendant. Thereupon a decree was passed against the other two defendants. This appeal is against that decree.

Mr. Krishnaswami Iyengar, in his learned argument, contended before us that as the principal debtor, the 1st defendant, has been exonerated, the other two defendants are also discharged from the liability and that there should be no decree against them. He relied upon the language of section 134 of the Indian Contract Act. We may say at once that we do not agree with the lower Appellate Court that sections 134 and 139 of the Indian Contract Act do not apply to the Negotiable Instruments Act. The general law regulating the relationship between principal and surety is contained in the Contract Act and would apply to all cases of contract. Therefore, we do not base our decision upon the view taken by the District Judge that the Indian Contract Act has no application to suits of this description. The real question is whether the release of the 1st defendant during the trial of the suit destroys the right of the plaintiffs to proceed

against defendants Nos. 2 and 3. There is no doubt that under the English Law the discharge of the principal debtor where there is a reservation to proceed against the sureties would not affect the right of suit against the sureties. That has been laid down by that eminent Judge, Willes, J., in *Bateson v. Gosling* (1). He says, after examining the earlier authorities: "It must, therefore, now be taken to be settled that where the principal has entered into a deed of arrangement containing a release subject to the reservation of the creditor's right of recourse against the surety the latter has no right to raise the objection." If, however, there is an absolute and unconditional release, the remedy against the surety is gone because the debt is extinguished. The reason that the surety cannot in such a case be sued is, that it would be a fraud upon the rest of the creditors, as is pointed out in *Lewis v. Jones* (2) where there is a note of Mr. Gresswell which has sometimes been erroneously attributed to Holroyd, J., in which the matter is very fully considered. Two points have been raised with reference to this judgment. One is that there is no reservation in this case. We are unable to agree with the learned Vakil on this point, because, where a suit is brought against three persons and it is withdrawn against one, there cannot be a more express reservation of the plaintiff's intention to prosecute his remedies against the other two. Therefore, we must hold that there has been a reservation of the right to proceed against the two sureties. The other point is whether this principle of English Law can be introduced into section 134 of the Contract Act. The learned Vakil contended that there is nothing in the language of section 134 which would warrant the introduction of the principle of reservation enunciated in *Bateson v. Gosling* (1). The principle of applying English Law to the provisions of the Indian Contract Act was considered by Sir Arnold White in *Natesa Aiyar v. Appavu Padayachi* (3). The learned Chief Justice there says with reference to the question whether a

(2) (1825) 4 B. & C. 506; 6 D. & R. 567; 3 L. J. (o. s.) K. B. 270; 28 R. R. 360; 107 E. R. 1148.

(3) 19 Ind. Cas. 462; 33 M. 178; 24 M. L. J. 188; 13 M. L. T. 391; (1913) M. W. N. 341.

(1) (1871) 7 C.P. 9; 41 L. J. C. P. 53; 85 L. T. 560; 20 W. R. 98.

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deposit can be recovered back when the contract has fallen through: "I agree that the question must be determined with reference to the provisions of the Indian Contract Act and that if they are in conflict with the English Law as laid down in the English authorities, we must follow the Statute. I think, however, it may safely be premised that in a question such as this it was not the intention of the Legislature to depart from what was understood to be the English Law at the time the Indian Contract Act was passed." Miller, J., uses similar language. Wallis, J., as he then was, who differed from Sankaran Nair, J., is equally clear on the question. Therefore, in considering the Indian Contract Act, we have to see what was the state of the law when the section was introduced. If we ascertain the state of English Law and if we find that the Indian Law does not in terms depart from the rule of English Law, according to the principle laid down by the learned Chief Justice, we would be justified in saying that the Indian Law carried out the rule as enunciated by eminent Judges in England. Applying that principle, we must hold that the law which Wallis, J., regarded as settled in England just before the passing of the Contract Act must be taken to have been in the mind of the Legislature in enacting section 134 of the Indian Contract Act. Therefore, we have come to the conclusion that there has been a reservation of right as against the sureties and there is nothing in the terms of section 134 of the Indian Contract Act which is inconsistent with the rule of law as understood in England; we must hold that the remedy against the sureties is not affected. Moreover, on principle it seems to us that the same conclusion is deducible. As was pointed out by Kelly, C. B., in *Cragore v. Jones* (4), the rule why a surety is held to be discharged from liability where there is a release of the principal debtor is "If the creditor, without the consent of the surety by his own act destroy the debt, or derogate from the power which the law confers upon the surety to recover it against the debtor in case he shall

have paid it to the creditor, the surety is discharged;" consequently, so long as there is the possibility of the surety having recourse to the principal debtor for payment or for contribution the debt itself is not extinguished and the right to proceed against the surety is not affected. That must be taken to have been the principle which underlies the decisions in *Nathabhai Tricanlal v. Ranchodlal Ramji* (5), *Shaik Ali v. Mahomed* (6), although, no doubt, in those cases the creditor gave up his remedy against the principal debtor because he could not be served.

Mr. Krishnaswamy Iyengar drew our attention to Order IX, rule 5, which gives a right of suit against a person exonerated if the plaintiff is able to bring a suit within the time allowed by law. But that could not affect the principle which underlies the decisions in the two Bombay cases. The mere giving up a right in Court against a principal debtor would not affect the right of the plaintiff to obtain a decree against persons against whom he reserved the right. Further, the principle of English Law is recognised in section 39 of the Negotiable Instruments Act. It follows *a fortiori* that this principle which reserves to the plaintiff the right to proceed against the surety, while giving up his right against the principal debtor, is applicable in the present case.

We do not agree with the Vakil for the respondent that there is a case of the Court exonerating the defendant and not the party himself exonerating him. The Court is not in any way interested in refusing to give a decree against the other party. We must take it that there was an exoneration by the plaintiff himself of the principal debtor. We are of opinion that the decision of the lower Court is right and we must dismiss the appeal. We make no order as to the costs of the 1st defendant. As regards other respondents there will be one set of costs.

M. C. P.

Appeal dismissed.

(5) 27 Ind. Cas. 165; 29 B. 52; 16 Bom. L. R. 611.
(6) 14 B. 267.

(4) (1878) 8 Ex. 81; 42 L. J. Ex. 69; 28 L. T. 36; 21 W. R. 408.

MALIRAM KALITA v. PURNANANDA ADICHAR.

CALOUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 501
OF 1917.

June 27, 1919.

Present:—Justice Sir Ernest Fletcher, K.T.,
and Mr. Justice Cuming.MALIRAM KALITA (BARA KALITA
in Vakalatnamah) AND OTHERS—DEFENDANTS
APPELLANTS

versus

PURNANANDA ADICHAR (ADHIKAR
in Vakalatnamah) GOSWAMI—PLAINTIFF—
RESPONDENT.*Animals—Damages, suit for—Injury to animal—
Contributory negligence, effect of.*

In removing an animal from premises in order to prevent its causing damage no more injury should be inflicted than is reasonably necessary for the purpose. The infliction of excessive injuries will render the person inflicting them liable in an action for damages.

Appeal against the decree of the Subordinate Judge, Sibsagar, in Assam Valley Districts, dated the 31st of March 1916, affirming that of the Munsif, Jorhat, dated the 30th of January 1915.

Mr. O. O. Ghose and Babu Jatindra Mohan Ghose, for the Appellants

Babus Sarat Chandra Roy Chowdhury and Satya Charan Sinha, for the Respondent.

JUDGMENT.

FLETCHER, J.—This appeal is preferred by the defendants against the decision of the learned Subordinate Judge of the Court of the Assam Valley Districts, dated the 31st March 1916, affirming the decision of the Munsif at Jorhat. The plaintiff brought the suit (to recover damages for injuries inflicted on his elephant and for consequential damages by reason of his being deprived of the services of his elephant. The facts found by the Judge are these:—This elephant had been turned out under a state of partial control by having its feet tethered on to the grazing ground belonging to the plaintiff. The elephant was not properly secured: that is the finding, and the elephant went to the property of the defendants and caused damages. So, the plaintiff being guilty, in the opinion of the learned Judge, of negligence in turning out his elephant without being properly secured, the defendants were entitled to use force to remove the elephant from their premises and to prevent it from committing damage to their property. Up

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to that extent, the learned Judge seems to me to have found in favour of the defendants. But what the learned Judge has found then is this: He found, to my mind in distinct terms, that the injuries inflicted upon the elephant were excessive and were not such as were requisite or necessary for preserving the rights of the defendants. Of course, the defendants were not entitled to inflict injuries more than what were reasonably necessary for the purpose of preserving their property and for removing the plaintiff's elephant from their property. The injuries were inflicted, according to the findings of fact, by Kali, Dao and fire. Injury by spear might have been an act done on the spur of the moment, but the blow from the Dao and the mischief by fire were matters that would take some time having regard to the nature of the elephant's hide. I think the learned Judge was clearly right in finding that the injuries were excessive and that, therefore, the elephant had been damaged and the plaintiff was deprived of its services owing to this excessive act of the defendants. In that view of the case, the present appeal must fail and be dismissed with costs.

CUMING, J.—I agree.

Appeal dismissed.

S. N. Das
Advocate High Court
Jammu & Kashmir

Srinagar.

MADRAS HIGH COURT.

CIVIL APPEAL No. 278 OF 1914

AND

CIVIL MISCELLANEOUS PETITIONS Nos. 1063
AND 1655 OF 1919.

August 28, 1919.

Present:—Mr. Justice Sadasiva Aiyar
and Mr. Justice Burn.A. L. A. C. T. SOLAIYAPPA CHETTY—
DEFENDANT No. 1—APPELLANT—PETITIONER
versusR. M. M. L. LAKSHMANAN CHETTY
AND OTHERS—PLAINTIFFS AND DEFENDANTS
Nos. 2 AND 3—RESPONDENTS.

Civil Procedure Code (Act V of 1908, s. 151, O.
XLIV, r. 1—Appeal, presentation of, with proper
Court-fee—Additional Court-fee called for—Applica-

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tion to continue appeal as pauper, maintainability of
—Limitation Act (IX of 1908), Sch. I, Arts. 171, 181.

Even if an Appellate Court has power under section 151, Civil Procedure Code, to allow an application by an appellant to continue his appeal as a pauper, such power should be exercised subject to the conditions imposed by the proviso to Order XLIV, rule 1, i. e., it should be rejected where, from a perusal of the memorandum of appeal, there is no reason to think that the decree is contrary to law or some usage having the force of law or is otherwise erroneous or unjust. [p. 763, cols. 1 & 2.]

Quære.—Whether an Appellate Court has jurisdiction to allow an appellant to continue as a pauper an appeal originally filed with the prescribed Court-fee.

Obiter.—An application for permission to continue an appeal as a pauper would probably be governed by Article 181 of Schedule I of the Limitation Act. [p. 763, col. 1.]

Appeal No. 278 of 1914 purporting to be against the 3rd preliminary decree, but since converted by the order of the High Court, dated 6th December 1918, into an appeal against the final decree of the Court of the Subordinate Judge, Ramnad at Madura, in Original Suit No. 371 of 1910.

Civil Miscellaneous Petition No. 1063 of 1919, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to extend the time granted for the petitioner appellant to pay the additional Court-fee on the Memorandum of Appeal No. 278 of 1914, presented against the final decree of the Court of the Subordinate Judge, Ramnad at Madura, in Original Suit No. 371 of 1910.

Civil Miscellaneous Petition No. 1655 of 1919 put in under section 151 of the Code of Civil Procedure, praying that for the reasons set forth in the affidavit filed therewith the High Court will be pleased to exempt the petitioner, the appellant in the appeal, from paying the additional Court-fee directed to be paid on the Memorandum of Appeal No. 278 of 1914 against the final decree of the Court of the Subordinate Judge, Ramnad at Madura, in Original Suit No. 371 of 1910.

FACTS appear from the judgment.

Mr. S. T. Srinivasagopalachariar (with him Messrs. K. P. Madhavi Row and K. P. Lakshmana Row), for the Appellant.—The Court has power under section 151, Civil Procedure Code, though not under the provisions of Order XLIV, rule 1, to allow a person to

continue an appeal as a pauper when he is not able to pay the additional Court-fee required of him. It is a general section which provides generally for cases of hardship and invests Court with inherent powers.

Mr. C. Krishnamachariar, for the Respondents.—The provision directly applicable is Order XLIV, rule 1, Civil Procedure Code, and it does not apply to the present case. Section 151 should not be invoked in aid of exemption to pay the Court-fee. Even if the section is applicable, it should be read subject to the conditions in Order XLIV, rule 1, and there is no question here of the decree being against law or being otherwise unjust.

ORDER.—Civil Miscellaneous Petition No. 1655 of 1919 is an application under section 151 of the Code of Civil Procedure, praying that the petitioner may be allowed to continue an appeal as a pauper (the appeal having been filed long ago as an ordinary appeal in the regular course), so that the petitioner may be exempted from payment of the additional Court-fee of Rs. 2,900 and odd which he would have to pay if the appeal was prosecuted further as an ordinary appeal.

Appeal No. 278 of 1914 was filed in the first instance against the so-called third preliminary decree passed on the 20th April 1914 in the Ramnad Subordinate Judge's Court and the appeal was presented on the 3rd of August 1914. The appeal has been since converted by an order of this Court, dated 6th December 1918, into an appeal against the final decree passed by the Ramnad Court on the 29th of October 1914, which followed the judgment of the same date (29th October 1917), the judgment or order passed (a third preliminary judgment) on the 20th of April 1914 being treated as part of this final judgment of the 29th of October 1914. The petitioner (appellant) was directed on the 6th of December 1918 to pay the additional Court-fee within two months, but he has not yet paid the same though it is nearly nine months since that order was passed. He put in several applications for extension of time and the latest of those applications is Civil Miscellaneous Petition No. 1063 of 1919, which we may at once dismiss as he is unable to pay the balance Court-fees and as it is, therefore, not pressed.

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The present application in Civil Miscellaneous Petition No. 1655 of 1919 was filed on the 14th of July 1919, and it is not disputed that the petitioner is a pauper. This application does not fall under Order XLIV, rule 1, Civil Procedure Code, as the appeal has already been failed as an ordinary appeal and hence the petitioner has been obliged to invoke our powers under section 151, Civil Procedure Code. The first question, therefore, is whether we have got jurisdiction under that section to allow a person to continue an appeal as a pauper. The decisions in *Nirmul Chandra Mookerjee v. Doyal Nath Bhattacharjee* (1), *Revji Patil v. Sakharam* (2) and *Thompson v. Calcutta Tramway, Co., Ltd.* (3) support the petitioner's contention that we have got the power to allow the prosecution of an appeal to be continued *in forma pauperis*. There may, no doubt, result an anomaly in holding that such a power exists because while under Article 170 of the Limitation Act a person who puts in an application for leave to appeal as a pauper has got only one month's time from the date of the decree appealed from, an application under section 151 for permission to continue an appeal as a pauper would be probably governed by the general Article 181, "three years for applications for which no period of limitation is provided elsewhere." It seems again not advisable to express a final opinion on this question involving liability for the payment of Court-fees due to Government (in which the Government, therefore, is interested) without giving notice to and without hearing the arguments of the Government Pleader. Assuming for the sake of argument that we have got the power, it is clear that we should exercise our discretion subject to the conditions imposed by the proviso to Order XLIV, rule 1 on a Court to which an application is made by a person to allow him to appeal as a pauper; that is, unless from a perusal of the appeal memorandum, of the judgment and decree appealed from, there is no reason to think that the decree is contrary to law or to some usage having the force of law, or otherwise erroneous or unjust, the Court is bound

to reject the application. We have read through the appeal memorandum and the judgment and decree appealed from, including in the word "judgment" the order of the 20th April 1914, and we have also taken the assistance of the Vakils on both sides to understand what we have read, and we are not satisfied that the decree is contrary to law or to any usage having the force of law or is otherwise erroneous or unjust. We shall, therefore, dismiss this petition also. There will be no order as to costs in either of the petitions.

As the extension of time to pay Court-fees has expired, the appeal will stand rejected with costs.

*Appeal rejected;
Petitions dismissed*

CALCUTTA HIGH COURT.

CIVIL RULE No. 299 OF 1919.

July 28, 1919.

Present:—Justice Sir Syed Shamsul Huda, Kt.

BASANTA KUMAR SARKAR AND

ANOTHER—PLAINTIFFS—PETITIONERS

versus

SUKHOMOY MONDAL AND OTHERS—

DEFENDANTS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s 1—Res judicata—Landlord and tenant—Rent decree, ex parte, whether operates as res judicata.

A rent decree though only *ex parte* is *res judicata* of the question of the existence of the relationship of landlord and tenant between the parties. [p. 764, col. 2.]

Raj Kumar Roy v. Alimaddi, 16 Ind. Cas. 911; 17 C. W. N. 627, *Mahammad Gowhar Ali v. Samiruddin Sheikh*, 22 Ind. Cas. 383; 18 C. W. N. 33 at p. 37, followed.

Rule against the order of the Munsif, 2nd Court, Alipore, exercising the powers of a Court of Small Causes.

FACTS appear from the judgment.

Babu Manmohan Banerjee, for the Petitioners.—This Rule was obtained by the plaintiffs against the order of the Small Cause Court Judge dismissing their suit for recovery of arrears of rents and ceases from the defendants, who are their tenants.

(1) 2 C. 130.

(2) 8 B. 615.

(3) 20 C. 319.

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The plaintiffs' father purchased the land at an auction sale in execution of a decree and let out the lands to the father of the present defendants Nos. 1-4 and the remaining present defendants. In 1911 an *ex parte* rent decree was obtained against the present defendants by the plaintiffs, which was not executed. A part only of the decretal amount was realised, as would appear from the endorsement at the back of the decree. The defendants having again defaulted the present suit was brought. The defendants appeared this time and in their defence denied the relationship of landlord and tenant. The learned Munsif held that inasmuch as there was no evidence of realisation of rent and the *ex parte* rent decree of 1911 was not executed in time, there was no relationship of landlord and tenant between the parties. My submission is that the learned Munsif failed to give proper weight to the *ex parte* decree, which operated as *res judicata* on the question of relationship of landlord and tenant. The defendants have neither proved that the relationship ceased after the *ex parte* decree, nor have they impeached the decree which they could have done under section 44 of the Indian Evidence Act. The *ex parte* decree operates as *res judicata* upon the question of landlord and tenant. It does not lose its conclusive character because it is not executed. Where once the relationship of landlord and tenant is established, the mere fact of non-payment of rent is not sufficient to show that the relationship has ceased. See *Raj Kumar Roy v. Alimaddi* (1), *Mahammad Gowhar Ali v. Samiruddin Sheikh* (2).

Babu Surjya Kumar Guha, for the Opposite Party.—My submission is that the *ex parte* decree did not operate as *res judicata* on the question of the relationship of landlord and tenant. The plaintiffs never realised rent from us. We all were not parties to the previous decree, which was never executed. We hold a different land under a different landlord. No question of *res judicata* can arise. The case in *Raj Kumar Roy v. Alimaddi* (1) is not applicable. The Rule should be discharged.

(1) 16 Ind. Cas. 911; 17 C. W. N. 627.

(2) 22 Ind. Cas. 383; 18 C. W. N. 33 at p. 37.

JUDGMENT.—I think this Rule must be made absolute. The suit has been dismissed on the ground that the plaintiff had failed to prove the existence of the relationship of landlord and tenant between him and the defendants. My attention has been drawn to the fact that there was a previous rent decree to which all the defendants were parties. The learned Judge refers to this decree, but says that it is not shown that any payment was made towards the satisfaction of this decree. It seems to me, on the authority of the decisions of this Court in the case of *Raj Kumar Roy v. Alimaddi* (1) and in the case of *Mahammad Gowhar Ali v. Samiruddin Sheikh* (2), that a rent decree though only *ex parte* is *res judicata* on the question of the existence of the relationship of landlord and tenant. The case must be remanded to the Court below for the determination of the other issue, namely, what was the amount of rent payable by the defendants as rent.

The decree of the Small Cause Court is, therefore, set aside and the case sent back to that Court for being tried in accordance with law. The parties will be allowed to adduce such evidence as they may think it necessary to prove their respective cases regarding the amount of rent. The Rule is made absolute with costs. The hearing fee is assessed at one gold mohur.

Rule made absolute.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 97 OF 1919.

January 17, 1920.

Present:—Mr. Justice Rafique and
Mr. Justice Piggott.

RAM PARSAN UPADHYA—DEFENDANT—
APPLICANT

versus

NAGESHAR PANDE AND OTHERS—
OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), O. XLVII,
r. 1—Review, application for—Appeal, pendency of,
whether bar to hearing of review application—Appeal,
disposal of, effect of.

RAM PARSAN UPADHYA v. NAGESHAR PANDE.

The fact that an appeal is pending against a decree is no ground for rejecting an application to review the judgment on which such decree is based. [p. 765, col. 2]

Petitioner applied to the trial Court for a review of its judgment, and about the same time preferred an appeal against the same order. The trial Court refused to hear the application for review, on the ground that an appeal was then pending against the order which it was asked to review. Petitioner then moved the High Court in revision and during the pendency of his petition, his appeal was disposed of:

Held, that though the order refusing to hear the application for review was erroneous, yet as upon disposal of the appeal the decree of the trial Court no longer existed, the final decree being that of the Appellate Court, there was no order which the High Court could set aside. [p. 765, col. 2.]

Civil revision from an order of the Munsif, Bangsaon, dated the 31st of May 1919.

Messrs. Jang Bahadur Lal, Lakshmi Narain and Shiva Prasad Sinha, for the Applicant.

Mr. Iswar Saran, for the Opposite Parties.

JUDGMENT.—It appears that there are three brothers called Rameshar Pande, Nageshar Pande and Sri Ram Pande who, according to the allegation of Nageshar Pande, the plaintiff, are members of a joint and undivided Hindu family. Rameshar Pande and Sri Ram Pande, two of the brothers, executed a deed of sale in respect of some of the family property in favour of Parmanand Tewari. One Ram Parsan Upadhyia sued to pre-empt the sale and obtained a decree. After the passing of the pre-emption decree, Nageshar Pande brought the suit out of which this application for revision has arisen, for a declaration that the sale by Rameshar Pande and Sri Ram Pande in favour of Parmanand Tewari was invalid and that the decree of Ram Parsan Upadhyia on the ground of pre-emption was also invalid and inoperative. Nageshar Pande impleaded as defendants in the case his two brothers Rameshar Pande and Sri Ram Pande, the vendors, Parmanand Tewari, the vendee, and Ram Parsan Upadhyia, the pre-emptor. The claim was resisted on various grounds. It was decreed by the learned Munsif of Bangsaon, on the 10th of January 1919. Ram Parsan Upadhyia, the pre-emptor, filed an application before the learned Munsif for review of judgment on the 12th of February 1919. Two days after Ram Parsan

filed an appeal in the District Judge's Court from the decree of the learned Munsif. The application for review was heard and disposed of on the 31st of May 1919. The learned Munsif held that as an appeal had been filed by Ram Parsan, which appeal was pending at the time, the application for review was not maintainable. He accordingly dismissed it on the 31st of May 1919. On the 4th of July 1919 Ram Parsan came up in revision to this Court, alleging that the pendency of appeal on his behalf in the Court of the District Judge was no ground for the rejection of his application for review by the learned Munsif. On the 7th of July 1919 a learned Judge of this Court admitted the application and issued notice to the other side to show cause. About a week after, namely, on the 15th of July 1919 the appeal of Ram Parsan was heard by the learned District Judge and disposed of. The appeal was dismissed. It is contended on behalf of Ram Parsan, the applicant before this Court, that the order of the learned Munsif of Bangsaon rejecting his application for review is erroneous on the face of it in view of the case-law on the subject. The applicant relies upon the following cases:—*Chenna Reddi v. Pedda Obi Reddi* (1), *Narayan Purshottam v. Laxmibai Datto Bhagwan* (2) and *Partap Singh v. Jaswant Singh* (3). The case-law, is no doubt in favour of the contention for the applicant, but the circumstances of the three cases relied upon by the applicant were quite different to those in his case here. In the cases relied upon the appeal had not been disposed of. In the present case the application of Ram Parsan before this Court has come up for hearing after the disposal of his appeal by the learned District Judge. The decree of the learned Munsif no more subsists. The final decree in the case is that of the learned District Judge.

No doubt the order of the learned Munsif rejecting the application for review was erroneous. It would, however, serve no useful purpose now to set aside that order, inasmuch as the decree sought to be reviewed

(1) 2 Ind. Cas. 802; 32 M. 416; 6 M. L. T. 135 (F. B.); 19 M. L. J. 388.

(2) 23 Ind. Cas. 513; 38 B. 416; 16 Bom. L. R. 180.

(3) 52 Ind. Cas. 642; 17 A. L. J. 1021.

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no more exists. The decree which subsists at present is that of the District Court. We, therefore, disallow the application and dismiss it. Considering all the circumstances, the parties will bear their own costs.

Application rejected.

OUDE JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 119 OF 1918.

December 18, 1919.

Present:—Mr. Stuart, A. J. C., and

Pandit Kanhaiya Lal, A. J. C.

P. GUR DAYAL—PLAINTIFF—APPELLANT

versus

Saiyid TAID HUSAIN AND OTHERS—

DEFENDANTS—RESPONDENTS.

Evidence Act (1 of 1872), s. 115—Estoppel—Representation made by mortgagor to prior mortgagee—Subsequent mortgagee, whether bound by representation.

A subsequent mortgagee is bound by the representations made by the mortgagor to a prior mortgagee and is estopped from challenging the validity of the prior mortgage so far as it affects the share which was subsequently mortgaged. [p. 767, col. 1.]

Appeal against the decree of the Subordinate Judge, Barabanki, dated the 9th September 1918.

The Hon'ble Mr. Wazir Hasan and Mr. Basudeo Lal, for the Appellant.

Mr. Hyder Husain, for Respondent No. 2.

Mr. Wasim, for Respondent No. 3.

JUDGMENT.—The suit which has given rise to these appeals was brought to enforce a mortgage-deed effected by Taid Husain in favour of Ajudhia Prasad on the 1st November 1906. The plaintiff is the son of Ajudhia Prasad. The property mortgaged comprised shares in 3 villages known as Murliganj, Garhi Rakhman and Rasulabad. The said villages belonged to Khairat Husain, who died leaving two daughters, Musammât Tahir-un-nissa and Musammât Tayebunnissa, each of whom became entitled to a half share under the Shia Law. The half share of Musammât Tayebunnissa was entered in the names of her four sons, Jawed Husain, Taid Husain, Said Husain and Rashid Husain. On the 7th December

1883, Musammât Tahir-un-nissa executed an agreement in favour of Jawed Husain allowing the latter to remain in possession of her 8-annas share in the said villages subject to his paying her an annual allowance of Rs. 500. On the 16th June 1886 a similar agreement was executed by Said Husain in favour of Jawed Husain, allowing the latter to hold the entire property subject to his paying him an allowance of Rs. 125 per year.

On the 21st December 1895 Jawed Husain mortgaged the said villages with Raja Tasadduk Rasul Khan of Jahangirabad. He stated in the mortgage-deed that by virtue of a private settlement between him and his co-sharers and certain agreements executed by Musammât Tahir-un-nissa and Said Husain he was in possession of, and had dominion over, the said villages with an absolute right of transfer and that in order to pay off certain debts and meet other private necessities he was mortgaging the same in their entirety (Exhibit B1). The mortgage-deed was attested by Taid Husain and Rashid Husain, two of the brothers of the mortgagor. Their attestations were apparently obtained because their names were entered in the revenue papers as holding the said villages jointly with the mortgagor. The mortgagee subsequently obtained a decree in pursuance of a compromise to which Taid Husain and Rashid Husain were parties (Exhibit B3), and in execution of that decree brought to sale in separate lots a one-anna share of Taid Husain in the said villages, which was purchased by Musammât Maqsd-un-nissa the wife of Taid Husain, and the remaining one-anna share of Taid Husain in the same which was purchased by Ainul Hasan, one of his relations.

Musammât Maqsd-un-nissa and Ainul Hasan claim that the plaintiff is estopped from denying the title of Jawed Husain to mortgage the villages in question with Raja Tasadduk Rasul Khan. The Court below has found in their favour and declared that they would be entitled to priority as against the rights enforceable by the plaintiff.

We have examined the evidence adduced in the case and agree with the learned Subordinate Judge in finding that Taid Husain had represented that Jawed Husain had a right to mortgage the entire villages in ques-

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tion, and in token of his consent attested the mortgage deed which Jawed Husain had executed in favour of Raja Tasadduq Rasul Khan. The evidence has been discussed by the learned Subordinate Judge and we see no sufficient reason to disbelieve it. In the petition of compromise filed in the suit brought by the Raja to enforce his mortgage, Taid Husain agreed that the two annas share of Jawed Husain might be sold first and that if it did not prove sufficient to pay the decretal money, the two annas share held by Taid Husain should be sold and that if that too proved insufficient, the remainder of the decretal debt shall be realizable from the two annas share of Rashid Husain in the villages mortgaged (Exhibit B3). Taid Husain deposes that the custom of his family was that the eldest member remained the owner of the property and the junior members received maintenance. In response to an enquiry as to succession made by the British Government in 1860 Tafazzul Husain, with whom the first settlement of these villages was made, stated that he wanted that the property granted to him should continue in his family entire and without partition according to custom and that the younger brother should be entitled to get maintenance from the Gaddinashin or the person in charge of the property (Exhibit C35). In the Khewat prepared at the Settlement for 1272 Fasli the names of Tafazzul Husain and his brother Khairat Husain were entered as co-sharers living jointly and holding the said property in equal shares. On the death of Tafazzul Husain without issue the latter became the sole owner of the said villages. After the death of Khairat Husain the brothers of Jawed Husain, including Taid Husain, apparently allowed Jawed Husain to represent himself as the sole owner of the property mortgaged and on the faith of that representation helped him to obtain a loan from Raja Tasadduq Rasul Khan. The plaintiff as the subsequent mortgagee is bound by the representation so made and is estopped from challenging the validity of the mortgage so far as it affects the share which was afterwards mortgaged with him by Taid Husain. As observed by their Lordships of the Privy Council in *Sarat Ohunder Dey v.*

Gopal Ohunder Lahu (1): "What the law and the Indian Statute mainly regard is the position of the person who was induced to act, and the principle on which the law and the Statute rest is that it would be most inequitable and unjust to him that if another by a representation made or by conduct amounting to a representation has induced him to act, as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it." The contesting defendants have stepped into the shoes of the mortgagee and the mortgagor and are entitled to claim the benefit of that estoppel as against Taid Husain and his subsequent transferee.

It is urged on behalf of the plaintiff that the decree passed by the Court below does not give effect to the right of the plaintiff to redeem the property purchased by the contesting defendants on payment of a proportionate amount of the money due on the mortgage of the 21st December 1895 or to his right to sell the said property if he so liked, subject to a prior charge in favour of the said defendants. The present suit is not framed so as to justify a decree being passed for the redemption of the mortgage effected by Jawed Husain. The plaintiff can be allowed a right to sell the disputed property subject to the proportionate liability for the prior mortgage effected by Jawed Husain. The contention of *Musammam Maqsood-un-nisa* is that she is entitled to the entire purchase-money paid by her or at all events to the entire mortgage money due on the said mortgage, but these matters cannot be properly decided between the representatives of the mortgagor *inter se* except in a suit properly framed for the purpose.

The appeals are, therefore, dismissed with costs. The cross objections are also disallowed, except in so far that the decree will contain a direction that the plaintiff will be entitled to bring the mortgaged properties held by the contesting defendants to sale in case of non-payment of the decretal money which may be found due to him, subject to a proportionate liability for the money

(1) 20 C. 296 at p. 311 (P. C.); 19 I. A. 203; 6 Sar. P. C. J. 224.

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due on the mortgage effected by Jawed Husain in favour of Raja Tasaddug Rasul Khan on the 21st December 1895. The costs of the cross-objection will be borne by the parties themselves.

Appeal dismissed.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 1670 OF 1917.
December 18, 1919.

Present:—Mr. Justice Tudball and
Mr. Justice Rafique.

MAHRAJ SINGH—DEFENDANT—
APPELLANT
versus

PITAMBAR SINGH—PLAINTIFF—
RESPONDENT.

Custom—Pre-emption—Wajib-ul-arz, entry in, of wishes of co-sharers, whether proof of custom—Appeal, second—Finding of fact based upon one piece of evidence alone, whether binding.

Where an entry in a *wajib-ul-arz* dealing with pre-emption records the wishes of the co-sharers as to what should happen in the future, such entry is not binding on the members of the co-parcenary body as a village custom, nor is such entry proof of the existence of the custom of pre-emption.

Where an Appellate Court bases a finding of fact upon one piece of evidence alone without considering the whole of the evidence bearing upon the point, the finding is not binding in second appeal.

Second appeal against the decree of the Second Additional Judge, Aligarh, dated the 23rd of August 1917.

Mr. Kailash Nath Katju, for the Appellant.

Dr. S. N. Sen, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for pre-emption based upon village custom. The Courts below have both held that the existence of the custom was established. The plaintiff produced one *wajib ul-arz* and he called two witnesses. The defendant called other witnesses. As far as the oral evidence is concerned, it merely consists of a parrot like repetition on the one side that the custom existed and on the other side that the custom did not exist. The defendant also

attempted to show that sales to strangers had taken place. The first Court on a consideration of the evidence as a whole decided in favour of the plaintiff. The judgment of the lower Appellate Court shows that that Court considered nothing else but the *wajib ul-arz*. It held that the *wajib ul-arz* clearly recorded a custom under which the plaintiff was entitled to pre-empt and it upheld the decision of the first Court. If the decision of the Court below had been based upon all the evidence on the record, we might perhaps have been bound by its finding as a finding of fact, but in the present case its decision is clearly based upon the one document alone. A reference to that document will show clearly that far from a custom being recorded by the co-sharers, they were expressing their own wish as to what should happen in the future. The co-parcenary body consisted of Thakurs, one Bohra and two or three Muhammadans, and the document merely states that among Thakurs and Bohras a certain rule was observed for pre-emption and that among the Muhammadans, the Muhammadan Law of pre-emption prevailed. Clearly this was no village custom binding upon the members of the co-parcenary body nor was it a case of two customs existing side by side as the lower Appellate Court has said. We have examined the oral evidence in the case. As evidence it has no weight whatsoever. This case is very similar to that of Second Appeal No. 1565 of 1917 decided on the 15th of February 1919 in this Court. We think that the evidence on the record is utterly insufficient to establish any custom of pre-emption in this village. We, therefore, allow the appeal and set aside the decrees of the Courts below. The suit will stand dismissed with costs in all Courts, including in this Court fees on the higher scale.

Appeal allowed.

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ALLAHABAD HIGH COURT.
CRIMINAL MISCELLANEOUS No. 242 OF
1919.

December 18, 1919.

Present:—Justice Sir George Knox, Kt.

JAWAD HUSAIN AND OTHERS—

APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 497—
Bail—Non-bailable offence—Court, duty of.*

In considering an application for bail from a person accused of a non-bailable offence, the Court must be satisfied by an examination of the investigation inquiry or trial, whether or not there are reasonable grounds for believing that the accused has committed such offence. In the latter case, the accused should be admitted to bail, but not in the former.

Application for bail under section 498 of the Code of Criminal Procedure.

Mr. S. O. Mukerji, for the Applicants.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This is an application for admission to bail. The applicants are under trial for an offence under section 408, Indian Penal Code. On turning to Schedule 2 attached to the Code of Criminal Procedure, it will be found that offences under section 408 are not bailable offences. The Magistrate in charge of the case has refused bail. A case of this nature has to be dealt with under section 497 of the Code of Criminal Procedure. Paragraph 2 of that section lays down that if it appears to a Court at any stage of the investigation, enquiry or trial that there are not reasonable grounds for believing that the accused has committed such offence but that there are sufficient grounds for further enquiry into his guilt, the accused shall, pending such enquiry, be released on bail. From this it seems that the law requires that the investigation, enquiry or trial which is proceeding should be examined and that before admitting to bail this Court should come to the conclusion that there are not reasonable grounds for believing that the accused has committed such offence. Further that the person accused of such an offence is not to be released if there appear reasonable grounds for believing that the accused has been guilty of the offence charged. The affidavit before me which

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supports the application for bail contains absolutely no reason whatever why the accused should be admitted to bail. It does not help me in coming to any conclusion whether the accused have or have not been guilty of a non-bailable offence. In the arguments addressed to me all that I have heard is that a case was instituted in the Court below charging these same accused with an offence under section 420, Indian Penal Code. The matter was considered and the applicants admitted to bail. It is stated that the offence under section 408 hardly differs from that under section 420. I am unable to follow this inference. I see no reason to interfere and dismiss the application. The applicants must surrender to their bail and undergo the remainder of their sentences.

Application dismissed.

PATNA HIGH COURT.

CRIMINAL REVISION No. 20 OF 1919.

July 28, 1919.

Present:—Mr. Justice Atkinson and

Mr. Justice Adami.

TEPANIDHI GOBINDA CHANDRA

BHARATI AND OTHERS—PETITIONERS

versus

EMPEROR—RESPONDENT.

*Criminal Procedure Code (Act V of 1898), s. 239—
Joint trial of several accused for offences not arising
out of same transaction, legality of—"Transaction",
meaning of.*

If accused persons have been wrongly tried together in respect of offences which cannot be jointly tried together legally in point of law, the conviction so obtained against them is illegal and void and cannot stand. It is not a mere irregularity; it is a question of substance, and not of form. [p. 771, col 1.]

If several accused start together for the same goal, this suffices to justify their joint trial under section 239 of the Criminal Procedure Code, even if incidentally one of those jointly tried has done an act for which the others may not be responsible. [p. 771, col 2.]

The foundation for the procedure laid down in section 239 of the Criminal Procedure Code is the

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association of two persons concurring from start to finish to attain the same end. [p. 771, col. 2]

Community of purpose or design and continuity of action are essential elements of the connection necessary to link together different acts into one and the same transaction. In such cases the acts alleged to be connected with each other must have been done in pursuance of a particular end in view and as accessory thereto. [p. 772, col. 1.]

Criminal revision against an order of the Sessions Judge, Cuttack, dated the 28th June 1919, affirming that of the Deputy Magistrate, Cuttack, dated the 4th June 1919.

Mr. S. A. Asghar (with him Mr. Gajendra Prasad Das), for the Petitioners.

Mr. Manohar Lal (Assistant Government Advocate), for the Crown.

JUDGMENT.—The three accused before us as petitioners in the present application were respectively charged with offenses under section 354 of the Indian Penal Code and under section 323 of the Indian Penal Code. Accused No. 1 was the only accused charged with the commission of an alleged offence under section 354; and accused Nos. 2 and 3 were charged with the commission of an offence under section 323 of the Indian Penal Code.

Both offences are alleged to have taken place on the 6th April 1919 at or between the hours of 7 and 8 P. M.

Shortly summarised, the evidence in the case appears to be as follows:—Accused No. 1 entertained sexual designs on a lady called Khiradmani, who was the wife of the complainant; that on the evening in question seeing this lady passing through her garden not far from the fence which separated her house from that of the accused No. 1, the accused No. 1 seized her and endeavoured to forcibly retain her in his custody for an immoral purpose. The woman resisted, and called out for assistance. The incident took place not far from the house of Musammât Khiradmani herself; and accordingly her husband and her aunt, hearing the cry of help uttered by Musammât Khiradmani, immediately came to her assistance.

Now up to this period of time accused Nos. 2 and 3 were not in any way connected with the accused No. 1. There is no evidence on the record to suggest or prove that accused Nos. 2 and 3 were *particeps criminis* with the accused No. 1 in his acts or

purpose relative to the assault which he committed upon Musammât Khiradmani.

Musammât Khiradmani's husband having appeared upon the scene he immediately attacked the accused No. 1; and apparently as the complainant seized the accused No. 1 and got into hand grips with him, accused Nos. 2 and 3 appeared for the first time upon the scene. Accused Nos. 2 and 3 are the servants of the accused No. 1, and evidently their intention was to free their master from the assault which was then being committed upon him by the complainant.

These are the only facts which it is necessary to state to dispose of the legal matter of objection taken before us with regard to the validity of the conviction of the accused.

The three accused were all tried jointly, upon joint charges. One charge was only referable to accused No. 1, and the other charge was referable against accused Nos. 2 and 3 jointly.

The point taken on behalf of the petitioners is that in this case the law does not justify or permit a joint trial of accused Nos. 2 and 3 with accused No. 1; because it is alleged that the respective offences with which the accused were charged were not offences arising out of the same or in the course of the same transaction.

The general law as to the trial of accused persons is embodied in section 233 of the Code of Criminal Procedure; and section 233 provides that

"For every distinct offense of which any person is accused there shall be a separate charge, and every such charge shall be tried separately except in the cases mentioned in the subsequent sections."

Such being the general law, the exceptions that follow must be strictly construed so as not to defeat the right of independent trial conferred by the general law.

Now amongst the exceptions to the general rule laid down in section 233 of the Code of Criminal Procedure is the class of exception provided by section 239.

Section 235 is very much akin in phraseology with section 239. Section 239 appears to be wider in scope than section 235; but in the main the underlying principle and intention governing these sections

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seems to be common. Section 239 provides that

"When more persons than one are accused of the same offence or of different offences committed in the same transaction,....they may be charged and tried together or separately as the Court thinks fit."

If accused persons have been wrongly tried together in respect of offences which cannot be jointly tried together legally in point of law, the conviction so obtained against them is illegal and void and cannot stand. It is not a mere irregularity; it is a question of substance, and not of form.

The ruling of their Lordships of the Privy Council has laid the contest regarding this question at rest; and it is not open now to debate or discussion notwithstanding the earlier decisions in the Calcutta High Court.

What we have to consider in the present case is whether the offence charged as against the accused Nos. 2 and 3 was an offence arising out of the "same transaction" in respect of the main offence charged against the accused No. 1; if not, then the right of joint trial did not arise, and the trial would be illegal.

It is conceivable that if persons were tried together, who ought not to have been so tried, that prejudice might accrue to an accused person which would be contrary to the spirit of fair trial.

Everything depends on the construction of section 239, upon the meaning and interpretation to be attributed to the words "in the same transaction," or "in the course of the same transaction," as used in the illustrations to section 239.

The learned Assistant Government Advocate contends that one and the same transaction means, as I gather, any state of circumstances that may exist, whereby one crime may have been committed which in some way may directly or indirectly be connected with another; that design and purpose do not form an essential ingredient in considering whether the transaction out of which two crimes may have been committed as a test and criterion for ascertaining if the several crimes so committed arose out of the same transaction. The authorities on the construction of section 239 and its cognate sections in this chapter of the Criminal Procedure Code

leave one under very little doubt as to the interpretation to be given to section 239.

The cases mainly relied upon are *Emperor v. Jethalal* (1), *Emperor v. Datto Hanmant Shahapurkar* (2) and *Ohoragudi Venkataadri v. Emperor* (3).

Out of these three cases I think the law as to the construction of section 239 is best enunciated by the decision of the learned Judges in *Emperor v. Datto Hanmant Shahapurkar* (2). The learned Judges say at page 54 of the report as follows:—

"The word 'transaction' is unfortunately not defined in the Code and the meaning to be attached to it must be gathered from the context in which it occurs in various sections and illustrations."

"According to its etymological and dictionary meaning the word 'transaction' means 'carrying through' and suggests, we think, not necessarily proximity in time so much as continuity of action and purpose. The same metaphor implied by that word is continued in the illustrations where the phrase used is 'in the course of the same transaction'. In section 215, the phrase is used in a connection which implies that there may be a series of acts. Illustration (f) to that section indicates that the successive acts may be separated by an interval of time and that the essential is the progressive action, all pointing to the same object. In section 239, therefore, a series of acts separated by intervals of time are not, we think, excluded, provided that those jointly tried have throughout been directed to one and the same objective. If the accused started together for the same goal this suffices to justify the joint trial, even if incidentally one of those jointly tried has done an act for which the other may not be responsible."

"We think the foundation for the procedure in that section is the association of two persons concurring from start to finish to attain the same end."

A brief quotation may also be made from *Ohoragudi Venkataadri v. Emperor* (3) from the judgment of the learned Judge who delivered the judgment of the Court:—

(1) 29 B. 449; 7 Bom. L. R. 527; 2 Cr. L. J. 480.

(2) 30 B. 49; 7 Bom. L. R. 633; 2 Cr. L. J. 578.

(3) 5 Ind. Cas. 847; 33 M. 502; 7 M. L. T. 299; 20 M. L. J. 220; 11 Cr. L. J. 258; (1910) M. W. N. 65.

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"Now what is the nature of the connection contemplated between different acts which would bind them into the 'same transaction'? The idea conveyed by the words 'same transaction' seems to be obvious enough and it may be doubted whether it can be compendiously expressed in simpler and clearer language."

"I think—and this seems to be the effect of the decisions—that at least in a certain class of cases—the present case is alleged to be within that category—*community of purpose or design and continuity of action* are essential elements of the connection necessary to link together different acts into one and the same transaction. In such cases the acts alleged to be connected with each other must have been done in pursuance of a particular end in view and as accessory thereto or perhaps as suggested by the circumstances in which the acts in pursuance of the original design were done and in close proximity of time to those acts."

Many other decisions to like effect might be cited from the rulings of the Calcutta High Court. It is needless to refer to them, because speaking generally they all conform in principle with the authorities cited above.

In our opinion the several authorities already referred to lay down with accuracy and precision the correct legal principle to be applied in interpreting and construing section 239 of the Code of Criminal Procedure; and accordingly we apply the principle deducible from the authorities cited to the facts of the case now before us.

It cannot be said on the evidence in this case to which I have already referred that there was any continuity of action or purpose between the act or acts committed by the accused Nos. 2 and 3 and the main principal act committed by the accused No. 1. If the Crown had been able to show by evidence some association between the accused No. 1 and accused Nos. 2 and 3, acting for a common purpose in execution of a common design between the three accused, then I think the charges against the respective accused might have been jointly tried and might have been disposed of together.

But inasmuch as no such evidence was given, it appears to us on the true interpretation of the law that the accused per-

sons in this case, the petitioners before us, have not been tried in accordance with the law, and that their joint trial was illegal, and consequently it becomes our duty to set aside the conviction of all the accused as recorded by the learned Sessions Judge of Cuttack.

The learned Judge did not take into his consideration the question of separate trial of the accused; the accused never took the point before the learned Judge, and of course he is in no wise to blame; but in our opinion the omission of the accused to urge the illegality of their joint trial before the learned Sessions Judge does not debar them from asserting such right before us here now in revision.

Accordingly we set aside the conviction of the accused Nos. 1, 2 and 3 and direct that they be separately retried on the charges which have been separately preferred against them.

Re-trial ordered.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 580 OF 1919.
November 19, 1919.

Present :—Mr. Justice Ryves.
RAM CHANDER AND OTHERS—
PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.
*Criminal Procedure Code (Act V of 1898), s. 403—
Accused, trial of, for specific offence—Acquittal—Subsequent trial on same facts for same offence, legality of.*

Where a person is tried for a specific offence and is acquitted, he cannot subsequently be tried for the same offence upon the same facts. [p. 773, col. 1]

Criminal revision from an order of the Additional Sessions Judge, Mirzapur, dated the 1st September 1919.

Mr. A. P. Dubé, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—Eight persons, all Karmis, were convicted by a Magistrate of the first class of rioting and causing grievous

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hurt, and sentenced to various terms of imprisonment and to pay fines. On appeal the learned Additional Sessions Judge of Mirzapur altered the conviction to one under section 147 read with section 323 of the Indian Penal Code.

On revision before me it was argued that this trial was barred by the provisions of section 403 of the Code of Criminal Procedure. It appears that there was a riot of some sort between certain Brahmins and certain Kurmis. The Police challaned the Brahmins. Thereupon one Dina Nath, a Brahmin, filed a complaint in the Court of Muhammad Mahboob Alam, a Magistrate of the third class, charging all the present applicants with rioting with the common object of causing hurt to the Brahmins. That learned Magistrate convicted four of the accused and acquitted six. He consequently held that no charge of rioting had been made out and passed his order under section 323 of the Indian Penal Code against four only of the Kurmis. This was on the 14th of May 1919. These four persons appealed to the District Magistrate, who dismissed their appeals and went on to direct that each of the four appellants should execute a bond to keep the peace under section 106 of the Criminal Procedure Code. Thereafter one Ramchander, another Brahmin, filed a complaint on which this trial was held. It is argued that the facts which were the subject of enquiry in the first trial before Muhammad Mahboob Alam are exactly the same as the facts which were enquired into in this trial and the persons accused are the same. It seems to me, therefore, that under the provision of section 403, clause 1, they cannot be tried again. The result is that I allow this application. I set aside the convictions and direct that the accused be set at liberty and the fines, if paid, be refunded to them.

Application allowed.

PATNA HIGH COURT.

CRIMINAL REVISION No. 402 of 1919.

December 12, 1919.

Present:—Mr. Justice Adami.

MAHESH DUTT SINGH AND OTHERS—
PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 47—Rioting—Unlawful assembly, finding as to, whether necessary—Conviction, whether maintainable.

In the absence of a finding as to the existence of an unlawful assembly, a conviction under section 147 of the Penal Code cannot be maintained. [p. 774, col. 2.]
Poresh Nath Sircar v. Emperor, 34 C. 295; 2 C. L. J. 516; 3 Cr. L. J. 153, referred to and explained.

Criminal revision against the order of the Sessions Judge, Monghyr, dated the 18th September 1919, dismissing the appeal of the petitioners from their conviction and sentence by the Deputy Magistrate, Monghyr, dated the 29th August 1919.

Mr. G. C. Pal, for the Petitioners.

Mr. H. P. Sinha, for the Opposite Party.

JUDGMENT.—This is an application for the setting aside of an order passed by the Deputy Magistrate of Monghyr convicting the petitioners, and sentencing Mahesh Dutt Singh to a fine of Rs. 100 and the rest of the petitioners to a fine of Rs. 50 each under section 147 of the Penal Code.

The petitioners were charged with being members of an unlawful assembly who met together with the common object of looting by force the crops standing on plot No. 124 in village Chandanpura. It seems that originally this holding belonged to the petitioners and was sold by them and bought by Jhangu who, however, could not get possession at first, with the result that in the survey record it was entered in the name of one Ramlal, one of the defence witnesses. The purchaser Jhangu then instituted a suit to have the Record of Rights corrected and to be put in possession of the land. He obtained a decree against the present petitioners and was put in possession by the Court. In the holding there was a plot No. 124 measuring 1.36 acres. This plot formed one of the plots which Jhangu had claimed in the plaint in this suit, but in the decree and in the *Dakhal-dahani* the area of the plot was given as .36 instead of 1.36. The petitioners apparently came and looted the crops of this plot No. 124 on the ground that in the

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Civil Court possession only of .36 of the plot had been given to Jhangu. It may be mentioned that Jhangu's suit had been decreed in full and that the petitioners were parties to that suit, and, therefore, they can be taken to have had information what land was covered by it. Furthermore, there had been cases under sections 144 and 107 concerning the same land. The Deputy Magistrate found that the petitioners had come in to this land, looted the crops and used force, and convicted them as above mentioned under section 147.

There had been a separate charge of theft, but no separate sentence under section 379 was found to be necessary. The learned Sessions Judge upheld the conviction and sentence on appeal.

The chief points put forward by the learned Vakil in this Court are (1) that the petitioners acted *bona fide*, being misled by the mistake in the decree and Dakhal-dahani, (2) that neither of the Courts have come to a finding as to the common object of the assembly or definite findings as to the details of the offence charged.

With regard to the first ground the matter has, I think, been satisfactorily considered and dealt with by the lower Courts, and it is quite clear that the petitioners must have known that the mistake in the decree was merely a clerical one, and that the decree was meant to cover the whole plot, also that possession had been made over to Jhangu of the whole plot, though only an area of .36 was mentioned in the Dakhal-dahani.

With regard to the second ground, it is quite true that in neither of the judgments of the lower Courts is there a finding as to the common object of the assembly, or of the fact that the petitioners were members of an unlawful assembly. The learned Sessions Judge merely says: "I am satisfied that rioting did take place and that the crop was looted as stated by the complainant," while all that the Deputy Magistrate says is: "From the evidence on the record I come to the conclusion that he (the complainant) was disturbed in possession of the land at the time of reaping, and the accused did commit the offence with which they are charged."

The learned Vakil cited the case of

Poresh Nath Sircar v. Emperor (1) where, however, the common object found differed from the common object charged against the accused. Certainly in this case there is no finding as to the existence of an unlawful assembly in either judgment which satisfies the requirements of the law. The petitioners, however, were charged with theft, and it is made out and proved that they committed the theft, and the Courts found them guilty of that offence though no separate sentence was passed under section 379, Indian Penal Code.

I set aside the conviction and sentences passed under section 147 and confirm the conviction under section 379 and under that section sentence them to the period of imprisonment they have already undergone, and Mahesh Dutt Singh to pay a fine of rupees one hundred or in default one month's rigorous imprisonment and the rest of the petitioners to pay a fine of rupees fifty each or in default two weeks' rigorous imprisonment.

Order accordingly.

(1) 33 C. 295; 2 C. L. J. 516; 3 Cr. L. J. 153.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPLICATION No. 377
OF 1919.

June 17, 1919.

Present:—Mr. Kanhaya Lal, J. C.
FAQIRAY LAL AND OTHERS—ACCUSED—
APPLICANTS

versus

EMPEROR—OPPPOSITE PARTY.

Criminal trial—Magistrate, whether can inspect scene of occurrence—Procedure.

It is not only not objectionable but in many cases highly advisable that a Magistrate trying a criminal case should himself inspect the scene of occurrence, in order to understand fully the bearing of the evidence given in Court; but if he does so, he should be careful not to allow any one on either side to say anything to him, which might prejudice his mind one way or another. [p. 775, col. 1.]

Application for transfer of the case from the Court of the Magistrate, 1st Class, Lucknow, dated the 29th May 1919.

Mr. *Mumtaz Hussain*, for the Applicant.

The Government Pleader, for the Crown.

ORDER.—This is an application for the transfer of a criminal trial pending in the

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Court of a Magistrate of the First Class at Lucknow. There are nine accused. Their allegation is that the trying Magistrate went to the village where the alleged occurrence is said to have taken place, without informing the accused or their Pleaders, and not only saw the house of the deceased Bholai but made enquiries from various persons as to the facts of the case, including the nature of the entries which the Patwari had made in his papers, but made no written record thereof.

It is admitted by the learned Counsel for the applicants that two of the accused Muhammad Khan and Ibrahim, who lived in the village, reached the place where the Magistrate was making the enquiry, soon after his arrival; but there is nothing to show that the other accused had any information that such an enquiry was intended to be made at the village. The learned Government Pleader admits the general correctness of the allegations made in paragraph 5 of the petition and states that the trying Magistrate has no objection to the case being transferred, if this Court thinks that a transfer is desirable. As pointed out in *Lalii*, *In the matter of the petition of (1) and Atiar Rai v. Emperor (2)*, it is not only objectionable, but in many cases highly advisable, that a Magistrate, trying a criminal case, should himself inspect the scene of the occurrence in order to understand fully the bearing of the evidence given in Court; but if he does so, he should be careful not to allow any one on either side to say anything to him, which might prejudice his mind one way or the other. In this case the learned Magistrate went out of his way in making enquiries on the spot in order to satisfy himself how the facts stood, without previous notice to seven of the accused and in their absence. It is possible that the learned Magistrate may be able to shake off the impression which that enquiry may have made on his mind, if it was unfavourable to the accused, and confine himself during the trial to the evidence which may be recorded in Court, but it is not likely that the accused

would have the same confidence which they would have had, had no such enquiry been made. It is desirable, therefore, that the case should be transferred to some other Magistrate competent to try the same.

The application is allowed and the District Magistrate directed either to try the case himself or send it for trial to any other Magistrate subordinate to him who may be competent to try the same.

Application allowed.

PATNA HIGH COURT.
CRIMINAL REVISION No. 379 of 1919.
November 26, 1919.

Present:—Mr. Justice Adami.

ENAYET KARIM AND OTHERS—PETITIONERS
versus

EMPEROR—OPPOSITE PARTY.

Evidence Act (I of 1872), s. 8—Penal Code (Act XLV of 1860), s. 147—Evidence doubtful—Conduct, subsequent, of accused, whether can be considered as evidence against him.

Where the evidence against a person charged with an offence under section 147, Penal Code, is open to doubt, his conduct sometime after the occurrence cannot be taken to be such evidence of conduct under section 8 of the Evidence Act as can be used against him in the case. [p. 777, col. 2.]

Criminal revision against the order of the Judicial Commissioner, Chota Nagpur, dated the 30th September 1919.

FACTS of the case appear from the judgment of the Judicial Commissioner which was as follows:—

"Ten persons, all constables of the Daltonganj Thana, have been tried for rioting and other offences, of whom three have been acquitted. The other seven, who have been convicted of rioting only and sentenced each to three months' rigorous imprisonment and fine, now appeal.

The affair arose out of a party of constables, 5 or 6 in number, having a dispute with Gajadhar Lal, a merchant of Daltonganj town, regarding the sum to be paid for some rice which the constables were wanting to purchase. While the dispute was going on, some more constables arrived with sticks and there followed a somewhat one-sided fight in which the con-

(1) 19 A. 302; A. W. N. (1897) 52.

(2) 13 Ind. Cas. 844; 39 C. 476; 16 C. W. N. 426; 15 C. L. J. 403; 13 Cr. L. J. 156.

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stables beat Gajadhar Lal and his brothers and some other shopkeepers, themselves escaping without injury.

Ten of the shopkeepers received injuries, more or less severe, which were medically examined the same day by either the Civil Surgeon or Assistant Surgeon. These men were Jagmohan (P. 6), who received three injuries including a broken arm, Lalji (P. 5) three injuries, Sitaram (P. 9) one injury, Boudh (P. 2) four injuries, Khublal (P. 3) two injuries, Lochi (P. 8) one injury, Gajadhar (P. 1) five injuries, Dukhi (P. 4) four injuries, Deyal (P. 7) two injuries.

Of the above Boudh and Khublal are the brothers of Gajadhar. All the injured men sell grain in the Daltonganj Bazar, except Jagmohan who sells sweetmeats.

The occurrence took place in the morning publicly and is conclusively proved by the above named and other witnesses. The common object of the constables as set forth in the charge of rioting is 'to terrorize by means of criminal force the shopkeepers of Daltonganj Bazar to sell articles at a cheaper rate to the constables.' This comes within the fifth clause of section 141. The long list of injured shopkeepers indicates that this probably was the common object. Another view is that the constables who came up later realised that there was a quarrel between the first batch and the grain dealers and rallied to the support of their comrades, beating any one of the opposite party who crossed their path without any clear idea of the details of the quarrel. In that case their common object was voluntarily to cause hurt which comes within the third clause of section 141 (*vide* section 40). In any case the offence committed was rioting. It is not suggested that there was the smallest excuse for the constables. The defence of each of them is that he individually was not present. The only point for consideration accordingly is the matter of identification.

Soon after the occurrence the Deputy Commissioner paraded the constables found at the Thana and invited such of the injured men as he found to come and identify the assailants. He took notes of what happened. He held another test of

the same kind at his bungalow the same day, at which some more constables were present. Next day another identification was held by Babu Kshitish Chandra Sarkar, Deputy Magistrate.

Enayet Karim was present only at the first and third identification tests. At both of these and in Court Gajadhar and his brother Khublal identified him. They assign him the most prominent part at the beginning of the affair. Their minds were then clear and they are not likely to be mistaken about him.

Madar Bux was present at the first and third test. Gajadhar and Khublal identified him too on both occasions, and in Court Gajadhar says he was the man who gave the first blow a slap. Boudh also identified him at the first test and in Court but left him out at the third identification.

Raghunandan Dube was present at the first test, but apparently not at the second and third. Lalji and Rameshwar identified him on that occasion and in Court. The former says he was the man who struck him.

Ali Bux was present at the first and third tests. On both these occasions and in Court he was identified by four witnesses, namely, Gajadhar, Dukhi, Lochi, Sitaram.

Muhammad Hussain was present at the second and third tests. Dukhi identified him on both occasions and in Court. Parmeswar who was not present at the third test, identified him at the second test and in Court. Boudh identified him in Court but has not done so previously.

Hafiz Khan was present at the second and third tests. Gajadhar identified him at both and in Court. Khublal missed him at the second test but identified him at the third test and in Court. Boudh identified him only in Court.

Banslochan Singh was present at the second and third tests. Gajadhar and Dukhi identified him at both these and in Court. Govind Ram, who was absent at the third test, identified him at the second test and in Court. Jagmohan identified him only in Court.

The number of constables present at the three tests was respectively 42, 22 and 66. The identification is proved to have been independently made by the witnesses owing

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to the precautions taken in each case. The witnesses, moreover, have on the whole shown considerable caution in the way they identified. That being so, the fact that two of the witnesses independently agree in identifying an individual is in itself very strong evidence against that individual.

It is not clearly proved that the witnesses made any mistakes except in the case of Rambahadur, one of the men acquitted. The Magistrate has accepted the defence evidence that he was at the Treasury at the time of occurrence, but at the second test Gajadhar and Govind identified him. Whether or not he resembles some other constables in appearance does not transpire. The fact of this wrong identification, however, should lead us to treat the evidence of Gajadhar and Govind with somewhat more caution than that of the other witnesses. Making full allowance for that, I do not think the evidence of identification, pure and simple, is shaken except in the case of Hafiz Khan. If there were no other evidence against Hafiz Khan, I should be inclined to give him the benefit of the doubt. Other evidence is forthcoming, however, from Babu Kshitish Chandra Sarkar about an occurrence which took place in the course of the third test identification. Hafiz Khan was then ringleader of a party of the constables who made a demonstration. He announced that the constables as a body would all go to the Bazar again and loot so that they could all be tried together. He actually started to go off with his following, but was checked before he left the Thana compounds. Leaving out of consideration any remark of a confessional nature that he made at the time, this conduct is hardly consistent with his innocence.

The evidence of *alibi* has been fully dealt with by the Magistrate. I consider it to be worthless so far as the present appellants are concerned and I think there is no reasonable doubt of the guilt of any of them.

The appeals are accordingly dismissed."

Messrs Sami and Athar Hussain, for the Petitioners.

The Assistant Government Advocate, for the Crown,

JUDGMENT.—This was a Rule issued on the Deputy Commissioner of Daltonganj to shew cause why the conviction of the accused Hafiz Khan should not be set aside, and why the case of the petitioner Banslochan Singh should not be considered by the Judicial Commissioner.

The two petitioners are constables who were convicted by the Deputy Magistrate of Daltonganj and sentenced to three months' rigorous imprisonment each and to pay a fine of Rs. 20. They and others were found guilty of being members of an unlawful assembly met together with the common object of terrorising the shopkeepers of Daltonganj with a view to making them decrease the price of rice.

On appeal the learned Judicial Commissioner upheld the conviction of these two petitioners and they have now come up to this Court, on the ground that the learned Judicial Commissioner in appeal had, in the case of Banslochan, not properly considered the evidence, and in the case of Hafiz Khan, had expressed doubt as to his presence in the unlawful assembly.

In the case of the petitioner Hafiz Khan the Rule must, I think, be made absolute. The learned Judicial Commissioner agrees that the presence of this man at the unlawful assembly is open to doubt and that he would be inclined to give him the benefit of the doubt, were it not that during the course of a test identification during the investigation into the offence, Hafiz Khan was a ringleader of the constables and made a demonstration. This conduct of the petitioner, sometime after the occurrence, cannot be taken to be such evidence of conduct under section 8 of the Evidence Act as could be used against him in a charge under section 147, Indian Penal Code.

With regard to Banslochan Singh, in the first place it has been argued that the Judicial Commissioner did not consider his case, but when the Rule was issued it was probable that certain portions of the Appellate Court's judgment were not called to the attention of this Court. That judgment shows clearly that Banslochan's case was considered. It was found that he had been identified on two occasions by three persons at test identification and that though the learned Judi-

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Chief Commissioner stated elsewhere that the evidence of two of the persons who identified him must be received with caution, it is clear that he was satisfied that with regard to this man the evidence was sufficient. He says for instance: "I do not think the evidence of identification, pure and simple, is shaken except in the case of Hafiz Khan." It is further contended that the case against Banslochan Singh should not succeed, because the lower Appellate Court came to no definite finding as to the common object of the assembly. He said that it was probable that the common object was to terrorise the shopkeepers by a show of criminal force to reduce their prices, but another view might be taken that later on the other constables came and joined the assembly only with the object of supporting their comrades without knowing the details of the quarrel. I gather from this that the learned Judicial Commissioner meant that he found that the object was to terrorise the shopkeepers, though another view might be put forward with which he was not altogether in agreement. In any case I am of opinion that the judgments of both the lower Courts sufficiently show that when the beating took place by the constables, there was a dispute as to the price of rice and that the members of the assembly were trying to force the shopkeepers to reduce their prices. The common object, I think, was the same throughout. I can see no reason to find that Banslochan Singh was not rightly convicted or that his case was not properly considered.

The Rule, so far as it concerns him, will be discharged. The conviction and sentence of Hafiz Khan will be set aside and he will be set at liberty. Banslochan Singh will surrender to his bail and serve out the rest of his sentence.

Rule partly discharged.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 271 of 1919.

May 28, 1919.

Present:—Mr. Justice Walmsley and Justice Sir Syed Shamsul Huda, Kt.

SURENDRA NATH MANNA—ACCUSED
—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 110, 118—Security for good behaviour—Statements of approvers in dacoity cases, value of—Corroboration, whether necessary—General repute, Police suspicion, whether can be made basis of—Evidence of good character, value of.

The Police, having failed to establish the guilt of the accused in regard to three specific charges of dacoity, instituted proceedings against the accused under section 110, Criminal Procedure Code:

Held, that the Magistrate was not wrong in initiating proceedings under section 110 of the Criminal Procedure Code but, in such circumstances, the evidence against the accused must be very satisfactory before security can be demanded of him under section 118 of the Code. [p. 779, col. 1.]

Statements of approvers in different dacoity cases implicating the accused in a proceeding under section 110 of the Criminal Procedure Code ought to be left out of consideration, if there is nothing to corroborate them. [p. 779, col. 2.]

Where in a proceeding under section 110 of the Criminal Procedure Code the prosecution witnesses for general repute say that they believe the accused to be a thief or a dacoit, but in cross-examination they admit that their suspicion is the outcome of house searches and arrests by the Police, the accused is entitled to the benefit of the admission by the prosecution witnesses as to the origin of their suspicion. Where there is positive evidence for the defence that the accused is a good man, it is not a sufficient reason for casting it aside to say that proof of malice against the accused on the part of the prosecution is wanting. [p. 780, cols. 1 & 2.]

Babus Atulya Charan Bose and Bir Bhusan Dutta, for the Petitioner.

Mr. Orr, for the Crown.

JUDGMENT.

WALMSLEY, J.—The petitioner Surendra Nath Manna has been bound down under section 118 of the Criminal Procedure Code in his own bond of Rs. 800 with two sureties in the sum of Rs. 200 each to be of good behaviour for three years.

It appears that there were numerous dacoities in the neighbourhood of petitioner's village in the year 1915. One of these dacoities was committed at Rajipur in December and a man named Bahir Das Bagdi was arrested; he made a confession implicating the petitioner, and

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the latter was arrested some time in January 1916: he was committed to the Sessions, and in February 1917 he was acquitted by this Court on a reference under section 307, Criminal Procedure Code, being made by the Sessions Judge. The same Bahir Das Bagdi named the petitioner as an associate in a dacoity at Shamserpur, which took place on January 19, 1916: and the petitioner was committed to the Sessions on that charge also: he was acquitted in June 1916.

In May 1918 there was a dacoity committed in the village of Joynagar and a man named Ashu Bagdi was arrested: he made a confession implicating the petitioner, and the latter was arrested on May 12, 1918: he remained in custody until July 6, 1918, when he was discharged, but on the same day the present proceedings under section 110, Criminal Procedure Code, were initiated.

These facts are important. The petitioner spent the whole of 1916 either in custody or on bail awaiting a final decision upon the charge of dacoity, and he was arrested again in May 1918 and kept in custody for nearly two months, again upon a charge of dacoity. The Police have, therefore, failed to establish his guilt in regard to three specific charges, and immediately on their third failure the present proceedings have been begun.

The first ground on which the Rule was issued challenges the propriety of this course of action, but I do not think we ought to go so far as to hold that the Magistrate was wrong in instituting these proceedings, but it is, to my mind, clear that in such circumstances, the evidence against the accused must be very satisfactory before security can be demanded. The other four grounds attack the evidence, and amount to this, that the evidence does not establish the fact that the petitioner is a thief or a dacoit.

The first criticism is that the petitioner has been acquitted of the charges connected with the dacoities at Rajipur and Shamserpur, and discharged in regard to the dacoity at Joynagar, and, therefore, the evidence of the approvers to the effect that he did take part in those dacoities ought not to have been admitted. That is true as regards the Rajipur and Shamser-

pur dacoities, but Bahir Das Bagdi names several other dacoities in which he says that Surendra took part. Ashu Bagdi does the same. With regard to these other dacoities I think the learned Magistrate was quite wrong in holding that there was any corroborative evidence, that is to say, as against the petitioner. He mentions the finding of a sword in Surendra's tank in 1918, which was identified by the complainant in the dacoity case at Khedah, but it does not appear that the disappearance of a sword was mentioned to the Police. The witness (P. W. No. 6) is most unsatisfactory: he contradicts himself about the recovery of some earrings in a way which makes it impossible to believe him. (Parenthetically I may remark that one part of his statement is pure hearsay and should not have been admitted.) The injury on Manik's person the sword found in Manik's bedding and the notes found on Manik's person lend no corroboration to the approvers as against Surendra the petitioner. Lastly the learned Magistrate alludes to the evidence given by some goldsmiths, P. Ws. Nos. 91, 92, 93. The two latter who melted the gold say that they told the Police at once: they are not friends of Surendra, and there is no reason why they should be chosen for such a compromising job. I should be disposed to regard their evidence as ludicrous. As this is all the evidence to corroborate the approvers so far as Surendra is concerned, I think statements of the approvers ought to have been left out of consideration, and it follows that there is nothing to connect Surendra with any particular dacoity.

The prosecution has further tried to show that Surendra has spent money lavishly on wine and women, but it is clear that he was at one time well-to-do, and he may quite possibly have raised the money in a legitimate way. The same evidence is used to prove association with bad characters. I think only one ex-convict is mentioned in the evidence, Gonesh Shou. The learned Magistrate refers to the evidence of P. Ws. Nos. 102 to 107 but what they say is not very clear, and amounts to little more than that Surendra is leader of a gang, among whom are some men who were convicted in 1917. The other evidence is merely that Surendra

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lived a dissipated life in company with men beneath him in social status. Of course, such evidence has its value but it does not carry the case far.

Lastly evidence of general repute is assailed, and a two-fold criticism is made, firstly, that much of the unfavourable evidence results entirely from the action taken by the Police and secondly, that the favourable evidence given by one or two prosecution witnesses and by many defence witnesses has been brushed aside in a most summary manner.

I think both these objections must be sustained. It is true that a great many people from Surendra's own village of Ramnarayanpur and from adjoining villages say that they believe him to be a thief and a dacoit, but over and over again they say in cross examination that their suspicion is the outcome of the house searches and the arrests. The learned Magistrate has not attempted to make allowance for these admissions. It is, of course, very difficult for a witness to say what his grounds are for suspecting a neighbour, if he cannot give concrete instances of suspicious conduct, but when the witnesses admit that one reason at least was in fact that the Police suspected Surendra, the accused ought to have the benefit of the admission. In the circumstances of this case it is particularly necessary that regard should be paid to the origin of the suspicion, for villagers are only too ready to believe that there must be something to justify repeated arrests and house searches.

Then as to the defence evidence the learned Magistrate says there is no satisfactory evidence to show that the case is due to party feeling and quotes two witnesses who say that there is no *daladali* in the village. He does not consider that if there is no *daladali*, it is a very remarkable fact that so many witnesses are ready to give Surendra a good character. Some witnesses, however, say that there is *daladali* and that Umesh Chandra Kar P. W. No. 28 is head of one party. P. W. No. 82 admitted that Umesh made him attend as a witness. It seems, therefore, quite possible that there is a quarrel in the village. But be that as it may, there is the positive evidence that Surendra is

a good man, and it is not a sufficient reason for casting it aside to say that proof of malice is wanting.

From this review of the evidence and of the Magistrate's judgment, my conclusions are that the judgment is vitiated by three main defects, first, that various statements have been treated as corroborative of the approvers which, even if true, do not corroborate them as against Surendra; secondly, that the Magistrate has failed to take into his consideration the admitted effect of the house searches and arrests in originating the general repute which is said to attach to the petitioner and thirdly, that the Magistrate has omitted to consider the volume of evidence directly in favour of the petitioner.

On these grounds I think the order requiring the petitioner to give security must be set aside.

SHAMSUL HUDA, J.—I agree.

Order set aside.

PATNA HIGH COURT.

CRIMINAL REVISION No. 336 OF 1919.

October 15, 1919.

Present:—Mr. Justice Das.

RAM CHANDRA MARWARI—PETITIONER
versus

EMPEROR—OPPOSITE PARTY.

Bihar and Orissa Excise Act (II of 1915), s. 47 (a)
—Illegal possession of cocaine—Place accessible to several persons, effect of—Possession of accused.

In order to convict a person of being in illegal possession of contraband goods, it is necessary to fix him with knowledge of their existence in the place where they were found. If the place is one in which several persons have an equal right of access, the goods cannot be said to be in the possession of any one of them. [p. 781, col. 1.]

Criminal revision against the order of the Sessions Judge, Bhagalpore, dated the 5th September 1919, dismissing the appeal of the petitioner against the order of the Deputy Magistrate, Bhagalpore, dated the 25th August 1919, convicting the accused under section 47 (a), Act II of 1915, Bihar and Orissa.

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Messrs. K. N. Chowdhry, H. L. Nandkeolyar, Gourchandra Pal and Baranasi Prosad Jajunwala, for the Petitioner.

The Assistant Government Advocate, for the Opposite Party.

JUDGMENT.—It seems to me that this application can be disposed of on a very short point. The petitioner, who is a rich Marwari and the proprietor of three shops, has been convicted of illegal possession of cocaine. It appears that at the time of the search, the Excise Sub-Inspector took with him a large number of persons, many of whom have not been examined in the case, and that the cocaine was discovered on a shelf, two or three cubits from the western door leading to the verandah. The learned Sessions Judge, discussing the evidence in the case, says as follows:—"The question is whether the appellant must have been aware of its existence or whether it could have been introduced into his shop unknown to him or his servants." I accept the first portion of the investigation which the learned Judge proposes for himself, but not the second. It seems to me that the petitioner can hardly be convicted if the cocaine was introduced into the shop unknown to the petitioner, but not unknown to his servants. In the case of *Jogriban Ghose v. Emperor* (1) the late Chief Justice of the Calcutta High Court said as follows: "It is well established, and is an elementary rule founded on common sense, that where the place in which an article is found is one to which several persons have equal right of access, it cannot be said to be in the possession of any one of them." The place where the cocaine was found is a shelf, two or three cubits from the door leading to the verandah. It seems to me that the servants of the petitioner had equal right of access to the shelf, a view which the learned Judge seems to accept. From the position of the shelf, it was equally accessible to outsiders. That being so, it is impossible to convict the petitioner. I would accordingly set aside the conviction and direct that the fine, if paid, be refunded.

Conviction set aside.

(1) 2 Ind. Cas. 681; 13 C. W. N. 861; 10 C. L. J. 633; 10 Cr. L. J. 125.

CALCUTTA HIGH COURT.

CRIMINAL REVISION NOS. 731 AND 732 OF 1919.

December 3, 1919.

Present:—Justice Sir Asutosh Chaudhuri, Kt., and Mr. Justice Newbould.

IN NO. 731 OF 1919

PROBODH CHANDRA BOSE—PETITIONER

IN NO. 732 OF 1919

ATUL CHANDRA GANGULY AND

ANOTHER—ACCUSED—PETITIONERS

versus

THE CORPORATION OF CALCUTTA—

OPPOSITE PARTY.

Calcutta Municipal Act (III of 1899), ss. 559 (52), 561—Bye-laws of Calcutta Corporation regulating hours of closing theatres, whether ultra vires—Abetment of offence under bye-law, whether punishable—Penal Code (Act XLV of 1860), s. 40.

The bye-laws of the Municipal Corporation of Calcutta prescribing the hour of closing theatres and the section of the Calcutta Municipal Act providing a penalty for the breach of any bye-law, are not *ultra vires*. [p. 783, col. 2.]

The Calcutta Municipal Act is a local and special law and section 40 of the Penal Code applies to the abetment of an offence which is thereby made punishable. [p. 784, col. 1.]

FACTS appear from the judgment.

Sir B. C. Mitter (with him Babu Bepin Chandra Mallick), for the Petitioners in Criminal Revision No. 732 of 1919. The petitioners before your Lordships, who are actors in a theatre, have been sentenced to pay a fine by the Municipal Magistrate of Calcutta for continuing a theatrical performance later than 1 A.M. in breach of the Theatre Bye laws, rules 83 and 85 of the Calcutta Municipal Act. I submit that the conviction is bad in law inasmuch as rule 25 of the Theatre Bye laws is *ultra vires* and, moreover, the actors, who at most can be fined only as abettors of an offence, if any, cannot be punished by a Municipal Magistrate who has no power to try an offence of abetment. The abetment sections of the Indian Penal Code cannot be made to apply to an offence created by a bye-law framed under the Calcutta Municipal Act. Section 561 of the Calcutta Municipal Act is *ultra vires*, as it purports to create an offence and is not in the nature of a ministerial act. The Bengal Legislature has no power to delegate such authority to a Municipality or its General Committee. The Municipality has no power under the Theatre Bye laws to regulate the time of a theatrical

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performance. The bye-law fixing the time limit of a theatrical performance is also unreasonable. See *Halifax Theatre de Luxe v. Gledhill* (1), *London County Council v. Bermondsey Bioscope Co.* (2).

The breach of a Municipal bye-law may be an offence within the meaning of section 40 of the Indian Penal Code. The Calcutta Municipal Act is not a special or local law within the meaning of section 40 of the Indian Penal Code and, therefore, the abetment section of the Penal Code does not apply to an offence committed by the breach of a Municipal bye-law. Lastly I submit that section 628 of the Calcutta Municipal Act gives power to the Local Governments to appoint a Magistrate for the trial of offences against the Municipal Act and the rules, bye-laws and regulations made thereunder, and as abetment has not been specifically referred to in section 561, the Municipal Magistrate so appointed is not empowered to try cases of abetment. Refers to *Amrita Lal Bose v. Chairman of the Corporation of Calcutta* (3).

Mr. Camell (with him Babu Monmathanath Mukherjee), for the Opposite Party.—Section 561 of the Calcutta Municipal Act is not *ultra vires*. Refers to 24 and 25 Viet. c. 67, sections 22, 42, 44. The Statute gives ample authority to the Government of Bengal to pass such an Act as the Calcutta Municipal Act and to empower the General Committee of the Municipality to frame bye-laws. Refers to *Empress v. Burah* (4), *Hodge v. Reg.* (5), *Powell v. Apollo Candle Co.* (6).

Section 40 of the Indian Penal Code makes everything punishable under a local or special law an "offence." See also section 4, clause (c), of the Code of Criminal Procedure. The actors who take part in a theatrical performance after 1 A. M. in breach of the Municipal bye-law, are really in the position of principals and

(1) (1915) 2 K. B. 49; 84 L. J. K. B. 649; 112 L. T. 519; 79 J. P. 238; 13 L. G. R. 541; 31 T. L. R. 138.

(2) (1911) K. B. 445; 80 L. J. K. B. 141; 103 L. T. 760; 75 J. P. 53; 9 L. G. R. 79; 27 T. L. R. 141.

(3) 40 Ind. Cas. 322; 26 C. L. J. 29; 21 C. W. N. 1009; 18 Cr. L. J. 674.

(4) 4 C. 172 (P. C.); 5 I. A. 178; 3 C. L. R. 197; 3 Sar. P. C. J. 834; 3 Suth. P. C. J. 553; 2 Shome L. R. 63.

(5) (1884) 9 App. Cas. 117; 53 L. J. P. C. 1; 50 L. T. 301.

(6) (1885) 10 App. Cas. 282; 54 L. J. P. C. 7; 53 L. T. 638.

the question of abetment hardly arises. Even if the actors be regarded as abettors, section 40 read with sections 109 to 114 of the Indian Penal Code makes the abettors also punishable. There is no force in the contention of the learned Counsel for the petitioner that a Municipal Magistrate is not empowered to try cases of abetment. If it is to be held that the principal is punishable under the special law by the Municipal Magistrate but not the abettor, the most extraordinary result would follow, that for the trial of the principal offence the Municipal Magistrate would have jurisdiction but the abetment would have to be tried by another Magistrate taking cognizance of offences under the Indian Penal Code. Besides in the present case the Municipal Magistrate was also a Presidency Magistrate.

Sir B. O. Mitter briefly replied.

JUDGMENT.—In the first case the petitioner, who is an actor, has been fined Rs. 10 for continuing a theatrical performance later than 1 A. M. on the 31st March last in breach of the Theatre Bye-laws, rules 33 and 85 of the Calcutta Municipal Act. A Rule was issued by this Court. The grounds urged were (1) that bye-law 85 is *ultra vires*, (2) that the abetment sections of the Penal Code do not apply to an offence created by a bye-law framed under the Calcutta Municipal Act.

In the second case both the petitioners are actors and have been fined Rs. 20 each for committing a similar breach of the same bye-laws, and a Rule was issued on the same grounds. Both the matters have been heard together.

Under section 559, sub-clause (52), of the Calcutta Municipal Act III of 1899, the General Committee of the Municipality is empowered to make bye-laws for the regulation of theatres and other places of public resort, recreation or amusement. Section 561 lays down that in making a bye-law under section 559 the General Committee may provide that a breach of it shall be punishable with fine which may extend to Rs. 20 in some cases and to Rs. 10 in others. Under the power so given the following bye-laws have been framed:—

HOUR OF CLOSING THEATRES:—Bye-law 82: "No performance shall be continued later than 1 A. M. unless with the special permission of the Chairman for any particular occasion."

THE PENALTY CLAUSE is Bye-law 85:

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"Every person guilty of a breach of any of the bye-laws shall be punishable" as provided in section 561 (quoting the words of that section).

It is contended that section 561 is *ultra vires*, as it creates an offence and is not in the nature of a ministerial act and the Bengal Legislature has no power to delegate such authority to a Municipality or its General Committee, that there is no power under the bye-law to regulate the time of a performance, that is to say, there is no authority to fix a time limit. It is also argued that the bye-law as framed is unreasonable. Reliance has been placed upon *Halifax Theatre de Luxe v. Gledhill* (1) and also *London County Council v. Bermondsey Bioscope Co.* (2) in support of the last point. We are unable to accept these contentions. The first case above cited does not support the view that a time limit may not be fixed, and we do not find anything unreasonable in such a bye-law. 24 and 25 Vict. c. 67, section 22, lays down the extent of the power of the Governor-General to make laws and regulations. Section 42 of the same Statute lays down the extent of the powers of Governors of Bombay and Madras in Council to make laws and regulations. Section 44 provides that the Governor-General may establish Councils for making laws and regulations in the Presidency of Fort William in Bengal. By a proclamation in 1862 such Council was established in Bengal. The Statute as extended gives ample authority to the Government of Bengal to pass such an Act as the Calcutta Municipal Act and to empower the General Committee of the Municipality to frame bye-laws. It is clear that the General Committee has clear authority to make breaches of the bye-laws punishable. The power of the Government is very clearly put in *Empress v. Burah* (4), which holds that when the Indian Legislature has power expressly limited by the Act of the Imperial Parliament which created it, it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within the limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of Legislation, as large, and of the same nature, as those of Parliament itself.

Where plenary powers of Legislation exist as to particular subjects, whether in an Imperial or in a Provincial Legislature, they may be well exercised, either absolutely or conditionally. Legislation conditional on the use of particular powers or on the exercise of a limited discretion, entrusted by the Legislature to persons in whom it places confidence, is no uncommon thing, and in many circumstances it may be highly convenient. Their Lordships refer to the British Statute Book as abounding with examples of it and say there is nothing in the Statute which limits such power so far as the Indian Legislature is concerned. In this connection the Public Health Act of 1875, 38 and 39 Vict. c. 55, section 1 & 2, the Municipal Corporation Act of 1882, 45 and 46 Vict. c. 60, section 23, the Local Government Act of 1888, 51 and 52 Vict. c. 41, section 15, may be referred to. Similar penalties as those now under consideration are provided therein.

In *Hodge v. Reg.* (5) their Lordships lay down that it is not a question of an application of the principle "*delegatus non potest delegare*" in a similar case and that within the limits of subjects and area the local Legislature is supreme and has the same authority as the Imperial Parliament would have had under like circumstances to confide, to a Municipal institution or a body of its own creation, authority to make bye-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect. They also held that penalties might be properly imposed.

A similar question arose in *Powell v. Apollo Candle Co.* (6), in which their Lordships have held that a Colonial Legislature is not a delegate of the Imperial Legislature. It is restricted in the area of its powers, but within that area it is unrestricted and not acting as an agent or delegate. We have no hesitation in holding that the bye-laws and the penalty provided in the Calcutta Municipal Act are not *ultra vires*.

Next comes the question of abetment. It is argued that a breach of the bye-law is an offence as defined in section 40 of the Indian Penal Code, but that the Calcutta Municipal Act is not a special or local law under that section. We are unable to accept that

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view. The Calcutta Municipal Act is a special and local law and the provisions of section 40 apply to abetment of the offence which is thereby made punishable.

It is next argued that section 628 of the Calcutta Municipal Act alone gives powers to the Local Government to appoint one or more Magistrates for the trial of offences against the Act, and the rules, bye laws and regulations made thereunder, and as abetment has not been specifically referred to in section 561, the Magistrate so appointed is not empowered to try cases of abetment, and since the conviction of the petitioners is upon the abetment sections of the Penal Code taken with the offence under the bye-law, it is unsustainable in law. We are unable to accept this contention. The Magistrate who tried the petitioners in this case is not only a Municipal Magistrate but also a Presidency Magistrate, and he has ample power to deal with the matter. It is difficult to avoid the conclusion that if a breach of the bye-law is an offence as defined in the Penal Code, sections 109 to 114 made the abettors also punishable. The actors who take part in a performance after 1 A. M. seem to us to be in the position of principals and the question of abetment hardly arises, but even if they be considered as abettors, we are of opinion that they have been justly convicted. The observations referred to in *Amrita Lal Bose v. Chairman of the Corporation of Calcutta* (3) are in the nature of obiter, as the question was not before the Court at that time. We think that the grounds upon which the Rules were issued fail and, therefore, they ought to be and are accordingly discharged.

Rules discharged.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 650 OF 1919.
January 2, 1920.

Present: - Mr. Justice Walsh.
JAGDAT TEWARI AND OTHERS—
PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 107—
Security to keep peace, when to be demanded—
Consent of accused, whether sufficient—Evidence,
independent, whether necessary.*

To justify an order to furnish security to keep the peace, there must be evidence on the record that the persons from whom security is demanded

are likely to commit a breach of the peace. The mere consent of the persons to be bound down is not sufficient: the fact of a likelihood of a breach of the peace must be established by independent testimony on oath.

Criminal revision from an order of the Magistrate, 1st Class, Basti, dated the 4th September 1919.

Mr. Satya Ohandera Mukerji, for the Applicants.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—In the face of the authorities I must allow this revision and set aside the order against these four people for giving bonds in Rs. 500 with two sureties. The law is quite clear that the Magistrate must have evidence upon the record that they are persons likely to commit a breach of the peace. It would be better that he should do so even though the accused were prepared to admit that they were likely to cause a breach of the peace. But in any case the consent given in this matter is really no consent at all. To entitle the Magistrate to act upon consent in such a case as this he must, if it is open to him to act upon consent at all, obtain a full admission from each of the persons called upon to show cause that he is likely to commit a breach of the peace, and the circumstances under which or reasons why he is likely to commit a breach of the peace, and that he fully understands that it is for that reason that he is to be bound over and that if he fails to find the sureties, he may have to go to prison. An admission of that kind clearly made by a person who has to show cause becomes evidence in the case, and there would be on the record some fact at any rate tending to show that the persons against whom the order is proposed to be made are likely to commit a breach of the peace. But having regard to the authorities I think it would always be better that the Magistrate should have the facts established by independent testimony on oath, which ought not to be difficult if he has already been furnished with grounds for beginning the proceedings at all. I allow the application and send the case back to the Magistrate to be dealt with according to law.

Application allowed.

HARIS CHANDRA NANDI v. KESHAB CHANDRA.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 941
OF 1917.

June 19, 1919.

Present:—Justice Sir Ernest Fletcher, Kt.,
and Mr. Justice Cuming.HARIS CHANDRA NANDI AND ON HIS
DEATH HIS HEIRS AND LEGAL REPRESENTATIVES
SARAT CHANDRA NANDI AND OTHERS—
DEFENDANTS—APPELLANTS

versus

KESHAB CHANDRA DAS AND OTHERS—
PLAINTIFFS—RESPONDENTS.*Transfer of Property Act (IV of 1882), ss. 65, 68—
Contract Act (IX of 1872), ss. 15, 16—Mortgage—
Mortgagee deprived of part of security—Right to sue
for mortgage money—Interest, high rate of—Coercion
or undue influence, absence of—Hard and unconscion-
able transaction—Court, duty of—Equitable considera-
tions, applicability of.*

Where a mortgagee is deprived of a part of the mortgaged property by the act of the mortgagor, he is entitled to recover the mortgage money from the mortgagor. [p. 786, col. 1.]

Where in a contract of mortgage interest is stipulated to be paid at the rate of 24 per cent. per annum, in the absence of coercion or undue influence there is no reason why the rate of interest stipulated should not be allowed. [p. 786, col. 1.]

The law relating to hard and unconscionable transactions has been codified in the Contract Act and a Court cannot go outside the statutory provision and follow some rules or supposed rules that have been applied in certain cases by the Courts of Equity in England. [p. 786, col. 1.]

Appeal against the decree of the subordinate Judge, 1st Court, 24 Pergunnas, dated the 14th of February 1917, modifying that of the Mansif, 2nd Court, at Baruipur, dated the 5th of June 1915.

FACTS appear from the judgment.

Mr. J. W. Chippendale, for the Appellants.—Under the provisions of section 68 (b), Transfer of Property Act, the mortgagee has the right to sue the mortgagor for the mortgage money where the mortgagee is deprived of the whole or part of his security on account of the wrongful act or default of the mortgagor. The cause of action arises when the money becomes re-payable. Nowhere in the plaint does the plaintiff say that I deprived him of his security—the plaint is silent thereto, so that he could sue me for a personal decree. Under the circumstances a personal decree should not have been passed.

[FLETCHER, J.—You are bound by your covenant. You cannot destroy the mortgage security.]

It was a non-transferable holding. The rights conferred by sections 65 and 68 of the Transfer of Property Act apply only in cases where the mortgage money has not become due in accordance with the terms of the mortgage deed.

[FLETCHER, J.—The Act means what it says.]

Babu Jyotish Chandra Hazrah (with him Babu Tarakeswar Roy), for the Respondents, preferred a cross objection and submitted that the rate of interest which the lower Court had decreed was without any rhyme or reason. There was no issue as to the rate of interest, and no evidence directed on this point. I want the contractual rate. There was no coercion or undue influence.

Mr. J. W. Chippendale referred to *Gopeswar Saha v. Jadab Chandra* (1) saying that the rate of interest was hard.

JUDGMENT.

FLETCHER, J.—This appeal is preferred by the first defendant against the decision of the learned Subordinate Judge of the 24 Pergunnas, dated the 14th February 1917, modifying the decision of the Mansif at Baruipur. The plaintiffs brought the suit for recovery of certain money in terms of a mortgage deed and also for interest. That is how they described it in the plaint. The facts are these:—The plaintiffs got the mortgage in 1902. The date for re-payment of the mortgage money was the 17th October 1908. The present suit was not instituted till the 5th November 1914. The mortgaged property consisted of three plots of a non transferable occupancy holding, and the defendant No. 1, in breach of the duty that he owed to his mortgagees, purported to transfer two of the mortgaged plots which entitled the landlord to re-enter and to forfeit two plots of the mortgaged property. In these circumstances, the learned Subordinate Judge points out that, under the provisions of the Transfer of Property Act, the plaintiffs were entitled to sue for the mortgage money. The argument that has been advanced on behalf of the appellant is

(1) 32 Ind. Cas. 537; 43 C. 632; 22 C. L. J. 352; 20 C. W. N. 689.

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that the rights conferred by sections 65 and 68 of the Transfer of Property Act apply only in cases where the mortgage money has not become due in accordance with the terms of the mortgage deed. There is no warrant for such a suggestion and the terms of the Act appear to me not to support such an argument. The Act means what it says and no such limitation is to be placed upon the sections as has been suggested by the learned Vakil for the appellant. In that view of the case it is quite clear that the learned Judge was right when he said that the mortgagees having been deprived of these two plots of the mortgaged property by the act of the mortgagor, were entitled to recover the mortgage money from the mortgagor. In my opinion, the learned Subordinate Judge was clearly right. No other point has been urged in this appeal. The present appeal, therefore, fails and is dismissed with costs.

There is a cross objection preferred by the plaintiffs and the question involved in the cross-objection is this: The plaintiffs say that the Court ought to have awarded to them interest as provided by the contract between the parties. The interest provided for by the contract is no doubt high, 24 per cent. per annum, but it is not suggested, nor has it been proved or found, that any coercion or undue influence was exercised by the plaintiffs in order to obtain this stipulation as to interest. No issue was settled in the first Court as to the rate of interest, nor was any evidence given on either side, and it was only when the case came to the lower Appellate Court that the learned Judge stated that having regard to the decision of this Court reported as *Gopeswar Saha v. Jadab Ohandra* (1) the interest in the present case must be taken to be hard and unconscionable. As pointed out by the Judicial Committee in some recent judgments, those provisions about the interest being hard and unconscionable do not apply in this country. The law relating to this matter has been codified in the Indian Contract Act, and the Court cannot go outside the statutory provisions and follow some rules or supposed rules that have been applied in certain cases by the Courts of Equity in England. There is no reason why the parties should not

be held to the bargain originally entered into between them and why the rate of interest stipulated between them should not be allowed; I think, therefore, that we should allow the cross-objection and declare that the plaintiffs are entitled to recover interest on the principal sum secured by the mortgage deed at the rate stipulated therein and remit the case to the Court of first instance to ascertain what amount is now actually due on this footing. The plaintiffs are entitled to their costs in the cross-objection.

CUMING, J.—I agree.

*Appeal dismissed;
Cross-objection allowed.*

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 96 OF 1918.

January 5, 1920.

Present:—Mr. Justice Tudball and
Mr. Justice Rafique.

RAM SARUP AND ANOTHER—DEFENDANTS
—APPELLANTS

versus

RAM DEI AND OTHERS—PLAINTIFFS—
RESPONDENTS.

*Custom—Pre-emption—Village confiscated by
Government—Settlement record, entry in, value of.*

Certain villages were confiscated by Government in 1857 and were subsequently settled with other persons. In 1860 and 1870 entries were made in the Settlement Records that the custom of pre-emption existed in the villages:

Held, (1) that when the Government became the sole owner of the villages in 1857, the old custom ceased to exist: [p. 787, col. 1.]

2) that a new custom could not have sprung up between 1857 and 1860 or between 1860 and 1870; [p. 787, col. 1.]

(3) that, therefore, the entries in the Settlement Records were not sufficient to prove the existence of the custom of pre-emption, [p. 787, col. 1.]

First appeal from an order of the District Judge, Meerut, dated the 2nd May 1918.

Mr. Iqbal Ahmad, for the Appellants.

Mr. Mangal Prasad Bhargava, for the Respondents.

JUDGMENT.—The sole question in this appeal is whether the evidence on the record is sufficient to establish the existence of the custom of pre-emption. The village in question formerly belonged to certain ladies. After the mutiny of 1857 Government confiscated the village and

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subsequently made a settlement thereof with other persons. It is obvious that when the property was in the hands of the Government, there were no owners except Government and no custom of pre-emption could possibly have then existed. Three years later, that is in 1860, when a Settlement Record was made, there was actually recorded the existence of a custom of pre-emption. This record is obviously incorrect, for whatever might have been the previous state of affairs before the confiscation, the old custom could no longer have continued to exist while the property was in the hands of Government. Obviously a custom could not have arisen between 1857 and 1860. In the year 1870 another Settlement Record was made in which the custom was again recorded. At the last Settlement no record of custom whatever was made. In the year 1893, there was a sale in reference to which a claim for pre-emption was made successfully, though whether it was based on custom or on contract is not shown. In 1902 there was another pre-emption case in which the suit was withdrawn. In 1909 there were two other sales in respect to which two suits were brought, and both of them were dismissed on the ground that no custom existed. On this evidence the Court of first instance dismissed the suit, holding that the custom was not established. The lower Appellate Court was of opinion that the facts disclosed the existence of a custom. In our opinion the decision of the Court of first instance was correct. The entries made in 1860 and 1870 are clearly not good evidence of custom, as we have shown above. We allow the appeal, set aside the order of the Court below and restore the decree of the Court of first instance. The suit will stand dismissed with costs in all Courts.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES

Nos. 974, 994, 995, 1183, 1184 AND 1185
OF 1918.

July 17, 1919.

Present:—Mr. Justice Chatterjea and
Mr. Justice Cuning.

BEPIN CHANDRA ROY CHOWDHURY
AND OTHERS—DEFENDANTS—APPELLANTS

versus

PROFULLA NARAIN ROY AND OTHERS
— PLAINTIFFS—RESPONDENTS.

*Bengal Tenancy Act (VIII B. C. of 1885), s. 87—
Rent decree obtained by co-sharer landlord—Sale of
holding in execution—Purchase by decree-holder—Co-
sharer landlords, whether entitled to joint possession
—Fair rent, right to.*

Where a co-sharer landlord purchases a holding sold in execution of a decree obtained by himself for his share of the rent, his co-sharer landlords are entitled to joint possession to the extent of their shares in the Zemindari. But they would not be so entitled if the decree in execution of which the holding is sold is a decree under section 87 of the Bengal Tenancy Act. In such a case they would only be entitled to fair rent to the extent of their shares. [p. 787, col. 2.]

Appeals against the decrees of the Officiating District Judge, Raugpur, dated the 1st and 5th of February 1918 respectively, reversing those of the Munsif, 1st Court at that place, dated the 20th and 27th of November 1916 respectively.

FACTS appear from the judgment.

Babu Mohini Mohan Chakerbutty (with him Babu Atul Chandra Gupta), for the Appellants.—The defendants are appellants. The appeals arise out of six suits brought by the same plaintiff against some defendants for joint possession, on the allegation that he as a joint owner was entitled to joint possession. The defence was that the defendant was an auction-purchaser and as such he was entitled to his share of rent. In Second Appeals Nos. 974, 1183—85, the decree in execution of which I purchased the holding was for the entire rent. In Second Appeals Nos. 994 95 both the co-sharers obtained rent decrees against the tenants and the defendant was the purchaser. The suits were all dismissed by the first Court. The Court of Appeal below decreed the suits. My contention is if it is a decree for entire rent, no notice is necessary even after the amendment of section 148 (a) of the Bengal Tenancy Act. See Chandra Sekhar

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Patra v. Rani Manjhee (1). The purchase in this case was before the amendment. The decree obtained by the co-sharer was for entire rent. Therefore, it was a rent decree and under section 65, Bengal Tenancy Act, the holding passed to the defendant. Therefore, defendant would be entitled to exclusive possession of his share. The case of *Girish Chandra Chowdhury v. Kedar Chandra Roy* (2) relied upon by the lower Appellate Court has no bearing on the present case. As regards the other two appeals, I do not press them.

Babu *Prokash Chandra Mazumdar*, for the Respondents.—Though the judgment of the lower Appellate Court is brief, it is clear that he held that the decrees were not rent decrees. In none of the cases has any one of the decrees been produced. My prayer was two fold, viz, *khas* possession and equitable share of rent. The first Court did not give effect to them. If I am not allowed *khas* possession, I must be entitled to some relief in equity.

Babu *Mohini Mohan Chakerbutty* briefly replied.

JUDGMENT.—These six appeals arise out of six suits for joint possession of certain occupancy holding, which were purchased by the defendant who is a co-sharer of the plaintiff in a *Zamindari*. Plaintiff's case is that these occupancy holdings are non-transferable and that the defendant by purchase thereof at auction sales did not acquire any right to the same and that, therefore, he (the plaintiff) was entitled to get joint possession to the extent of his share in the *Zamindari*. The Court of first instance found in four of the suits (which gave rise to Second Appeals Nos. 974 and 1183 to 1185 of 1918) that the decrees in these cases were passed in suits brought by one of the co-sharer landlords as plaintiff, but that they were decrees for the entire rent payable to both the co-sharers and that the other co-sharer was made a party defendant in the suits. The Court accordingly held that the decrees in execution of which the occupancy holdings were sold were decrees for rent and that, under these circumstances, the plaintiff

could not get a decree for joint possession as against the defendant. It should be mentioned that the plaintiff made an alternative prayer in the plaint for assessment of fair rent in the event of the Court holding that the plaintiff was not entitled to get possession. The Court of first instance did not deal with this alternative case, being of opinion that it should be gone into in another suit. On appeal by the plaintiff, the learned District Judge without going into the nature of the decree held that the plaintiff was entitled to joint possession, and accordingly gave a decree to the plaintiff for joint possession of the lands. The defendant has appealed to this Court.

The whole case turns upon the question whether the decrees in execution of which the holdings were sold were decrees for rent under the Bengal Tenancy Act, with the consequences attaching to such a decree. It was pointed out by the learned Pleader for the appellant before us that in two of the cases, namely, Appeals Nos. 974 and 1184 of 1918, the decrees for rent were obtained by one of the co-sharers for his share of the rent. That being so, the plaintiff is certainly entitled to joint possession of the lands comprised in these two cases. With regard to the remaining two cases, namely, Appeals Nos. 1183 and 1185, it is stated on behalf of the appellant that the decrees for rent, although obtained by one of the co-sharers as plaintiff, were for the entire rent and that the other co-sharer landlord was made a party defendant. In the other two cases, i.e., Nos. 974 and 975, it is stated that both the co-sharers jointly obtained decrees against the tenant. Now if the decrees for rent were obtained jointly by both the co-sharers or by one of the co-sharers making the other co-sharer a party to the suit and for the entire rent of the holding, in either of these two cases, the decree being a decree for rent under the Bengal Tenancy Act, the sale held in execution of such a decree passed the holding to one of the co-sharer landlords as it would to a stranger; and in such circumstances the plaintiff is not entitled to a decree for joint possession. The cases must, therefore, go back to the lower Appellate Court in

(1) 3 C. W. N. 386.

(2) 27 C. 473; 4 C. W. N. 569.

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order that the question mentioned above may be gone into and the cases disposed of. If the lower Appellate Court finds that the decrees were decrees for rent, that Court will send the cases back to the Court of first instance for assessment of fair rent and in that event, both parties will be entitled to adduce evidence on the question of fair rent.

The result is that Appeals Nos. 974 and 1184 are dismissed with costs. There will be one set of hearing fee for both the appeals. In the other four appeals, namely, Nos. 1183, 1185, 994 and 995, the decrees of the lower Appellate Court are set aside and the cases are remanded to that Court to be dealt with according to observations made above. In these four cases costs will abide the result.

Order accordingly.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 140 OF 1915.
January 2, 1917.

Present:—Sir Henry Drake-Brockman,
Kt., J. C.

TIKARAM—PLAINTIFF—APPELLANT
versus

RAM CHANDRA AND OTHERS—DEFENDANTS
—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, O. IX, r. 8—Res judicata—Dismissal for default, whether operates as res judicata—Defendant, absence of, effect of—Landlord and tenant—Thekadar, whether entitled to trees standing on land leased—Landlord, right of, to enter and fell timber—Tenant, permission of, whether must be obtained—Transfer of Property Act (IV of 1882), s. 108 (h).

The dismissal of a suit in terms of Order IX, rule 8, of the Civil Procedure Code, is not intended to operate in favour of the defendant as *res judicata*. [p. 790, col. 2.]

The application of the principle of *res judicata* cannot be avoided by a defendant on the ground that he did not appear at the trial, but the conclusive effect of the decision must be confined to the point actually decided in the suit. [p. 791, col. 1.]

Modhusudan Shaha Mundul v. Brae, 16 O. 300 (F. B.), followed.

A thekadar has, in the absence of any contract or local usage to the contrary, no right to fell

timber, nor does the mere grant of protected status confer on him any right to cut down trees and appropriate them to his own use if he had no such right before the grant of that status. [p. 791, col. 1.]

The position might, however, be different if the trees are planted by the person claiming the right to cut them or by his forefather, the principle embodied in section 108 (h) of the Transfer of Property Act being applicable to such a case. [p. 791, col. 1.]

Sitabai v. Shambhu Sonu, 28 Ind. Cas. 140; 38 B. 716 16 Bom. L. R. 595, followed.

A lessor is not entitled as owner of the trees standing on the land leased out to enter and fell them at his pleasure. [p. 791, col. 2.]

Daryaosingh v. Sitru Mokasi, 3 C. P. L. R. 18, *Badam v. Ganga Dei*, A. W. N. (1907) 150; 4 A. L. J. 452; 29 A. 484, followed.

If the lessor desires to take out timber he must, by arrangement with his lessee, acquire permission to go on the land for the purpose. It is not, however, open to the lessee to arbitrarily refuse permission when the lessor, as owner of the timber, desires to fell what he is entitled to take, but reasonable notice of the lessor's intention to enter and fell should be given. [p. 791, col. 2; p. 792, col. 1.]

Appeal against the decree of the District Judge, Bhandara, in Civil Appeal No. 71 of 1914, dated the 30th November 1914, arising out of Civil Suit No. 117 of 1910, on the file of the Subordinate Judge, Balaghat, dated the 28th February 1914.

Mr. A. J. Balm, for the Appellant.

Mr. V. R. Pandit, R. B., for the Respondents.

JUDGMENT.—Tikaram, the appellant in this Court, is the great-grandson of one Chimna, who in 1258 Fasli (1848-49 A. D.) obtained from the predecessor in title of the respondents a lease of Mauza Singola in the Bhadra Zemindari. The respondents are the inferior proprietors of the village, the superior proprietor being the Zemin-dar.

The suit out of which this second appeal arises was instituted on the 4th November 1910 by the appellant's father, Pandurang, who claimed to be perpetual lessee of the village and entitled as such to all timber. The defendants were said to have no rights over the jungle and against them damages were asked for in respect of timber felled between the years 1905 to 1910, both inclusive. The relief claimed included also an injunction restraining the defendants from cutting any timber in future.

At the 30 years settlement in 1865, there was no jungle, either *dochand* or *fazil*, in the village. At the current settlement the plaintiff's father, Pandurang, was given protected status. For the purposes of this appeal it must be taken that such timber as

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the defendants felled or is still standing was of spontaneous growth.

The trial Judge found the lease to be a perpetual one by reason of certain decisions in previous suits between the inferior proprietor, Saku Bai, on the one hand and the plaintiff's grandfather, Gondu, on the other and held that the plaintiff as perpetual lessee was entitled to all timber and forest in the village. The injunction prayed for was granted and the defendants were ordered to pay Rs. 107 as damages, part of the claim for money being dismissed as time-barred.

In appeal the District Judge held that the previous decisions did not operate as *res judicata* and that the plaintiff had no right to any timber. The decree of the trial Judge was accordingly reversed and the suit dismissed *in toto*.

In second appeal the plea of *res judicata* is again pressed on behalf of the plaintiff-appellant. The history of the previous litigation is given in paragraphs 9 to 14 of the lower Appellate Court's judgment. No question whatever was decided in the earliest suit (No. 99 of 1873) in which Saku Bai sought to eject Gondu on the ground that his lease had expired. The claim was dismissed on the 16th June 1874, under section 114, Act VIII of 1859, the plaintiff being absent and unrepresented while the defendant was present. An account of the various proceedings before and after decree will be found in Exhibit P.16, a copy of the Commissioner's appellate judgment in Suit No. 8 of 1885, in which Saku Bai made a second attempt to eject Gondu, again alleging that his lease had expired many years back and that he refused to vacate. The Commissioner's judgment makes it perfectly clear that he dismissed the suit of 1885 because section 114, Act VIII of 1859, expressly precluded the plaintiff from bringing a fresh suit on the same cause of action. Saku Bai's third attempt at ejectment was made in Suit No. 89 of 1885, but failed as appears from Exhibit P.20, copy of the judgment delivered on the 6th August 1886. It was held that beyond issuing a notice to quit under section 106, Transfer of Property Act, Saku Bai had done nothing to change her position with reference to her Thekedar and that the Commissioner's decision in

Suit No. 8 of 1885, therefore, operated as *res judicata*.

So far as these three suits are concerned, I am clearly of opinion that they in no way settle the question whether the appellant was not a perpetual lessee. It was held by the Privy Council in *Ohand Kour v. Partab Singh* (1) that the dismissal of a suit in terms of section 102, Civil Procedure Code of 1882, the counterpart of section 114 in the Code of 1859, was plainly not intended to operate in favour of the defendant as *res judicata*. The judgment of their Lordships goes on (at page 102) to describe the effect of sections 102 and 103 taken together as follows:—

"They impose a certain disability upon the plaintiff whose suit has been dismissed. He is thereby precluded from bringing a fresh suit in respect of the same cause of action. Now the cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words, to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour."

There has never been a decision that the Thekedar was a perpetual lessee and consequently there can be no application of section 11 of the present Civil Procedure Code to the issue whether he is or is not such a lessee.

A fourth suit remains to be noticed, namely, No. 63 of 1884. The record of this has been destroyed and all our knowledge of it is derived from the register of Civil Suits of which Exhibit P.13 gives the relevant extract. Exhibit P.6 is said to be a copy of the plaint, but it is a private document and as the trial Judge pointed out in the 13th paragraph of his judgment, there is no adequate proof that a plaint in the same terms was actually filed. Exhibit P.13 shows merely that Gondu sued Saku Bai for Rs. 102 8-0 as "damages in respect of the forest of Manza Singola," obtained an *ex parte* decree for Rs. 102 8 0 and costs and recovered his claim in full upon an application for execution. Now a defendant can-

(1) 16 C. 98 at p. 102; 15 I. A. 156; 5 Sar. P. C. J. 243; 177 P. R. 1888 (P. O.)

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not avoid the application of the principle of *res judicata* by saying that he did not appear at the trial, but the conclusive effect of the decision is confined to the point actually decided: See *Modhusudan Shaha Mundul v. Brae* (2). And without the pleadings and issues we cannot be sure of the basis laid by Gondu for his claim. He may have sued because some action on the part of Saku Bai had infringed his right of *nistar* and the claim may have had no reference to timber or even trees of any kind. It certainly cannot be assumed that the plaint included a prayer for declaration of Gondu's exclusive title to the jungle as a whole. Nor can we be sure that any timber existed so far back as 1884. For the appellant paragraph 16 of the defendant's written statement, dated the 2nd March 1911, is relied on as amounting to an admission that Gondu set up exclusive title, but I am unable to extract any such admission from the words employed, though they doubtless indicate misapprehension regarding the effect of an *ex parte* decree.

In my opinion the question whether the appellant is a perpetual lessee is not *res judicata*. Apart from the previous decisions there is admittedly no basis for a finding in his favour on the point. *Qua thekedar* he has not, in the absence of any contract or local usage to the contrary, any right to fell timber, nor does the mere grant of protected status confer on him any right to cut down trees and appropriate them to his own use, if he had no such right before the grant of that status: See *Jaswant Singh v. Musammatt Jasoda* (3) in which all the case-law on the subject is reviewed. There was no jungle at all when the lease was originally given and the parties could not then have contemplated the lessee having the exclusive right to fell timber. Had the appellant or any forefather of his planted the trees cut down, the position might be different, the principle embodied in section 108 (h), Transfer of Property Act, being applicable as was held in *Sitabai v. Shambhu Sonu* (4). Where, as in the present case, the trees are of spon-

taneous growth there appears to be no equity in the lessee's favour.

In so far then as the appellant's claim to damages and an injunction rests on exclusive title to the trees cut it has, in my opinion, been rightly dismissed. He relies, however, on adverse possession since the decision in Gondu's favour of Suit No. 63 of 1884. It is said that if Gondu had no title to trees before that decision, he and his descendants acquired one by adverse possession since its date. This is a new plea of which no trace can be found in the pleadings. I have already pointed out that we have no sure indication of the right upon which Gondu based his suit for damages or that his claim related to trees at all. Without an issue on the new point and evidence showing that Gondu asserted an exclusive right to fell trees and prevented his lessor from felling any, a finding that the appellant has acquired an exclusive title to trees could not be reached. It has further to be observed that Saku Bai is shown to have died within 12 years of the commencement of this litigation, so that if section 28 of the Indian Limitation Act was to be relied on. Article 141 of the Limitation Schedule would not admit of its application.

No damages have been claimed on the ground that the lessor, though the owner of the trees, could not legally enter to fell any. Nor has evidence been given to show what damage, if any, the Thekedar suffered from this point of view. I must not, therefore, be understood to decide that the defendants respondents are entitled as owners of the trees to enter and fell at their pleasure. There is clear authority to the contrary in *Daryaosingh v. Sitru Mokasi* (5) and *Badam v. Ganga Dei* (6). As remarked by me in *Nanaji v. Kashiram* Second Appeal No. 793 of 1909, decided on the 17th February 1910) if the lessor desires to take out timber he must, by arrangement with his lessee, acquire permission to go on the ground for the purpose. Of course it will not be open to the Thekedar to arbitrarily refuse permission when the inferior proprietor, as owner of timber, having armed himself with any authority to cut, which

(2) 16 C. 300 (F. B.).

(3) 88 Ind. Cas. 66; 13 N. L. R. 1.

(4) 28 Ind. Cas. 140; 16 Bom. L. R. 595; 38 B. 716.

(5) 3 C. P. L. R. 18.

(6) 29 A. 484; A. W. N. (1907) 150; 4 A. L. J. 452.

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the law prescribes, desires to sell what he is entitled to take; but reasonable notice of intention to enter and sell should be given.

The appeal is dismissed with costs. In the lower Courts costs will be paid as already ordered.

Appeal dismissed.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 50 OF 1917.

June 13, 1919.

Present:—Sir George Knox, Kt.,
Acting Chief Justice, and Justice

Sir P. C. Banerjee, Kt.

ABDUR RAHIM—PLAINTIFF—APPELLANT
versus.

SITAL PRASAD—DEFENDANT—RESPONDENT.

Attachment, illegal—Goods attached in custody of Court—Damage to goods—Creditor, liability of.

Where goods are illegally attached and remain in the custody of the Court or of a Receiver, the creditor at whose instance the attachment is made is liable for any injury to, or depreciation owing to climatic conditions in, the goods. [p. 794, col. 1.]

Appeal, under section 10 of the Letters Patent, from a judgment of Mr Justice Walsh, dated the 22nd February 1917.

Mr. Iqbal Ahmad, for the Appellant.

Dr. S. N. Sen, for the Respondent.

JUDGMENT.—The appellant Abdur Rahim says that he kept a pedlar's shop in the City of Meerut; the goods from this shop were taken from time to time to fairs and exhibitions. His father Abdul Qayum carried on the same business. He was declared an insolvent some time prior to 1913. Abdul Qayum had his shop in the Meerut Cantonments, quite separate and distinct from the shop kept by Abdur Rahim. In the year 1913, Abdur Rahim took a large amount of goods (most of them woollen goods) to the fair or exhibition held at Bulandshahr. According to the plaintiff Sital Prasad (respondent to this appeal and a creditor of Abdul Qayum, the insolvent) presented an application based on wrong allegations to the Additional Judge of Meerut. The date of the application, which is No. 35C on the record, was the 13th of February 1913, and the prayer in it

was that the goods of Abdur Rahim in the exhibition at Bulandshahr might be taken into the custody of the Court as the shop and the goods were the shop and the goods of Abdul Qayum the insolvent. The Additional Judge of Meerut ordered the Receiver to attach the goods. The Receiver on the 14th of February acting upon indications given by Sital Prasad attached all the goods at the exhibition, the value of which the plaintiff says was Rs. 500, packed them in boxes and brought them into Meerut. On the 18th of February Abdur Rahim presented an application to the Court which had attached the goods and prayed that after thorough enquiry made by the Court the attached goods might be declared the property of Abdur Rahim and released in his favour. On the 4th of July 1913 the application was granted and on the 5th Abdur Rahim asked for the return of the goods. Upon this Sital Prasad objected to the delivery, as he said he intended to appeal to the High Court at Allahabad, and prayed that the goods might remain in the custody of a Receiver pending the result of his appeal. On the 4th of July 1913 Sital Prasad got an injunction from this Court and he also got permission to appeal from the order of the Additional Judge of Meerut. This appeal was heard on the 6th of December 1913 and dismissed. The goods which had been attached were returned to Abdur Rahim on the 9th of January 1914, and were found to be badly damaged. There has been some confusion as regards the cause of damage. In certain places in the judgment of the Courts below the damage is attributed to destruction by "white ants." It is not easy to understand why or how the white ants were introduced into the case. What Abdur Rahim said was the cause of the mischief done was the work of insects such as appear in woollen goods when they are shut up and not aired during the rainy season, and this was the season in which the goods, which were to have been released on the 4th of July 1913, remained in the custody of the Receiver until the 9th of January 1914, when they were returned. The defence put in by Sital Prasad was to the effect that he was only a creditor and that he informed the Court of what he had ascertained and from which he was satisfied that the goods were not the goods of Abdur Rahim but the goods of Abdul Qayum. He maintains

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that he acted in good faith and that if any damage was caused to the goods it was the Receiver's act. Abdur Rahim and Abdul Qayum, he said, were joint, had no separate capital and when the goods were at the Bulandshahr fair Abdul Qayum was ostensibly in possession of them. He maintains that he had never applied for the detention of the goods but that security should be taken from Abdur Rahim if they were returned to him. From the above statement it will be seen that the goods (which are found to have been damaged by the agency of insects) would not have passed from the possession of the appellant on the 14th of February 1913, had it not been for the application presented by Sital Prasad in the Court of the Additional Judge at Meerut on the 13th of February 1913. We have heard the contents of the application made by Sital Prasad (paper No. 35C of the record). It is supported by an affidavit sworn to by Sital Prasad. In this affidavit Sital Prasad solemnly affirms that the insolvent Abdul Qayum had not sold his goods but had taken them to the Bulandshahr exhibition. No attempt was made to dispute the allegations that it was Sital Prasad who identified and pointed out the goods which the Receiver attached. Sital Prasad must, therefore, have been fully aware that a large number of the goods attached, more than half of them, were goods wholly or mainly manufactured from wool. The Civil Courts have found that the act of Sital Prasad was a wrongful act. This being so, he became responsible for the ordinary consequences which were likely to result from this wrongful act of attachment. Furthermore when the appellant applied for the goods to be handed back to him as they had been found by the Court to be his goods, the respondent again opposed the application (see paper No. 39C) and prevented their return. Regarding this opposition the learned Judge of this Court rightly observes that the order made by the Court which had heard the case has an important bearing upon the question whether the defendant Sital Prasad was acting without reasonable and probable cause, because that order could not have been made unless the Court realised that although it had decided against the defendant, there was reasonable ground for the defendant appealing to the High Court. We do not for a moment ques-

tion the right of appeal presented by Sital Prasad, and we allow that the Court granting leave to appeal must have considered that there was a good case for such an appeal. But was there an equal necessity for the application which followed and in which Sital Prasad asked for an injunction restraining the release of the goods pending the appeal? The learned Judge of this Court rightly observes that from the moment Sital Prasad applied for this injunction, a totally different set of consideration arises. It was a fresh act done by Sital Prasad and he adds that it was necessary for Abdur Rahim if he had a case to show, if he relied upon this act of Sital Prasad, that such act or application was a wrong to him and that the damage done by the animals was the result of that order. The finding of the Munsif upon this matter is somewhat loosely worded. He says the goods probably got damaged during the period that the appeal was pending in the High Court. It is a well known fact that goods are generally eaten up by worms, as he calls them, during the rains. The lower Appellate Court expressed itself satisfied that the immediate result of the attachment was the damage done to the goods and the deterioration in their prices. This point, he adds, has been fully dealt with by the learned Munsif in his judgment and he decides it against the appellant before him (i.e., Sital Prasad). Some attempt was made to attack this finding as being based on no evidence, but this point was not taken in the appeal or petition either to the learned Judge of this Court or to us. Sital Prasad knew that the goods which he had attached were articles mainly made from wool, he knew as every inhabitant of this part of India knows that woollen goods packed away in boxes during the rains breed, as a natural and probable consequence, worms which riddle woollen articles through and render them worthless. Generally speaking, as Bovill, Chief Justice, pointed out in *Sharp v. Fowell* (1): "One who commits a wrongful act is responsible for the ordinary consequences which are liable to result therefrom. But, generally speaking, he is not liable for damage which is not the natural or ordinary consequences of such an act, unless it be

(1) (1872) 7 C. P. 253; 41 L. J. C. P. 95; 26 L. T. 436; 20 W. R. 582.

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shown that he knows, or has reasonable means of knowing, that consequences not usually resulting from the act are by reason of some existing cause, likely to intervene so as to occasion damage to a third person." The existing cause, of which Sital Prasad was fully aware, was that these woollen goods were about to be shut up and owing to climatic causes which prevail during the rains, would be damaged most materially by insects bred and breeding in them whilst they were so shut up. Their Lordships of the Privy Council in *Kissori Mohun Roy v. Harsukh Das* (2) point out that "there is no analogy between the two systems regarding the law of execution which prevails in India and which prevails in England. In England the execution of a decree for money is entrusted to the Sheriff, an officer who is bound to use his own discretion and is directly responsible to those interested for the illegal seizure of goods which do not belong to the judgment-debtor. In India warrants for attachment in security are issued on the *ex parte* application of the creditor, who is bound to specify the property which he desires to attach and its estimated value." The illegal attachment of Abdur Rabim's goods was the direct act of Sital Prasad for which he became immediately responsible in law, and the litigation which underlay and consequent depreciation of the goods together with the climatic conditions which contributed still further to that depreciation may well be considered the natural and necessary consequences of that unlawful act. We do not think that in a case of this kind any question of reasonable and probable cause arises and that it is for the plaintiff to prove the absence of reasonable and probable cause.

As regards damages, after hearing both parties we think that the damages assessed by the Additional Judge of Meerut were fair and just damages.

We decree the appeal, set aside the order of the learned Judge of this Court and restore that of the lower Appellate Court with costs of both hearings in this Court.

Appeal allowed.

(2) 17 C. 436 (P. C.); 17 I. A. 17; 5 Sar. P. C. J. 472.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 530 of 1918.

June 24, 1919.

Present:—Sir Henry Drake-Brockman, Kt., J. C.

BHURE—PLAINTIFF—APPELLANT

versus

SHEOGOPAL AND OTHERS—DEFENDANTS—RESPONDENTS.

C. P. Tenancy Act (XI of 1898), s. 45 (1)—Sale of village share—Occupancy rights in sir land, surrender of—Surrender, validity of—Contract Act (IX of 1872), s. 65, applicability of—Parties contravening provisions of Statute, effect of—*In pari delicto potior est conditio defendentis*, applicability of.

The defendants sold to the plaintiff their share in a village, reserving to themselves the occupancy rights in the sir land, and on the same day executed another deed by which they surrendered their occupancy right in the sir land accrued to them by virtue of the sale. The plaintiff was put in possession of the village share under the sale-deed and of the land under the surrender deed, but the defendants ejected him on a subsequent date. The plaintiff brought the present suit for possession of the land surrendered:

Held, (1) that the mere fact of the possession having been delivered to the plaintiff did not suffice to separate the transaction of surrender from that of sale and that the surrender must be held to be void under the provisions of section 45 (1) of the Central Provinces Tenancy Act. [p. 796, col. 1.]

(2) that the plaintiff was not entitled to get back the consideration for the surrender, as both the parties knew that they were contravening the provisions of the Central Provinces Tenancy Act and, therefore, the maxim *in pari delicto, potior est conditio defendentis* applied. [p. 796, col. 2.]

The test as to whether a surrender in such a case is an evasion of the provisions of section 45 (1) of the Central Provinces Tenancy Act consists in the fact as to whether the transaction is distinctly separate from that of sale of the village share. [p. 796, col. 1.]

If a covenant to relinquish the sir lands is part of the transaction of sale or of mortgage, then the agreement to surrender will be void and unenforceable, no matter what ingenious devices may be employed to give colour to it. If the Court is satisfied that there was first of all a transfer by way of sale or mortgage and that the transferee, having obtained the status of an ex-proprietary tenant with full knowledge of that fact and of the rights preserved to him by the Statute, deliberately chooses, as a separate transaction, to relinquish his ex-proprietary tenancy into the hands of new proprietor, or of the mortgagee in possession, then the law cannot go further in the way of protecting a reckless and imprudent man against the consequences of his own acts. [p. 795, col. 2; p. 796, col. 1.]

Section 65 of the Contract Act has no application, where the contract embodies a purpose known to be illegal to which both sides are parties. [p. 796, col. 2.]

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Mir Dad Khan v. Ramzan Khan, 44 Ind. Cas. 988; 40 A. 449; 16 A. L. J. 329; *Lekhrai v. Parshadi*, 2 Ind. Cas. 409; 6 A. L. J. 713; *Moti Chand v. Ikram Ullah Khan*, 39 Ind. Cas. 454; 39 A. 173; 15 A. L. J. 150; 5 L. W. 388; 21 M. L. T. 267; 32 M. L. J. 383; 21 C. W. N. 616; 19 Bom. L. R. 433; 26 C. L. J. 24; (1917) M. W. N. 453; 44 I. A. 54 (P. C.), followed.

Appeal against the decree of the District Judge, Saugor, in Civil Appeal No. 32 of 1918, decided on the 31st July 1918, arising out of Civil Suit No. 700 of 1917, in the Court of Munsif, Raheli, decided on the 5th April 1918.

Mr. M. Bhowani Shankar Niyogi, for the Appellant.

Mr. J. C. Ghosh, for the Respondents.

JUDGMENT.—This is an appeal from a decree passed by the District Judge, Saugor, which set aside a decree of the Munsif, Raheli, and dismissed the present appellant's suit for possession of four *sir* fields in Monza Chbindli.

On the 30th October 1916, the defendants sold their $10\frac{2}{3}$ -pies share in the village to the plaintiff, who owns a 5-annas 4-pies share. The sale-deed reserves to the vendors their right to occupy the *sir* land and, therefore, does not come within the scope of section 45 (1) of the Central Provinces Tenancy Act, 1898. On the same day, however, the defendants executed another deed (Exhibit P-2) by which in consideration of old debts aggregating Rs. 180 and a cash payment of Rs. 320 or Rs. 500 in all, they surrendered the occupancy right accrued to them in the *sir* of their share by virtue of the sale aforesaid. The plaintiff was put in possession under the surrender and it is common ground that he was the defendants' sole landlord, their share within the land in dispute having constituted a separate *patti*. On the 21st June 1917 the defendants ejected him from the land to which the surrender relates and on the 8th August following he brought the suit out of which this second appeal arises. In the plaint he claimed restoration to possession and any other relief which the Court might consider appropriate. The defence, so far as we are here concerned with it, was that the surrender amounted to an evasion of the law contained in section 45 of the Tenancy Act and was, therefore, void. This plea was overruled by the learned Munsif, on the ground that a

surrender of occupancy right is permissible under section 35 of the Tenancy Act and is not prohibited by section 45.

In appeal the District Judge held, on the authority of the decision of the Privy Council in *Moti Chand v. Ikram Ullah Khan* (1) and of *Mir Dad Khan v. Ramzan Khan* (2), that the sale and surrender together constituted a single transaction, the object of which was to avoid the necessity of obtaining the sanction prescribed by section 45 (1), Tenancy Act, and was, therefore, illegal and void. The plea that the plaintiff should recover Rs. 500; the consideration for the surrender was not considered on the ground that this relief had not been expressly asked for in the Court of first instance. In this Court it is not and could not be denied that section 45 of the Central Provinces Tenancy Act, 1898, is for the purposes of this appeal identical in purport with section 10 of the N. W. P. Tenancy Act, 1901. For the appellant it is sought to distinguish the facts in *Moti Chand v. Ikram Ullah Khan* (1) (above cited), on the ground that there the plaintiff (vendee) sought to enforce not a transfer but an executory agreement to surrender the ex-proprietary holding. The later Allahabad case is sought to be distinguished on the ground that the transfer was a mortgage and not a sale; actual possession of the *sir* did not pass to the mortgagee under the relinquishment. It is urged that the surrender can be contested only under section 36 of the Tenancy Act and that once the vendors surrendered their occupancy right and put the landlord in possession, their title was finally extinguished.

In my opinion the true test in cases like the present is that laid down by Piggott, J., in *Mir Dad Khan v. Ramzan Khan* (2) (above cited). In the words of that learned Judge:—

"If a covenant to relinquish the *sir* lands is part of the transaction of sale or of mortgage, then the agreement to surrender will be void and unenforceable, no matter what ingenious devices may be

(1) 39 Ind. Cas. 454; 39 A. 173; 15 A. L. J. 150; 5 L. W. 388; 21 M. L. T. 27; 32 M. L. J. 383; 21 C. W. N. 616; 19 Bom. L. R. 433; 26 C. L. J. 24; (1917) M. W. N. 453; 44 I. A. 54 (P. C.).

(2) 44 Ind. Cas. 988; 40 A. 449; 16 A. L. J. 329.

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employed to give colour to it. If the Court is satisfied that there was first of all a transfer by way of sale or mortgage and that the transferee, having obtained the status of an ex-proprietary tenant, with full knowledge of that fact and of the rights preserved to him by the Statute, deliberately chooses, as a separate transaction, to relinquish his ex-proprietary tenancy into the hands of the new proprietor, or of the mortgagee in possession, then the law cannot go further in the way of protecting a reckless and imprudent man against the consequence of his own acts."

For a case of the latter kind I may refer to *Lekhraj v. Parshadi* (3). In the present case there is admittedly a design to evade the requirements of sub-section (1) of section 45 of the Tenancy Act, the two deeds of even date being executed not as separate transactions but as parts of a single design. In the words of their Lordships of the Privy Council in *Moti Ohand v. Ikram Ullah Khan* (1) such a device is in contravention of the policy of the Act and contrary to law and is, therefore, illegal and void. The mere fact that the plaintiff obtained actual possession does not, in my opinion, suffice to separate the surrender from the sale: indeed it is not even suggested for the appellant that such was the effect of his occupation. The appellant has nothing but the surrender as a basis for his title. That surrender must be held void no less than the agreement for relinquishment coupled with the deed of relinquishment, dated respectively the 2nd and 5th May 1903, which were considered by the Privy Council in *Moti Ohand v. Ikram Ullah Khan* (1). I hold, therefore, that the lower Appellate Court's dismissal of the claim for possession was right and must be upheld.

It remains to deal with the contention that the appellant should at least get back the consideration for the surrender. This should have been dealt with by the lower Appellate Court in view of the prayer in the plaint for other relief, which has already been mentioned. It is urged for the appellant that having once obtained possession he should not have been ousted by the defendants and should, therefore, be treated much as if he had retained

possession all along and not been ousted by the defendants. The contention is plausible but no authority is cited in support of it. The actual position obtaining is that the defendants are in possession while the plaintiff seeks to enforce against them an agreement which is void. Both parties knew that when the sale and surrender were executed they were contravening the provisions of the Tenancy Act. The plaintiff as the defendants' creditor was certainly not less to blame than the defendants, and the maxim *in piri delicto, potior est conditio defendantis* would seem to apply. Section 65, Indian Contract Act, has no application where the contract embodies a purpose known to be illegal to which both sides are parties. For similar cases I may refer to *Marlidhar v. Pem Raj* (4) and *Dipan Rai v. Ram Khelawan Rai* (5). The position in *Bahoran Upadhyay v. Uttamgir* (6) was practically the reverse of what obtains here: in that case the plaintiff sued the mortgagor of an occupancy holding to recover possession upon the ground that the mortgage was void under the Tenancy Act without repaying the mortgagee the money he had received, and it was held on the principle that he who seeks equity must do equity that the mortgagor could not retain the mortgage money in addition to regaining the property.

The appeal fails and is dismissed with costs. In the lower Courts costs will be paid as already ordered.

Appeal dismissed.

(4) 22 A. 205; A. W. N. (1900) 10.

(5) 5 Ind. Cas. 557; 32 A. 383; 7 A. L. J. 330.

(6) 12 Ind. Cas. 112; 33 A. 779; 8 A. L. J. 931

(3) 2 Ind. Cas. 409; 6 A. L. J. 713.

RADAR UD-DIN v. HERAJTULLA.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 819 OF 1917.

July 22, 1919.

Present:—Justice Sir Ernest Fletcher, Kt., and Mr. Justice Duval.

RADAR UD-DIN BISWAS AND OTHERS—
DEFENDANTS—APPELLANTS

versus

HERAJTULLA JOORDAR AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Pleadings and proof—Plaint based on specific allegation—Court, whether can find in favour of plaintiff on different allegation—Procedure—Bengal Tenancy Act (VIII B. C. of 1885), s. 167—Annulment of interest—Notice, proof of service of.

Where a plaintiff comes to trial with a specific allegation on which he asks the Court to adjudicate in his favour, it is not open to the Court to arrive at a finding in his favour contrary to the allegation set up [p. 797, col. 2.]

Before the interest of a party can be terminated under the provisions of section 167 of the Bengal Tenancy Act, it is necessary that the service of notice in accordance with the statutory procedure laid down in the section should be proved. [p. 798, col. 1.]

Appeal against the decree of the Additional District Judge, Jessore, dated the 30th January 1917, affirming that of the Munsif, 1st Court at Jhenidab, dated the 30th June 1915.

FACTS appear from the judgment.

Babu Surendra Chandra Sen (with him Babu Surendra Nath Bose), for the Appellants.—The defendants are appellants. The appeal arises out of a suit for recovery of possession on declaration of title against defendants who were alleged to be under *raiya*s. The plaintiff landlord's interest was sold and was purchased by the superior landlord. The question is whether the plaintiff is a tenure-holder or a *raiya*. We alleged that after notice under section 167 of the Bengal Tenancy Act the plaintiff's interest was extinguished, he being an under-*raiya*. The plaintiff claimed to be an intermediate tenure-holder, the original vernacular words being *madhyasatwabisistha*. The Appellate Court found that the plaintiff was a *raiya*, hence his right could not be annulled. My point is that the plaintiff cannot plead anything contrary to what he states in his plaint.

Babu Prabhat Chandra Dutt, for the Respondents.—The finding of the learned Judge is quite correct. The words do not necessarily mean an under-tenure holder. They can

also be used to mean a *raiya*. Hence his right could not be annulled.

Babu Surendra Chandra Sen replied in brief.

JUDGMENT.

FLETCHER, J.—The defendants in this case appeal against the decision of the learned Additional Judge of Jessore, dated the 30th January 1917, affirming the decision of the Munsif of Jhenidab. The plaintiffs brought the suit for declaration of title to and possession of certain land. The title pleaded in the plaint, according to the English translation of the vernacular document, was that the plaintiffs claimed a subordinate intermediate tenure, and those words are strengthened by the nature of the enjoyment that the plaintiffs alleged they had in the land in suit. What happened was this. The learned Judge in the lower Appellate Court has found that the plaintiffs are not either tenure-holders or under-tenure-holders but are *raiya*s with rights of occupancy, and in this case the defendants are not entitled to annul the interest of the plaintiffs under the provisions of the Bengal Tenancy Act. Whether that can be supported turns on this; whether the English translation of the allegation that the plaintiffs put forward in their plaint that they were subordinate intermediate tenure-holders is an accurate translation of the original document. It is suggested that the subordinate intermediate tenure-holder only meant, if due regard is had to the vernacular words used, that the plaintiffs were holding under a tenure holder without defining or limiting the nature of the interest of the plaintiffs. The words used in the vernacular do not support that contention. It is quite clear that the plaintiffs came to trial with the allegation that they were tenure holders within the meaning of the Bengal Tenancy Act. If that is so, the learned Judge was clearly wrong in finding that the plaintiffs were occupancy-*raiya*s, contrary to the allegation set up in the plaint on which they asked the Court to adjudicate in their favour. I do not think that the learned Judge was entitled on the facts to find that the plaintiffs were *raiya*s with rights of occupancy. The highest that could be held was that the plaintiffs had the interest that was set up in the plaint, namely that they

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were under-tenure-holders within the meaning of the Bengal Tenancy Act.

Then, one other point arises and that is this: In the view of the learned Judge, it became unnecessary to dispose of the second issue, because in his view the plaintiffs being *raiya*s with rights of occupancy, the Bengal Tenancy Act did not give the defendants any right to annul such an interest. It is necessary that the service of the notice in accordance with the statutory procedure laid down in the Bengal Tenancy Act should be proved before the interest of the plaintiffs could be terminated. In the view of the learned Judge of the lower Appellate Court, it was not necessary to enquire and decide whether or not such a notice had been duly served. The case must, therefore, go back to the Court of the learned Judge to have the appeal re-heard on the question as to whether the interest of the plaintiffs has been duly annulled under the provisions of the Bengal Tenancy Act, and if it appears that the matter has not been properly determined in the Court of first instance, the learned Judge will be at liberty to send the case back to the Court of first instance for the purpose of taking any further or additional evidence that may be considered necessary, in order to prove that the interest of the plaintiffs has been duly annulled under the provisions of the Bengal Tenancy Act. Costs will abide the result of the further hearing before the learned Additional Judge.

DUVAL, J.—I agree.

Case sent back.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 68B OF 1919.
October 10, 1919.

Present:—Sir Henry Drake-Brockman, Kt.,
J. C.

DHANSUKHDASS MARWADI—
DEFENDANT No. 1—APPELLANT

versus

ZANGO—PLAINTIFF AND ANOTHER—
DEFENDANT No. 2—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 53—Civil Procedure Code (Act V of 1908), O. XXI, rr. 58, 63—Claim proceedings—Objection dismissed—Suit to

establish title by objector—Transfer intended to defeat and delay creditors—Attaching creditor, whether can object to validity of transfer in defence—Suit to set aside transfer in representative capacity, whether necessary—Fraudulent transaction, whether can be avoided apart from s. 53, Transfer of Property Act.

In a suit for declaration of title by a purchaser from a judgment-debtor after the dismissal of his objection under Order XXI, rule 63 of the Civil Procedure Code, the attaching decree-holder is entitled to set up a defence that the sale in favour of the plaintiff was a sham transaction and was intended to defraud the creditors of the judgment-debtor. [p. 801, col. 1.]

A suit under section 53 of the Transfer of Property Act to avoid a transfer alleged to have been made with intent to defraud the creditors of the transferor need not necessarily be brought by one of several creditors in a representative capacity and a single creditor as a defendant in a suit to declare the transfer valid is entitled to avoid the plaintiff's transaction. [p. 801, col. 1.]

A defendant may use in defence a plea which would furnish him with ground for a suit, as this procedure would avoid multiplicity of suits. [p. 801, col. 1.]

Sheo Ram v. Lalman, 13 C. P. L. R. 163, followed.

A fraudulent and colourable transfer may be challenged otherwise than under section 53 of the Transfer of Property Act, for instance as being a sham transaction not intended to have any effect whatever. [p. 801, col. 2.]

Appeal against the decree of the Additional District Judge, Akola, in Civil Appeal No. 80 of 1918, decided on the 7th September 1918, arising out of Civil Suit No. 37 of 1918, in the Court of the 2nd Munsif, Akola, dated the 29th June 1918.

Mr. D. T. Mangalmurti, for the Appellant.

Mr. M. R. Bobde, for the Respondent No. 1.

JUDGMENT.—Dhansukhdas, the appellant in this Court, obtained on the 21st December 1916 a decree for money against the respondent Lakshmi, and in execution on the 26th July 1917 attached a certain field which she held in succession to her husband. The respondent Jhango had bought the field from Musammatt Lakshmi on the 10th January 1917, and on the strength of the conveyance (Exhibit P-1) objected to the attachment. Dhansukhdas opposed the objection on several grounds and it was dismissed by the executing Court on the ground that the alleged sale was a bogus and fraudulent one, Jhango not being a *bona fide* purchaser for value. Jhango then filed the suit out of which the present appeal arises to obtain a

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declaration of his right to the field and Dhansukhdas, after denying the sale altogether, went on to plead that if established, it was a bogus and fraudulent transaction without consideration and intended to defraud and delay creditors. Lakshmi pleaded that the sale was a genuine one, the price (Rs. 400) being required by her to pay off debts incurred by her husband and to meet necessary expenditure. The plaintiff in his reply pleaded as follows:—

"The sale is neither bogus nor fraudulent nor without consideration, nor was it intended to defraud the creditors, but on the contrary to partly pay off the debts of defendant No. 2's husband as well as for her own maintenance. Plaintiff had no knowledge of the decree of the defendant No. 1."

The following issues were framed:—

"1. Was the sale by defendant No. 2 to plaintiff for valid consideration and for legal necessity as alleged.

2. Is the plaintiff entitled to the relief claimed?"

The trial Judge found that consideration passed and that legal necessity was made out, although its establishment was not essential to the success of the plaintiff's claim. The Judge proceeded to point out that there was no specific issue embodying the questions explicitly raised in the pleadings regarding the character of Exhibit P. No. 1, but nevertheless held that the sale was "not fraudulent and bogus for defrauding the creditors and defeating their claim."

Dhansukhdas appealed to the District Court and an Additional District Judge, without deciding any questions raised by the pleadings, held on the strength of the Full Bench decision in *Subramania Ayyar v. Muthia Chettiar* (1) that in a suit of this kind the attaching decree-holder cannot in defence avoid under section 53, Transfer of Property Act, the alienation made by his judgment-debtor in the plaintiff's favour. Dhansukhdas has preferred this second appeal.

It is urged for the appellant that the decision of the Madras Full Bench should not be followed, that a suit under section

53, Transfer of Property Act, need not necessarily be brought by one of several creditors in a representative capacity, and that a single creditor as defendant in a suit like the present is entitled to avoid the plaintiff's transaction.

As remarked by the learned Additional District Judge, the practice in these Provinces has long been to allow such a defence, and after a careful perusal of the case which he relied upon and of the judgments in *Palaniandi Chetti v. Appavu Chettiar* (2) I have come to the conclusion that they do not furnish a sufficient ground for departing from that practice. In *Palaniandi Chetti v. Appavu Chettiar* (2) two judgments were delivered. That of Coutts Trotter, J., appears to have decided no more than that a creditor other than the one who had obtained a decree for his debt and attached property in execution thereof could only sue under section 53, Transfer of Property Act, in a representative capacity, i.e., on behalf of himself and all other creditors; this is clear from the passage towards the close of the judgment, in which the learned Judge expressly followed *Ishvar Timappa Hedge v. Devar Venkappa Shanbog* (3) and on that ground held that the fact that the deed relied upon by the plaintiff was executed with intent to defraud the creditors of the transferor afforded the attaching defendant no answer to the plaintiff's claim. As pointed out by Krishnan, J., in *Kottaurathil Puthiyapurayil Pokker v. Balathil Parkum Chandrakandi* (4), Coutts Trotter, J., seems to have overlooked that the decree-holder had not only attached property but had obtained an order in his favour upon the objection filed under rule 58, Order XXI, First Schedule to the Civil Procedure Code. I understand, therefore, that in a case like the present Coutts Trotter, J., would have entertained the defence based on section 53, Transfer of Property Act.

Sheshagiri Aiyar, J., was a party to the decisions in both *Palaniandi Chetti v. Appavu Chettiar* (2) and *Subramania Ayyar v. Muthia Chettiar* (1), and in the later decision con-

(2) 34 Ind. Cas. 778; 30 M. L. J. 565; 19 M. L. T. 390.

(3) 27 B. 146; 5 Bom. L. R. 19.

(4) 51 Ind. Cas. 714; 42 M. 143 at p. 151; 25 M. L. T. 47; (1919) M. W. N. 39; 9 L. W. 138; 36 M. L. J. 231.

(1) 43 Ind. Cas. 651; 41 M. 612; 6 L. W. 750; 33 M. L. J. 705 (F. B.).

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tented himself with stating that he had not been convinced that his view expressed in *Palaniandi Ochetti v. Appavu Ochetti* (2) was wrong. Seshagiri Aiyar, J., distinctly ruled in *Palaniandi Ochetti v. Appavu Ochetti* (2) that a representative suit is not necessary, but went on to lay down that a creditor can have no remedy against the property conveyed until the sale is set aside, and on this latter view based a further conclusion that as a defendant he is not entitled to avoid the conveyance by his defence.

The last sentence of his judgment shows that he reached this conclusion reluctantly.

The third Judge who took part in the Full Bench's decision declined to express an opinion on the question whether a suit by a creditor under section 53 of the Transfer of Property Act must be brought in a representative capacity on behalf of the body of creditors, but apart from this he expressed a general concurrence in the views of Courts Trotter and Seshagiri Aiyar, JJ. He also declined to approve of the proposition laid down in *Abdul Kader v. Ali Meah* (5) that anything which can be made the basis of a suit can be pleaded as a bar in action. He concluded with the remark that a sale such as the one now under consideration must be held to continue in force until it is set aside in proceedings properly instituted for the purpose.

In *Kottarathil Ruthiyapurayil Pokker v. Balathil Arkum Ohandrakundi* (4), above cited, Krishnan and Ayling, JJ., agreed in holding that an attaching decree-holder whose attachment has been raised on the objection of a transferee of the attached property is not bound to bring a representative suit on behalf of all the creditors to set aside the transfer under section 53 of the Transfer of Property Act, but can sue on his own behalf alone. The decision in *Hakim Lal v. Mooshahar Sahu* (6), which is relied upon here for the plaintiff respondent, was considered by both the Judges and they dissented from the view that a suit under section 53, Transfer of Property Act, must be brought by or on behalf of all the

creditors. Krishnan, J., also pointed out that the actual decision in *Ishvar Timappa Hegde v. Devar Venkappa Shanbog* (3) was that a creditor who has not obtained a decree in his favour is nevertheless entitled to sue under that section and that in the Calcutta case the special right of suit given to a defeated decree-holder by rule 63, Order XXI, was not referred to. Krishnan, J., referred also to the Privy Council decision in *Ochatterput Singh v. Maharaj Bahadur* (7), another case relied on for the plaintiff-respondent, and give reasons which seem to me conclusive for thinking that the observation of their Lordships on page 217 of the report is no authority for the view that a suit under section 53, Transfer of Property Act, must be a representative one. The observation is as follows:—

"No issue was stated in this suit whether the transfers were or were not liable to be set aside at the instance of Dhunpat under section 53 of the Transfer of Property Act, and no decree has been made for setting them aside. Such an issue could be raised and such a decree could be made only in a suit properly constituted for that purpose, and this suit was not so constituted either as to parties or otherwise."

I would also point out that the action out of which the appeal to the Privy Council arose was brought by Dhanput and his son and that the Judicial Committee's expression above quoted must be interpreted in the light of that fact.

In *Mina Kumari Bibi v. Bijoy Singh* (8) the Judicial Committee did not treat the institution of a separate suit as essential to make the provisions of section 53 of the Transfer of Property Act available to the defendant. There, as in the present case, the plaintiff was the objector who had failed in the executing Court and sued to establish the right which he claimed to the property in dispute. It is true that the question now under consideration was not raised and that the

(5) 14 Ind. Cas. 715; 16 C. W. N. 717; 15 C. L. J. 649.

(6) 34 C. 999; 11 C. W. N. 889; 6 C. L. J. 410.

(7) 32 C. 198; 2 A. L. J. 190; 9 C. W. N. 225; 32 I. A. 1 (P. O.).

(8) 40 Ind. Cas. 242; 44 C. 662; 1 P. L. W. 425; 5 L. W. 711; 34 M. L. J. 425; 21 C. W. N. 585; 21 M. L. T. 344; 15 A. L. J. 382; 25 C. L. J. 503; 19 Bom. L. R. 424; (1917) M. W. N. 473; 44 I. A. 172 (P. O.).

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transfer impeached was expressly held not to be a fraudulent one: nevertheless the fact that the application of the section to the circumstances was considered by the highest Tribunal cannot but be regarded as favourable to the present appellant.

In my opinion the mere fact that a transfer which can be impeached under section 53, Transfer of Property Act, is voidable only and must, therefore, continue in force until set aside is no sufficient reason for debarring a defendant from relying upon that section. It is not denied that the section could be relied on in answer to the objector's petition in execution proceedings and if the objection had succeeded instead of failing, the suit contemplated by rule 63, Order XXI, would necessarily have been brought by the appellant instead of the respondent Jhango. The result of such summary proceedings as those taken on objections preferred under rule 58, Order XXI, should not affect the power of the attaching decree-holder to support his attachment, and I agree with the view taken in *Kotturathil Puthiyapurayil Pokker v. Balathil Parkum Chandrankandi* (4) that an attaching decree-holder has a personal right on an objection being allowed to sue by himself to avoid the objector's transfer. In support of the general position that a defendant may use in defence a plea which would furnish him with ground for a suit I may refer to *Sheo Ram v. Lalman* (9), where it was laid down that in a suit for ejectment by a subsequent transferee with notice it is open to the defendant to set up by way of defence a right to claim specific performance of the transferor's agreement to convey to him. The advantage of this view was explained in *Jeyram v. Ganpati* (10) to be that multiplicity of suits is thereby avoided. It is true, as urged for the plaintiff respondent, that the facts in *Abdul Kader v. Ali Meah* (5) are distinguishable. There the decree holder was the sole creditor. Nonetheless I hold for the reason just given that we may fairly apply to the circumstances of the present case the consideration that the attaching

creditor can do as defendant what he might have done as plaintiff had he failed instead of succeeding in the matter of the objection to his attachment. The case is, therefore, remanded to the lower Appellate Court for consideration of the defence upon the merits.

I also observe for the guidance of the lower Appellate Court that the present appellant alleged the plaintiff's conveyance to be "bogus" and without consideration besides denying that any sale had taken place. I cannot but understand this pleading to mean that the sale was a mere sham and not intended to have any effect whatever. I am unable to accept a contention put forward for the plaintiff-respondent that the appellant did not mean to plead alternatively that the sale was a sham. It was pointed out by Stevens, J. C., in *Lalchand v. Hasto Bai* (11) that a fraudulent and colourable transfer may be challenged otherwise than under section 53 of the Transfer of Property Act, and the same view was expressed by both the Judges who were parties to the decision in *Palaniandi Ohetti v. Appavu Ohettiar* (2) (above cited). This aspect of the case must, therefore, not escape consideration.

A refund of the Court-fee paid on the memorandum of second appeal will be granted and all other costs hitherto incurred will be costs in the cause.

Case remanded.

(11) 7 C. P. L. R. 73.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 172 OF 1917.

January 13, 1920.

Present:—Mr. Justice Tudball and Mr. Justice Rafique.

Musammat FARHAT-UN-NISSA BIBI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

B. SUNDARI PRASAD AND OTHERS

—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 70—Local Government, power of, to make rules—Revenue Court—Execution of decree—Finality of orders—Suit to set aside order, maintainability of.

(9) 13 C. P. L. R. 163.

(10) 17 C. P. L. R. 19.

BANWARI LAL v. RAM CHANDRA SINGH.

A Local Government has power to frame rules, under section 70 of the Civil Procedure Code, giving finality to orders passed by Revenue Courts in execution of certain decrees, and no suit can be brought to set aside an order under those rules by a person against whom such order has been made.

First appeal from a decree of the Subordinate Judge, Jaunpur, dated the 26th April 1917.

Mr. Iqbal Ahmad, for the Appellant.

Messrs. Gokul Prasad and Radha Mohan, for the Respondent.

JUDGMENT.—This is a plaintiffs' first appeal. A decree for sale of ancestral property belonging to the plaintiffs was passed by the Civil Court and the execution of that decree was transferred to the Court of Collector under the rules made by the Local Government under section 70 of the Code of Civil Procedure. The property was sold by auction and the sale was set aside by the Collector, but on appeal by the opposite party to the Commissioner the Collector's order was set aside and the sale was confirmed. The Commissioner's order was appealed to the Board of Revenue but the appeal was dismissed. Thereupon the plaintiffs brought the present suit and asked for a declaration that the sale made on the 20th of August 1914 was fraudulent and null and void and ineffectual according to law. The Court below has dismissed the plaintiffs' suit on the ground that under the rules made by the Local Government no suit to set aside an order made under these rules can be brought by any person against whom such order has been made. The rule referred to is rule 32 of the rules made by the Local Government in the last clause. The position taken up by the appellants before us, to put it simply, is that the order passed by the Revenue Courts confirming a sale of this description has not that finality which a similar order would have if it had been passed by the ordinary Civil Court, that the Local Government has no power to make any such rules under section 70 of the Code of Civil Procedure as to give finality to the Revenue Court's order confirming the sale. It seems to us that the appeal is bound to fail. In cases where ancestral property is involved, the decree under the rules made by the Local Government

under section 70, clause (1) (a), must be transmitted to the Court of the Collector for execution. Under sub-clause (b) of the same section the Local Government has power to confer upon the Collector or any gazetted subordinate of the Collector all or any of the powers which the Court might exercise in the execution of the decree if the execution thereof had not been transferred to the Collector. The Local Government has made such rules and it is, therefore, clear that it has conferred upon the Collector the power of passing an order of the same nature as the Civil Court would have passed and could have passed under Order XXI, rule 92; that is to say, an order which is final and absolute and cannot be questioned by a subsequent civil suit. Under sub-clause (c) of section 70, clause (1), the Local Government has power to arrange for appeals from the orders passed by Collectors under the rules framed by the Local Government; so that the appellate order passed by the Revenue Authorities has the same finality as the Collector's order would have had if it had been upheld. It is obvious to us that the law contemplated that the full powers exercisable by the Civil Court in execution of a decree should be transferred to the Collector in certain cases and as we have pointed out above, one of the powers of the Civil Court is to pass an order which is final and cannot be questioned by a regular suit under Order XXI, rule 92, clauses 1, 2 and 3. In our opinion there is no force in this appeal. We, therefore, dismiss it with costs, including fees on the higher scale.

Appeal dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 924 OF 1919.

November 28, 1919.

Present:—Mr. Justice Adami.

Babu BANWARI LAL—APPELLANT

versus

RAM CHANDRA SINGH AND OTHERS—

RESPONDENTS.

Limitation Act (IX of 1908), s. 20—Part payment

BANWARI LAL v. RAM CHANDRA SINGH.

of principal by agent of debtor—Entry, whether must appear in handwriting of agent—Authority of agent, proof of—Interpretation of Limitation Law.

The law of limitation must be strictly interpreted. [p. 804, col. 1.]

Where an agent of a debtor makes a part payment of the principal debt, the payment, in order to give a fresh start of limitation under section 20 of the Limitation Act, must appear in the handwriting of the agent making it. Section 20 does not require that the payment should appear in the handwriting of the debtor himself. It must, however, be proved that the agent had authority to make the payment. [p. 803, col. 2; p. 804, col. 1.]

Appeal from a decision of the District Judge, Patna, dated the 28th May 1918, confirming that of the Officiating Munsif, 1st Court, Patna, dated the 30th January 1918.

Messrs. Purnendu Narayan Sinha and Sundar Lal, for the Appellant.

Mr. Rai Tribhuwan Nath Sahai, for the Respondent.

JUDGMENT.—The defendant in the suit, out of which this appeal arises, contracted to purchase a certain brick-kiln which contained some three lakhs of bricks. Many of the bricks, however, had disappeared and the defendant thereupon refused to pay the full price of the kiln and said he had paid sufficient. The plaintiff then sued him for Rs. 434 6-0 as price of the bricks. A decree was given for Rs. 134-12-0. It was on the 5th of August 1913 that the whole money was to have been paid, and the suit was not instituted till the 16th May 1917. Ordinarily, therefore, the suit would have been barred by limitation. The lower Courts, however, had found that there was a payment of Rs. 75 on behalf of the defendant through one Hussaini Mistry on the 8th of May 1914. It was found also that this payment of Rs. 75 was in part payment of the principal, and that no agreement had been come to between the parties as to payment of interest. The whole question before me turns on the point of limitation. Hussaini Mistry, by whom the payment was made, was a mason working for the defendant, who is a Pleader and wished to build a house with the bricks.

It is satisfactorily proved and admitted that Hussaini on the date above mentioned wrote in the book of the plaintiff "Rs. 75. Signed Banwari Babu—paid to Ram-

chandra Singh—Guineas 4—Rs. 60 cash; Rs. 15 per pen of Hussaini, 18-5-14."

The Hon'ble Mr. Purnendu Narain Sinha argues that this payment would not satisfy the condition of section 20 of the Limitation Act, which lays down that where part of a principal debt is paid by the debtor or by his agent duly authorised on his behalf, a fresh period of limitation starts from the time of such payment; provided that in the case of part payment of the principal debt, the fact of the payment appears in the handwriting of the person making the same. He contends that the payment must appear in the handwriting of the debtor, and not in that of a duly authorised agent, even if the payment is made by such agent. He relies on the Full Bench case of *Mukhi Haji Rahmuttulla v. Coverji Bhuja* (1). That case is, however, distinguishable. There the debtor had a duly authorised agent to pay the debt and that agent paid it, but the writing required by section 20 was made in the hand of the agent cashier.

The case of *Joshi Bhaishankar v. Bai Parvati* (2) is also distinguishable. In that case payment had not been made in the handwriting of the defendant, who seems to have paid the money, but in the hand of some one else at the request of defendant. In the case of *Santishwar Mahanta v. Lakhikanta Mahanta* (3) the case of *Mukhi Haji Rahmuttulla v. Coverji Bhuja* (1) is referred to, but it is clear there that the facts in the case had been misunderstood. In the case of *Santishwar Mahanta v. Lakhikanta Mahanta* (3) the endorsement was made by the debtor himself and the law has merely stated that the payment must be in the handwriting of the person making the payment. To me it seems clear that section 20 of the Limitation Act can have no other meaning than that the debtor or his duly authorized agent making the payment must make the fact of the payment appear in his own handwriting, that is to say, that if the agent makes the payment, it is the agent who is to make the entry.

(1) 23 C. 546 (F. B.).

(2) 26 B. 246; 3 Bom. L. R. 834.

(3) 4 Ind. Cas. 321; 13 C. W. N. 177; 35 C. 813; 5 M. L. T. 89.

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The next point raised is that section 20 requires the payment to be made by the duly authorised agent of the debtor, and that in this case there is no evidence that Hussaini was duly authorised by his employer. It is difficult to say what degree of authority is required, and whether it is necessary for the employer to have given his authority in writing. In this case the plaintiff admits that he receives the money from Hussaini and shows the entry in his book. Neither of the lower Courts has noticed this point and no attempt has been made to find out whether due authority had been given. It clearly lay on the plaintiff to prove the authority. The defendant denies that he made the payment through Hussaini, and in the plaint there is no mention of this payment through Hussaini. The said Hussaini was not the defendant's servant but merely a mason. The law of limitation must be strictly interpreted, and it seems that a due authority to the agent is required, and none is proved in this case. I think, on that point, it must be held that payment by a person, who is not proved to be authorised, must fail to save limitation. I, therefore, allow the appeal and set aside the decrees of the lower Courts with costs.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 271 OF 1918.

September 24, 1919.

Present: — Mr. Pridemore, A. J. C.

Lala RAMBHAROSA—DEFENDANT—

APPELLANT

versus

SUKHDAS AND OTHERS—PLAINTIFFS—

RESPONDENTS.

*Registration Act (XVI of 1908), s. 17 (1) (b)—
Compromise deed giving effect to arrangement arrived
at between parties, whether compulsorily registrable—
Document effecting division of property, whether
requires registration.*

A deed of compromise which gives effect to an arrangement arrived at between the parties about some estate is compulsorily registrable. Though a

document containing a mere recital of past acts and of a past partition or merely declaring the divided status of the parties need not be registered; yet when the document itself is a record of property subjected to a division which took place on the date on which it was written and which declares that in certain immoveable properties certain parties had shares and that their former rights in certain immoveable properties are extinguished, the document falls within the provisions of section 17 (1) (b) of the Registration Act and is compulsorily registrable. [p. 804, col. 2; p. 805, col. 1.]

Appeal against the decree of the Additional District Judge, Raipur, in Civil Appeal No. 275 of 1917, dated the 5th March 1918, arising out of Civil Suit No. 48 of 1917, in the Court of the 2nd Munsif, Raipur, dated the 3rd September 1917.

Mr. J. C. Ghose, for the Appellant.

Mr. M. P. Ohitale, for the Respondents.

JUDGMENT.—It is unnecessary to repeat the circumstances of the case, which are given in the judgments of the Courts below, for the argument here has been confined to one point, namely, whether Exhibit P-2 was rightly admitted in evidence. It is contended for the appellant that this document comes within the four corners of section 17 (1) (b) of the Registration Act of 1908 and as it has not been registered, it is inadmissible in evidence and further that under section 91 of the Evidence Act no evidence of the terms of the contract can be given. It seems to me that there is force in this contention. It is admitted here that the plaintiffs' title to sue rests on the agreement evidenced by Exhibit P-2. A previous partition, as stated in that document, had taken place and the status of the sharers in the village had been changed. As that partition was found not to work harmoniously, the parties agreed to the terms given in Exhibit P-2 and roughly divided the estate into two blocks. It is not denied that the lands in the hands of each party so exchanged by this document exceeded Rs. 100 in value. It has been held that a deed of compromise which gives effect to some arrangement arrived at between the parties about some estate is compulsorily registrable and though a document containing a mere recital of past acts and of a past partition or merely declaring the divided status of the parties need not be registered; yet when the document itself is a record of property subjected to a division which

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took place on the date on which it was written and which declares that in certain immoveable properties certain parties had shares and that their former rights in certain immoveable properties are extinguished, it seems to me that that document falls within the provisions of section 17 (1 (b) of the Registration Act. That is the case here. P.2 cannot, therefore, be proved for want of registration. Then section 91 of the Evidence Act steps in to prevent the evidence of the particular division evidenced by Exhibit P.2 being proved. Plaintiffs must, therefore, lose their case.

The other defendants have not appealed but as the question which I have decided in this case is common to the question in all three, I must alter the decree of the lower Appellate Court in favour of all. Plaintiffs' suit will stand dismissed with costs. Respondent will pay the costs of this appeal.

Appeal allowed.

ALLAHABAD HIGH COURT.

EXECUTION FIRST APPEAL No. 150 OF 1919.

January 17, 1920.

Present :—Justice Sir P. C. Banerji, KT.

Lala PHAKKI LAL—DECREE-HOLDER

—APPELLANT

versus

BRIJ MOHAN SINGH *alias* BACHCHA SINGH—JUDGMENT-DEBTOR—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 20 (2)—Execution of decree—Trees on ex-proprietary holding, whether liable to attachment and sale.

Trees existing on an ex-proprietary holding are appurtenant to the holding and are not liable to attachment and sale in execution of a decree, in view of the provisions of section 20 (b) of the Agra Tenancy Act.

Execution first appeal against the decision of the Subordinate Judge, Cawnpore, dated the 18th January 1919.

Mr. P. D. Tandon, for the Appellant.

Messrs. J. B. Lal and S. B. Sinha, for the Respondent.

JUDGMENT.—In this case the decree-holder applied for attachment of certain

trees on four plots of land of which the judgment-debtor is the ex-proprietary tenant. Some of these trees are fruit-bearing trees and others are timber trees. Upon the objection of the judgment-debtor the Court below has disallowed the application of the decree-holder and he has preferred this appeal. In my opinion, the decision of the learned Subordinate Judge is correct. The trees existing on an ex-proprietary holding are appurtenant to the holding and are not liable to attachment and sale in execution of a decree in the same way as the holding itself is not liable to attachment and sale. There can be no doubt that an ex-proprietary holding cannot be sold in execution of a decree in view of the provisions of the Tenancy Act. On the principles which apply to the land itself, the trees which exist on the land and appertain to it cannot be sold. The case is fully covered by the decision of the Full Bench in *Jugal v. Deoki Nandan* (1). The case of *Lalman v. Mannu Lal* (2) is distinguishable. The facts in that case were perfectly different and the question which arose in it was not the same as the question involved in the present case. The learned Vakil for the appellant contends that the object of the decree-holder is to sell the fruit of the trees mentioned in the application for execution. If the decree-holder wishes to sell the produce of the fruit-bearing trees as the property of the judgment-debtor, his application should be for the sale of the produce as it comes into existence and not for the sale of the trees, as is the application in the present case. I dismiss the application with costs, including fees on the higher scale.

Application dismissed.

(1) 9 A. 88 (F. B.)

(2) A. W. N. (1883) 175; 6 A. 19.

DUDALI UAYAL v. BELO BIBI.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 952
OF 1917.

June 19, 1919.

Present:—Justice Sir Ernest Fletcher, Kt., and
Mr. Justice Cuming.

DUDALI UAYAL AND ANOTHER—
PLAINTIFFS—APPELLANTS

versus

BELO BIBI AND OTHERS—DEFENDANTS
—RESPONDENTS.

*Mortgage, suit to enforce, against mortgagor and
purchaser of equity of redemption—Mortgagor, power
of, to transfer interest, whether can be gone into—
Procedure.*

In a suit to enforce a mortgage brought against the mortgagor and the purchaser of the equity of redemption, the question whether the mortgagor had a transferable interest ought not to be gone into. The sole question in such a suit is, whether the Court should enforce the security as regards the right, title and interest of the mortgagor, the case whether the mortgagor had a good interest to transfer being foreign to such suit. [p. 806, col. 2.]

Appeal against the decree of the 1st Additional District Judge, 24-Pergannabs, dated the 7th February 1917, affirming that of the Munsif, 3rd Court, Diamond Harbour, dated the 30th April 1915.

FACTS appear from the judgment.

Babu Nagendranath Ghosh, for the Appellants.—Plaintiffs are appellants before your Lordships. The suit was to enforce a mortgage. The real point is about the position and right of defendant No. 4 who had been added as a defendant. He turned out to be the landlord of the mortgaged property, who said that the defendants had no transferable interest and as such the mortgage could not be enforced, although the mortgage had been proved and the consideration had been proved to have legally passed. I submit that that is a point which is quite outside the scope of the present action. What has the Court to do in the present suit with the question whether the defendants (mortgagors) had a valid and good interest to transfer to the mortgagees? I question the authority of *Priya Sakhi Debi v. Bireswar Samanta* (1) in a case of this nature. That case is clearly distinguishable from the present one. The learned Judge thoroughly misdirected himself in widening the scope of the enquiry not warranted by the nature of the suit.

No one represented the Respondent.

(1) 37 Ind. Cas. 277; 21 C. W. N. 177; 44 C. 425;
27 C. L. J. 212.

JUDGMENT.

FLETCHER, J.—This is an appeal preferred by the plaintiffs against the decision of the learned Additional District Judge of the 24-Pergannabs dated the 7th February 1917, affirming the decision of the Munsif at Diamond Harbour. The plaintiffs brought the suit to enforce a mortgage, the defendants being the mortgagors and persons who were, or were supposed to be, the owners of the equity of redemption. The defendant No. 4, who apparently according to the plaintiffs' case was added or made a defendant on the ground that he was a purchaser of the equity of redemption, turned out during the course of the proceedings to be the landlord and he set up the case that the mortgagors had no interest which they could mortgage to the plaintiffs. The learned Judge in the lower Appellate Court agreeing with the Court of first instance held that, although the mortgage was proved and the consideration had been duly paid, the plaintiffs were not entitled to enforce the security on the ground that the mortgagors had not a transferable interest. *Prima facie* such a question ought not to be entered into in an ordinary suit to enforce a mortgage. The sole question in such a case is whether the Court should enforce the security as regards the right, title and interest of the mortgagors, and the case whether the mortgagors had a good interest to transfer to the mortgagees, or not is not a matter that ought to be gone into in a suit of this nature. Reliance was placed by the learned Judge of the lower Appellate Court on the decision of this Court in the case of *Priya Sakhi Debi v. Bireswar Samanta* (1), but that case is a very different case from the present one and the learned Judges in that case nowhere suggested that the course adopted in that case was one that ought to be adhered to in all cases. What they said was that the parties might by their conduct raise the question of title of a third party, but, having done so, they could not, at a later stage of the proceedings, question the course that had been adopted by the learned Judge with reference to that matter which *prima facie* ought not to have been raised or gone into in that suit. I think in a case like this, as in the majority of cases, the matter ought to be confined to what is the proper question in a mortgage suit, namely, whether the plaintiff

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iff is entitled to ask the Court to enforce the security. All questions of title either of the mortgagor or of anybody else are matters to be enquired into in other judicial proceedings. I think we ought to set aside the decision of the learned Additional District Judge and in lieu thereof declare that the mortgage-bond ought to be enforced in accordance with the terms of the law and remit the case to the Court of first instance to give effect to the above directions. The appellants are entitled to add their costs in all Courts to their mortgage security.

CUMING, J.—I agree.

Order set aside.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 120
OF 1919.

September 1, 1919.

Present:—Mr. Justice Krishnan.MUTHUSAMI ASARI—PLAINTIFF—
RESPONDENT—PETITIONER*versus*

ANGAYAKANNU ASARI—DEFENDANT

No. 2—PETITIONER—RESPONDENT.

Contract Act (IX of 1872), ss. 69, 70—Execution of decrees against family properties—Attachment of self-acquired properties of member—Payment to avoid attachment—Reimbursement, right to.

Where a person shows that in execution of a decree against family property, properties belonging to him exclusively as his self-acquisition were threatened with attachment as family properties, and to prevent attachment he paid the amount of the decree, he is entitled to obtain a refund of the amount so paid.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the order of the Court of the Temporary Subordinate Judge, Sivagunga, dated the 6th January 1919, in Execution Appeal No. 441 of 1918, in Small Cause Suit No. 646 of 1917.

Mr. T. M. Ramasamy Ayyar, for the Petitioner.

Messrs. K. Rajah Ayyar and V. Ramasami Ayyar, for the Respondent.

JUDGMENT.—The money in question was paid by the respondent (2nd defendant-petitioner) when execution was taken out against the family properties in his

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hands. The warrant of attachment is no doubt not very clear about what property was to be attached, but I think the meaning was to attach properties in his possession which were family properties. That being so, respondent can obtain a refund of the money paid by him only if he shows that certain properties belonging to him exclusively as his self-acquisition were threatened to be attached and to prevent such attachment he made the payment in question and that he had no family properties in his hands at all at the time of attachment. I am unable to accept the Subordinate Judge's disposal of the case on affidavits as satisfactory. The question should be properly tried on evidence. It is only if the respondent proves that his payment was an involuntary one occasioned by the decree being attempted to be executed against his own properties improperly that he will be entitled to the refund claimed. See *Kanhaya Lal v. National Bank of India Ltd.* (1).

The order of the Subordinate Judge is set aside and the case remanded to him for fresh disposal according to law. Costs will abide and follow the result.

M. C. P.

*Decree set aside;**Case remanded.*

(1) 18 Ind. Cas. 949; 40 C. 598; 17 C. W. N. 541; (1913) M. W. N. 406; 13 M. L. T. 406; 11 A. L. J. 413; 17 C. L. J. 478; 15 Bom. L. R. 472; 184 P. L. R. 1913; 25 M. L. J. 104; 40 I. A. 56 (P. C.).

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 190 OF 1917.

December 12, 1919.

Present:—Mr. Justice Das and Mr. Justice Foster.

DEBENDRA PRASAD SUKUL—

APPELLANT

versus

SURENDRA PRASAD SUKUL AND

OTHERS—RESPONDENTS.

Probate and Administration Act (V of 1881), ss. 4, 23, 64, 69, 70, 73—Letters of Administration, application for grant of—Caveator setting up para

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mount title—Court, whether can go into question of paramount title—Caveator not applying for grant, effect of.

A Court of Probate is not only entitled but even bound to enter into questions of title, if it is necessary to decide that question, in order to determine which of the two contesting parties is entitled to the grant of Letters of Administration. But where a caveator does not himself apply for Letters of Administration, but merely sets up a paramount title, *e. g.*, that he being an adopted son is entitled to the whole estate, not by inheritance but by survivorship, the Probate Court is not entitled to go into the merits of the title set up by the caveator and the nature of the estate left by the deceased. [p. 809, col. 2.]

Ochavaram Nanabhai Haridas v. Dolatram Jamietram Nanabhai, 28 B. 644; 6 Bom. L. R. 936, followed.

Sections 64, 69 and 70 of the Probate and Administration Act do not authorise a Probate Court to discuss the question of paramount title set up by a caveator, who puts forward title to the property not for the purpose of having a grant to himself, but for the purpose of preventing a grant to others. [p. 811, col. 2; p. 812, col. 1.]

Nishikant Chatterjee v. Ashutosh Mukherjee, 23 Ind. Cas. 296; 17 C. W. N. 613, followed.

Under section 23 of the Probate and Administration Act if the person making the application is, according to the law of inheritance, entitled to the whole or a part of the property and alleges the fact that there is property of that nature, and there is no other applicant for Letters of Administration, the applicant is entitled to the grant. [p. 813, col. 2.]

Appeal against the decision of the District Judge, Muzaffarpur.

Messrs. *K. B. Dutt, L. N. Singh, Kulwant Sahay* and *Rai Tirbhuwan Nath Sahai*, for the Appellant.

Mr. Hasan Imam, Khan Bahadur Fakhrudin and *Mr. Rajendra Prasad*, for the Respondents.

JUDGMENT.

DAS, J.—This appeal arises out of an application for Letters of Administration to the estate of one Shashi Kumar Sukul, who died on the 1st of February 1917. Shashi Kumar was the son of one Sheonandan Shukul and was the grandson of Guru Prasad Shukul, the common ancestor of the parties. Guru Prasad died leaving four sons, Jamuna, Moti, Kunta and Sheonandan. The petitioners, Surendra and Rajendra, are the sons of Jamuna, the petitioners Bindeswar and Batekrishna are the sons of Moti, and petitioner Birendra is the son of Kunta, and Debendra, who is the opposite party

in this proceeding and the appellant before us, is another son of Kunta. I ought to state that the application was originally made on behalf of Surendra, Rajendra, Bindeswar and Batekrishna and the petitioners alleged that they, together with Debendra and Birendra, were the heirs of Shashi Kumar and were entitled to the grant of Letters of Administration. They stated that they had asked Debendra and Birendra to join in the application with them, but that they had refused. It appears that subsequently Birendra changed his mind and separately applied to be included in the grant of Letters of Administration to the estate of Shashi Kumar; so that we must regard Surendra, Rajendra, Bindeswar, Batekrishna and Birendra as the applicants for Letters of Administration. Their case is, as I have stated before, that they together with Debendra are the heirs of Shashi Kumar and are, therefore, entitled to a grant of Letters of Administration. This application was opposed by Debendra, and it is necessary to state here, and at once, the grounds upon which he opposed the application made on behalf of the petitioners. It appears that he opposed the grant substantially on two grounds; first on the ground that he was adopted in the Kritrima form by Shashi Kumar and that on such adoption he became joint with Shashi Kumar, and took the entire property held by Shashi Kumar, prior to his adoption, by survivorship, and that consequently there was no intestacy at the time of the death of Shashi Kumar and that no Letters of Administration could be granted to the estate of Shashi Kumar. That was the first position which was specifically taken up by him. His next point was that assuming that he was not so adopted, so far as Surendra, Rajendra, Bindeswar and Batekrishna are concerned, they are not the heirs of Shashi Kumar at all, inasmuch as their fathers Jamuna and Moti were not full brothers of Sheonandan but half brothers, the allegation of Debendra being that his father Kunta was a full brother of Sheonandan. It will be noticed, however, that though he puts forward his title in the first place exclusively, and in the second place jointly with Birendra, he does not himself apply for Letters of Administration at all; and indeed he cannot,

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because his whole case is that he was adopted by Shashi Kumar and that on such adoption he became a member of the joint family with Shashi Kumar, and that he succeeded to the property by survivorship and not by inheritance, and, therefore, if his case as to adoption is correct, Shashi Kumar left no estate to which Letters of Administration can be taken. On the other hand, so far as the second position taken up by him is concerned, undoubtedly he could apply for Letters of Administration, but it is useful to remember that he did not apply for Letters of Administration and merely contented himself with opposing the application made on behalf of the petitioners. I ought to mention, however, that in this Court the appellant applied to amend his petition of objection by inserting the following paragraph in the body of his petition: "That assuming but not admitting that the late Babu Shashi Kumar Shukul left any separate estate which your petitioner did not take by survivorship, your petitioner submits that he as next-of-kin to the deceased, and under the circumstances of the case, is entitled to the grant of the Letters of Administration in preference to the applicants". In my view I would not be justified in allowing this amendment at this late stage, especially as he does not apply even now for a grant of Letters of Administration in due form. And such an application must obviously be made not here, but in the District Court.

Upon the pleadings of the parties, the learned District Judge who heard the case framed certain issues. They are:—

(1) Are the applicants sons of full brothers of Babu Sheonandan Prasad Shukul, father of the deceased?

(2) Was Debendra Prasad Shukul adopted by the deceased Shashi Kumar Shukul as a son in the *Kritrima* form? If so, is such adoption valid and legal?

(3) Are the parties to this case subject to the Mithila or the Benares School of Hindu Law?

(4) Are the applicants entitled to Letters of Administration as claimed by them?

In my view the only issue which properly arose in the case on the pleadings between the parties is the 4th issue, namely, are the applicants entitled to Letters of Administration, as claimed by them,

Issue No. 1 would undoubtedly have arisen if Debendra had in fact applied for Letters of Administration, but for the reason which I shall give in the course of my judgment, inasmuch as he was not an applicant for Letters of Administration, that issue did not at all arise. So far as issues Nos. 2 and 3 are concerned, I entertain no doubt at all that these were not questions for a Court dealing with testamentary and intestate matters to decide. The learned District Judge, however, dealt with all these questions very fully and very elaborately and answered all the questions which he put to himself in favour of the petitioners and against the objector. The objector appeals and on his behalf Mr. K. B. Dutt proposed to advance every contention that had been advanced on behalf of his client in the Court below, but in my view any discussion of the question of adoption or of the other question, namely, whether Jamuna and Moti were full or half brothers of Sheonandan, is wholly unnecessary in this case. I entertain no doubt at all that a Court of Probate is not only entitled but even bound to enter into questions of title, if it is necessary to decide that question in order to determine which of the two contesting parties is entitled to a grant of Letters of Administration, but that is not the point here. The position of the objector is not that he is entitled to a grant of Letters of Administration because, as the son of Shashi Kumar, he is preferentially entitled to a grant of Letters of Administration. His position on the other hand is, that no one is entitled to a grant of Letters of Administration, because he was jointly entitled to the estate before the death of Shashi Kumar and is solely entitled to it now, not by inheritance but by survivorship. It will be noticed, therefore, that it is the paramount title which he puts forward in issue in this matter, and the question for our determination is, is a Court of Probate bound to go into a question of paramount title in matters dealing with a grant of Letters of Administration?

Mr. K. B. Dutt on behalf of the appellant urges, and very strongly and forcibly urges, that it is the "interest" of the applicant which gives him title to a grant of Letters of Administration. That proposition may be conceded at once. But the applicants do allege an "interest" in their peti-

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tion. They say that Shashi Kumar died leaving the petitioners as the sons of Jamuna and Moti, and Debendra and Birendra as the sons of Kunta, his next heirs. I am not dealing at present with the second point that has been raised by Mr. K. B. Dutt, namely whether Jamuna and Moti were full brothers or half brothers of Sheonandan. I propose to discuss it later. But in discussing the first point raised by Mr. Dutt on the pedigree itself as furnished by the petitioners and as admitted by the appellant they are undoubtedly the heirs of Shashi Kumar. There is no dispute about that, but Debendra's position is: "I am going to prove my adoption. When once I prove my adoption, I am going to contend that I became a member of the joint family as soon as I was adopted, and that Shashi Kumar left no estate at all to which Letters of Administration could be taken in these proceedings." In other words, the question of paramount title is involved in the contention which Mr. Dutt puts forward on behalf of his client.

It is, therefore, necessary to see how the Courts of Law have dealt with these matters. The leading case on the subject so far as Indian Courts are concerned is the case of *Kulbantia (Raghoobur Hazam) v. Bahadoor Hazam* (1). That was a case in which Letters of Administration had already been granted by the Court to the brother of the deceased. Thereupon the widow of the deceased came to Court and asked the Court to cancel the letters issued in favour of the brother and to grant to her the Letters of Administration, on the ground that the property left by her husband was his separate property and that, therefore, she as the Hindu widow was entitled to inherit that property. This position was contested by the brother; his point was that he and the deceased were joint and that, therefore, there was no estate which could be inherited by the widow. Mr. Justice Sale, who had considerable experience in these matters, came to the conclusion that the question whether the deceased was joint with his brother and left joint property did not arise in the case at all. He proceeded merely upon the allegation of the widow, namely, that there was separate property, and held that as a widow was entitled to succeed to the separate

(1) 3 C. W. N. 277 notes.

property of her husband under the Mitakshra School of Hindu Law, she was entitled to a grant of Letters of Administration to the estate of her deceased husband.

Now this case has been consistently followed not only on the Original Side of the Calcutta High Court, but also on the Appellate Side of the Calcutta High Court. It is necessary to say this in view of the argument that the decision reported as *Kulbantia v. Bahadur Hazam* (1) was a decision based on the practice that prevails on the Original Side of the Calcutta High Court.

The next case is the case of *Raghu Nath Misser v. Musammat Pate Koer* (2) decided by the Appellate Side of the Calcutta High Court. The applicant for Letters of Administration was the widow of the deceased and she applied for a grant of Letters of Administration. The brother of the deceased entered caveat and opposed that grant, on the ground that there was no estate to which administration could be taken because he was joint with his deceased brother and took by survivorship all that belonged to the joint family. The learned District Judge of Shahabad, relying on the case reported as *Kulbantia (Raghoobur Hazam) v. Bahadoor Hazam* (1), held that it was not open to him to enter into the question of title at all. The High Court upheld that view. It will be useful to cite the following passages from the judgment of the High Court:—

"Of course we are aware," said their Lordships, "that when any one dies in the Mofassil and Letters of Administration are applied for, endeavours are always made to convert such a proceeding into a regular trial in which questions of title are raised and in which the nature of the estate left by the deceased person is hotly contested. This tendency on the part of Mofassil litigants is wrong and should be put a stop to, and we agree with the ruling laid down by the learned Judge who decided the case of *Kulbantia (Raghoobur Hazam) v. Bahadoor Hazam* (1) and see no reason to interfere with the decision of the District Judge in this case." This is, therefore, an authority for the proposition that the view which was established on the Original Side of the Calcutta High Court in the case reported as *Kulbantia (Raghoobur Hazam) v. Bahadoor Hazam* (1) is the right view so far as Mofassil Courts also are concerned.

(2) 6 C. W. N. 345.

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The next case is the case of *Ochavaram Nanabhai Haridas v. Dolatram Jamietram Nanabhai* (3). Identically the same point was raised in that case. The application for Letters of Administration was on behalf of the son of the deceased, and this was opposed by a certain person who alleged that he and the deceased were joint, and that, therefore, there was no estate which was left by the deceased to which Letters of Administration could be granted. The judgment is of Sir Lawrence Jenkins, and he held on a review of all the authorities, Calcutta, Bombay, and Allahabad, that the caveator in that case could not be allowed to take up such a position. He said that when the petitioner alleged property in the deceased's estate, that was sufficient. In the latter part of his judgment, dealing with the question whether there was any prejudice to the caveator, that distinguished Judge said as follows:—

"The grant in no way hurts or prejudices the caveator for it is general in its terms, specifying no item of property and prejudging nothing to the detriment of the appellant. It has been suggested that a grant of Letters might involve peril to the appellant's interest, but this is not so, as on the grant of Letters adequate security is taken."

These are three cases in favour of the respondents in this case. In my judgment, identically the same question is raised in this case and must be decided by the application of the same principle.

But then it is argued by Mr. Dutt that we are conclusively bound by the Statute, and that if the Statute declares that such questions have got to be gone into in an application for Letters of Administration, there is no possible escape from that position. He relies on sections 64, 69, 70 and section 73 of the Probate and Administration Act, and I think also on section 23 of that Act. Section 64 provides that "application for Letters of Administration shall be made by petition distinctly written as aforesaid" and stating amongst other things "the right in which the petitioner claims." The argument of Mr. K. B. Dutt on section 64 of the Probate and Administration Act is this: He says that as soon as the petitioners state the right in which they claim, it is open

to him to deny such a right, and that, therefore, there is an issue between them on the assertion of the petitioners and the objection of the objector, and the Court is bound under the provisions of the Civil Procedure Code to decide that issue. In my view, speaking with great respect, there is a complete misapprehension in the position taken up by Mr. K. B. Dutt. I concede that the objector is fully entitled to deny the right in which the petitioner claims; but what is the right? He can deny the correctness of the pedigree upon which the petitioners assert that they are the next-of-kin of the deceased. It was undoubtedly open to Debendra to come to Court and challenge the pedigree furnished by the petitioners. It was open to Debendra for instance to say that Surendra, Rajendra, Bindeswar and Batekrishna were not the sons of Jamuna and Moti at all. That is position which was available to him in this case. The petitioners clearly state the right in which they claim. That position was not disputed or denied by Debendra, but Debendra set up a separate case, namely that he was the adopted son of Shashi Kumar, and that, therefore, Surendra, Bindeswar, Batekrishna and Birendra were not entitled to a grant of Letters of Administration. In my view it was open to Debendra to set up his adoption only if he claimed to be preferentially entitled to a grant of Letters of Administration. If indeed the pedigree itself was disputed, then undoubtedly the Court would have to determine the question of the pedigree. Again if Debendra had asked for Letters of Administration himself on the ground that as the adopted son of Shashi Kumar, he was preferentially entitled to a grant, the Court would have to determine the question of adoption. Mr. K. B. Dutt says that as soon as the question of interest is before the Court, it is open to him to show his preferential title. I agree that it was open to him to show his preferential title, if he were an applicant for a grant of Letters of Administration, but in my view it was not open to him to go into that question since he was not an applicant for Letters of Administration, though he was entitled to challenge the pedigree upon which the petitioners applied for the grant of Letters of Administration.

Mr. K. B. Dutt next relies upon section 69 of the Probate and Administration Act. I do not think that this section is really rele-

(3) 28 B. 644; 6 Bom. L. R. 966.

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vant; all that it provides is "In all cases it shall be lawful for the District Judge or District Delegate, if he thinks fit, amongst other things, to issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of Probate or Letters of Administration." This is a very necessary proceeding, since it is essential that the Court ought to grant Letters of Administration only to a person having an interest in the estate, and it is on this view that citation was issued to Debendra, but I do not think that the mere fact that citation was issued to Debendra entitled him to come and oppose the grant to Surendra and others on the ground that he was the adopted son of Shashi Kumar. Section 70 of the Probate and Administration Act merely provides for caveats. That section is hardly relevant here; all that it entitled Debendra to do was to come before the Court and to challenge the title of Surendra and others to a grant of Letters of Administration, on the ground that the pedigree filed by them was not a correct pedigree. It did not, in my view, invite him to come and put forward his title to the property, not for the purpose of having a grant to himself, but for the purpose of preventing a grant to others.

Section 73 merely provides that "A District Delegate shall not grant Probate or Letters of Administration in any case in which there is contention as to the grant, or in which it otherwise appears to him that Probate or Letters of Administration ought not to be granted in his Court." Mr. K. B. Dutt only relied upon this section in order to explain the meaning of the word "contention." He says, by "contention" is understood the appearance of any one in person or by his recognised agent or by a Pleader duly appointed to act on his behalf to oppose the proceeding. I quite see that the citation served on Debendra entitled him to come and to oppose the proceeding, but the question is, on what ground was he entitled to oppose the proceeding? In my view, if the Calcutta High Court and Bombay High Court have correctly decided the cases to which I have referred, then it was not open to Debendra to oppose the proceeding on the ground that there was no estate at all to which Letters of Administration could be taken.

The only other sections to which I ought to refer are section 23 and section 4 of the Probate and Administration Act. Section 23 provides as follows:—"When the deceased has died intestate, administration of his estate may be granted to any person, who, according to the rules for the distribution of the estate of an intestate applicable in the case of such deceased, would be entitled to the whole or any part of such deceased's estate." Mr. Dutt's contention is, that it must be shown in the first place that there is an estate left by the deceased, before Letters of Administration can be granted to that estate. Undoubtedly this contention is correct, but in my view that question must be decided, as it has been held by the Calcutta High Court and Bombay High Court, upon the allegation made in the petition. There is no question that the Court can only grant Letters of Administration to an estate; if there is no estate, clearly there cannot be a grant of Letters of Administration, but the question in this case is between two parties, one claiming a paramount title in the estate, the others claiming that estate as the heirs of the deceased. If it is once conceded that the question of paramount title cannot possibly be gone into in Probate proceedings, then surely the only way in which the Court can deal with these matters is by looking at the allegation of the petitioners. If there is no estate, then clearly the person to whom the Letters of Administration are granted gets nothing at all. As Sir Lawrence Jenkins pointed out, the grant is general in its terms specifying no item of property and prejudging nothing to the detriment of any person at all. A question of this nature can only be dealt with in a Court that can deal with title. In my view, therefore, so far as the first position taken by the appellant is concerned, I hold that it is not a position which was available to him in these proceedings. I ought to say that under the specific words of section 4 of the Probate and Administration Act nothing can vest in an executor or administrator which was the subject of joint family and which would otherwise have passed by survivorship. I hold, therefore, that the first position taken up by the appellant was not available to him at all, and that it is wholly unnecessary to enter

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into the question of adoption in this case.

So far as the second point is concerned, it is a question of some difficulty. Clearly it is a matter of pedigree. Debendra asserts that the pedigree furnished by the petitioners was not a correct pedigree. He asserts that Jamuna and Moti were not full brothers of Sheonandan, and that, therefore, they cannot succeed to the property of Shashi Kumar, assuming that Shashi Kumar left any property at all. But there is one matter which we must take into consideration. Even on his allegations Birendra was clearly entitled to a grant of Letters of Administration, because Debendra does not deny that Birendra would be, on this view, one of the heirs of Shashi Kumar. Therefore, the position is this: Birendra is an applicant for Letters of Administration together with Surendra and others; Birendra sides with Surendra and others. Debendra opposes the grant to Birendra and others, but does not claim a grant for himself. In this view, ought the Court to have gone into the question raised by the appellant, namely that Jamuna and Moti were not full brothers of Sheonandan and that, therefore, Surendra and others were not entitled to a grant of Letters of Administration? In my opinion, having regard to the position taken up by Debendra, the Court was not entitled to go into that question. I am fortified in this opinion by the decision of Mr. Justice Fletcher in the case of *Nishikant Chatterjee v. Ashutosh Mukherjee* (4). In that case the husband of the deceased applied for Letters of Administration. The lady, it seems, died leaving her surviving besides her husband a brother upon whom citation was issued; he entered caveat and alleged that the property left by his sister was her Jantuka Stridhan and so he was the preferential heir. He did not ask for a grant of Letters of Administration to himself. The only applicant, therefore, for the Letters of Administration was her husband who, if the case set up by the caveator was true, was not the heir of the lady at all, and, therefore, was not entitled to a grant of Letters of Administration. Mr. Justice Fletcher in the course of the arguments

put that question specifically to the Counsel who appeared for the brother: "Do you apply for Letters of Administration?" To that the only answer was, "I have stated everything in my written statement." Mr. Justice Fletcher on a consideration of all the authorities, that were placed before him, came to the conclusion that the question whether the property was Jantuka Stridhan of the lady or not, need not be gone into in the proceeding before him. He said as follows:—"Under section 23 of the Probate and Administration Act, on the allegations contained in that petition, the husband would be the person who, according to the rules for the distribution of the estate of the intestate, is entitled to the whole or a part of the estate, the husband having alleged in his petition that part of the property is the Jantuka Stridhan of his wife". Stopping here for a moment, I would say that under section 23 of the Probate and Administration Act on the allegations contained in the petition before us the persons who applied for Letters of Administration would be the persons who, according to the rule for the distribution of the estate of the intestate, are entitled to the whole or a part of the estate, the petitioners having alleged that the deceased died, leaving them and Debendra and his brother as his heirs and leaving the property within the jurisdiction of the Court. Mr. Justice Fletcher continued as follows:—"It is sufficient under the Probate and Administration Act if the person making the application is, according to the rules for the distribution of the estate of the deceased, entitled to the whole or a part of the property and alleges the fact that there is property of that nature." Then he said that as there was no other application before the Court, and as it was necessary that the estate should be administered, Letters of Administration should be issued to the applicant. In my view this is a point which we must prominently keep before our minds. Debendra alleges that he and Birendra are the heirs of Shashi Kumar. So far as he is concerned, he does not apply for Letters of Administration. On his own showing Birendra would clearly be entitled to a grant of Letters of Administration, and the learned District Judge has undoubtedly made a grant in favour of Birendra together with others. So it was unnecessary for the

(4) 23 Ind. Cas. 296; 17 C. W. N. 613.

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Court to go into this question, having regard to the fact that Debendra was not an applicant for the Letters of Administration himself, and Birendra did not object to Surendra and others being associated with him. In my view, therefore, although I do not discuss the various questions of fact that have been raised in this appeal at all, I hold that Letters of Administration have been rightly granted to the petitioners.

I ought to point out that the finding of the learned District Judge on the question of adoption will not be binding on the parties in any subsequent litigation, because we hold that that was not a matter which ought to have been gone into in the proceeding at all.

We assess the hearing fee at ten gold mohurs. Both the appeals are dismissed. Letters of Administration will now issue.

FOSTER, J.—I agree.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 67-B OF 1919.

October 9, 1919.

Present:—Sir Henry Drake-Brockman,
Kt., J. C.

BALWANTRAO DOWLATRAO—DEFEND-
ANT NO. 2—APPELLANT

versus

NARHAR GANGARAM AGNIHOTRI
—PLAINTIFF—RESPONDENT.

Mortgage—Mortgagee entitled to possession—Failure to take possession—Interest, whether can be recovered.

Where a mortgagee who is entitled to the possession of the mortgaged property omits to take any steps to obtain possession under his mortgage, he is not entitled to recover damages for the period he is out of possession. [p. 815, col. 2.]

Appeal against the decree of the Additional District Judge, Akola, in Civil Appeal No. 122 of 1918, decided on the 20th of November 1919, arising out of Civil Suit No. 106 of 1915, decided on the 20th of June 1918 by Munsif No. 3, Akola.

Mr. M. B. Niyogi, for the Appellant.

JUDGMENT.—The only question raised in this second appeal is whether the lower

Appellate Court was right in refusing to the appellant any interest under the mortgage in suit for the period during which the mortgagee remained out of possession.

The deed sued upon (Exhibit P-1) bears date the 28th May 1889, and is styled "possessory mortgage-deed," the material portion of which has been translated as follows:—

"Both of us together have borrowed from you a debt of Rs. 250 (in words Rs. two hundred and fifty) British currency. You paid us this amount in cash as consideration and we received it personally. No dispute remains about receipt of consideration. In lieu of this amount, which is without interest, we have mortgaged to you our immovable property, namely, field survey number No. 2, area 27 acres 29 *gunthas*, rental Rs. 19, situate at Mouza Pongra, Taluqa Balapur, District Akola, bound on the east by No. 18, on the west by No. 1, on the south by No. 4 and on the north by No. 3 and standing in the name of mortgagor No. 2 Chahadu. There is no co-sharer, etc., in this field. As this field belongs to us both, we have this day given it in your possession. There is one mango tree in this field, but we have no right to it. All other trees, namely, *nim* trees, four *babul* trees and 2 *ayan* trees, belong to us solely. As regards repayment of this amount we agree to repay it in full on the seventh year from this day (by making repayments) from 1299 to 1305 Fasli and shall then get our property released from you and take back the document. If your amount is not paid as agreed upon, you should consider the property in your possession as your own, sell it and get your amount satisfied."

The plaintiff, who is the respondent in this Court, sued to redeem and the appellant's defence was that after remaining out of possession till 1901, the mortgagee had an account made and took over the mortgaged property in lieu of Rs. 1,005, the amount then found due: alternatively he pleaded that he should be allowed interest at 2 per cent. per mensem for the period during which he was out of possession. The trial Judge allowed the appellant this interest from the date of the bond up to the date of the decree and setting against the total amount thus reached the principal and interest expressly secured by the mortgage

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ordered the appellant and his co defendant, Yashwant Rao, besides delivering possession to pay the plaintiff Rs. 1,305-8-0.

The present respondent appealed to the District Court and an Additional District Judge, holding that no interest should be allowed for the period before the mortgagee took possession of the mortgaged field, reduced the amount to Rs. 250.

In this Court it is contended on behalf of the appellant that interest to the extent of Rs. 600 for the period between the date of the deed and the date of obtaining possession should have been allowed by way of damages.

It is urged in the first place that the mortgage is a simple mortgage rather than a usufructary one. I am referred to the following cases as indicating that the interest claimed should have been allowed:—*Sadashiv v. Vyankatrao* (1), *Yashwant Narayan v. Vithal Divakar* (2), *Marturu Subbamma v. Gadde Narayya* (3).

The first appears to be in no way in point. There the mortgage was a purely usufructuary one, the mortgagee being given no power of sale. The mortgage in the second case was held not to be a usufructuary one at all, the special stipulations inserted to secure the due payment of the interest during the continuance of the mortgage being read as merely ancillary. In the third case it was held that where a mortgagor fails to deliver possession to his mortgagee, a usufructuary mortgage does not come into existence and the mortgagee is entitled to bring a suit for sale of the mortgaged property.

It must be conceded that the mortgagee might have sued for possession, but on the findings of the trial Judge it must be taken, as held by the lower Appellate Court, that the mortgagor was not to be blamed for the mortgagee's omission to take possession. The position then is similar to that in *Jhunku Singh v. Chatkan Singh* (4), where, however, the mortgage-deed actually provided for repayment of interest if any defect were found in the mortgaged property or should arise in the mortgagee's possession. It was there held, on the principle underlying the

decisions in *Partab Bahadur Singh v. Gajadhar Bakhsh Singh* (5) and *Khuda Bakhsh v. Alim un-nissa* (6), that the mortgagee's acquiescence in the situation deprived him of his right to any interest under the express stipulation. *Mahadaji v. Joti* (7), a case relied upon by the lower Appellate Court, is also against the appellant: if he never took the trouble to obtain possession, there is no reason in equity why he should recover damages for not getting it. There is no room here for departing from the actual contract between the parties, for the mortgagee, though not obtaining possession for some years, eventually entered and held for a long time under the contract. Having so entered it ceased to be in his power to sue for sale on the ground that the contract to deliver possession had been broken. There is consequently no force in the contention that if a suit for the mortgage money and for sale of the mortgaged property had been brought under sections 68 and 67 of the Transfer of Property Act, interest would doubtless have been awarded.

I have also been referred to the decision of the Privy Council in *Lala Chhajmal Das v. Brijbhukan Lal* (8) where interest *post diem* was allowed as damages, although the bond sued upon omitted to provide for further interest after the expiration of the period allowed for payment of the principal with interest up to the *dies datus*. In that case no question of acquiescence in non-payment arose, and I am unable to see that it has any application to the facts of the present case.

The decision of the lower Appellate Court is, in my opinion, correct and the appeal is dismissed with costs. In the Courts below costs will be paid as already ordered.

Appeal dismissed.

(5) 24 A. 521 (P. C.); 29 I. A. 148; 7 O. W. N. 97; 4 Bom. L. R. 845; 8 Sar. P. C. J. 310.

(6) 27 A. 313; A. W. N. (1904) 273; 1 A. L. J. 715.

(7) 17 B. 425.

(8) 22 I. A. 199; 17 A. 511 (P. C.); 6 Sar. P. C. J. 624.

(1) 20 B. 296.

(2) 21 B. 267.

(3) 43 Ind. Cas. 4; 41 M. 259; 33 M. L. J. 623; 22 M. L. T. 429; 6 L. W. 738; (1917) M. W. N. 828 (F. B.).

(4) 2 Ind. Cas. 221; 31 A. 325; 6 A. L. J. 247.

ISHRI MAL v. UMRAO SINGH.

ALAGIASUNDARAM PILLAY v. MIDNAPORE ZEMINDARY CO., LTD.

ALLAHABAD HIGH COURT.

EXECUTION FIRST APPEAL No. 213 OF 1919.

January 19, 1920.

Present:—Justice Sir George Knox, Kt.

Lala ISHRI MAL AND ANOTHER

—PETITIONERS

versus

Babu UMRAO SINGH AND OTHERS

—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), s. 144—
Decree awarding costs—Costs realised—Decree reversed—
Restitution—Court, duty of.

A party realising costs awarded to him under a decree must refund the amount on reversal of the decree, quite apart from the fact that the property in the suit was given to a charity or applied to any other purpose, as the Court is bound, under section 144 of the Civil Procedure Code, to restore the parties to the position which they would have occupied but for the decree which was subsequently reversed.

Execution first appeal against the decision of the Subordinate Judge, Meerut, dated the 8th May 1919.

Mr. M. L. Agarwala, for the Appellants.

Mr. G. Agarwala, for the Respondents.

JUDGMENT.—Ishri Mal and Sohan Lal Jains brought a suit against Umrao Singh, Sheo Lal and others, also Jains. The suit was dismissed by the trial Court. An appeal was made to this Court and the case was sent back but before the decision of this Court was arrived at, costs which had been awarded to defendants were realised by the defendants from the plaintiffs. The case had been sent back for arbitration and an award was given in favour of Ishri Mal and Sohan Lal. The award ends with the words: *Kharcha fariqain zimma fariqain*. Ishri Mal and Sohan Lal applied to the Subordinate Judge for restitution of the costs which they had paid in. The application was objected to, and the objection was that the money had been paid to the Treasurer of the Jain Deo Asthan to which the suit had referred. The contention is that the applicants are entitled to the costs and to have restitution. The opposite party rely upon the case of *Venkatasami Pillai v. Kuppaves Ammal* (1). The facts of that case appear to me to be quite different from the one which is now before me. The parties according to section 144 of the Code of Civil Procedure can ask to be

placed in the position which they would have occupied but for the decree which has undoubtedly been reversed, and the Court is bound to make such restitution. We are in no way concerned as to whether the property was given to the Deo Asthan or to any other charity or applied to any other purpose. The order of this Court is that Rs. 120 be re-paid to the applicants with interest at the Court rate and costs of the application. A contention was also made to the effect that there was nothing in the decree following the award about costs. I do not think this objection is entitled to weight.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2045 OF 1918.

September 4, 1919.

Present:—Mr. Justice Bakewell and

Mr. Justice Odgers.

ALAGIASUNDARAM PILLAY AND OTHERS

—PLAINTIFFS NOS. 1, 3 AND 4—APPELLANTS

versus

THE MIDNAPORE ZEMINDARY CO., LTD.,

THROUGH ITS MANAGER P. V. SUBSRA-

MANI IYER, AND OTHERS—DEFENDANTS AND

OTHER PLAINTIFFS—RESPONDENTS.

Madras Hereditary Village Offices Act (III of 1895), ss. 13, 21—Madras Proprietary Estates Village Service Act (II of 1894), ss. 9, 10, 13, 15—"Succession," meaning of, whether includes right to be appointed to newly created village office—Suit for declaration that a person is not entitled to village office, maintainability of—Jurisdiction of Civil Court.

Per Bakewell, J.—The words "claim to succeed" in section 21 of the Madras Hereditary Village Offices Act should not be understood in the strict sense of the acquisition of an interest upon the death of a person, but mean the right to be appointed upon a vacancy in office. They include, therefore, the right to be appointed to a newly created office. [p. 818, col. 1.]

A suit for a declaration that a person is or is not entitled to a village office is not cognizable by the Civil Courts. [p. 818, col. 2.]

Per Odgers, J.—The words "claim to succeed" in section 21 of the Madras Hereditary Village Offices Act do not include any claim to be appointed in the first instance to any of the village offices set forth in the Act. [p. 819, col. 1.]

A suit merely for a declaration that a person is entitled to a village office is cognizable by the Civil Courts. [p. 819, col. 1.]

ALAGIASUNDARAM PILLAI v. MIDNAPORE ZEMINDARI CO. LTD.,

Second appeal against the decree of the District Court, Madura, in Appeal Suit No. 235 of 1917, preferred against the decree of the Court of the Principal District Munsif, Dindigul, in Original Suit No. 112 of 1915.

FACTS.—A village of which the father of the plaintiffs was the last Karnam was sub-divided into two, to one of which the 1st plaintiff was appointed Karnam. The other two plaintiffs were minors at the time of sub-division and so Government appointed the 2nd defendant, who was the father's brother's daughter's son of the plaintiffs, to be the Karnam of the new village. Plaintiffs thereupon brought a suit to the effect that they were entitled to the post as they were hereditary holders of the office. It was admitted that the 1st plaintiff, being already a Karnam of one village, could not be Karnam of another village as well. The lower Appellate Court dismissed the suit.

Mr. A. Krishnaswamy Aiyar (with him Mr. K. O. Gopaladesikan), for the Appellants.—A hereditary Karnam has a freehold in his office which cannot be disposed of at the pleasure of Government.

In the first place, Act II of 1894 clearly provides that the appointment should be from the "family" of the last holder. The ordinary sense of the word will and can include only the "children": section 10 (2).

Section 13 expressly provides for cases where the person to be so appointed happens to be a minor.

[BAKEWELL, J.—You do not contend that this is a case of succession.]

Section 13 read with section 15 makes the same provision for cases of succession as well as cases of selection. In the absence of any express provision in the Act to disqualify a person on the ground of minority, the rule in section 15 has to be followed irrespective of the question of age.

But see *Krishnaswami Naidu v. Akkulam-mal* (1) where Napier, J., takes a contrary view.

Mr. V. Ramesam, Government Pleader, for Defendant No. 1.—Minority is an express bar under section 10 (1) (b) in the case of an appointment like the present to the new post created by the sub-division

of the original village. Section 13 has no application at all. It refers to a case of succession only. If section 13 applies, the present suit is not cognisable by a Civil Court. See section 21 of Madras Act III of 1895. If section 15 alone applies, then section 10 applies and clause (1) (b) bars the appointment, and clause (3) says that sub section (1) disqualifies the person who would otherwise have been entitled and the proprietor is at liberty to appoint any person duly qualified. So irrespective of the question of "family" the appointment of the 2nd defendant is valid. Napier, J., is, therefore, right.

Mr. T. R. Venketrama Sastri (with him Mr. S. Subramania Aiyar), for Defendant No. 2, argued as to the question of "family".

"Family" is a comprehensive word including all blood relations. It is taken to have a restricted meaning only if the context is express. That is so even in England where the scope is more restricted than in India. See *Snow v. Teed* (2). It is conceded that a daughter's son may come within the scope of the term. The 2nd defendant is a brother's daughter's son. On principle, as applied in Hindu joint families, there is not much difference.

Mr. A. Krishnaswamy Aiyar, in reply.—Section 21 of Act III of 1895 applies only to a case of succession strictly so called. But when a claim has been overlooked, a party has a right to litigate for the same in a Civil Court, irrespective of section 21. This is a case of "a right infringed." That section 15 makes it incumbent on a proprietor to make his selection from the "family" of the last holder lends support to my contention that the plaintiffs are persons "who would otherwise be entitled to succeed to an hereditary village office" under section 13. The right is not a right to the office but a right to be selected to the office. I submit that such a right is a substantive right.

JUDGMENT.

BAKEWELL, J. Under section 15 of the Proprietary Estates Village Service Act, Madras Act II of 1894, the newly created office in this case is hereditary. Section 9 gives the power of appointment to the new office to the proprietor and the manner in which he shall proceed is declared by (2) (1870) 9 Eq 622; 39 L. J. Ch. 420; 23 L. T. 303; 18 W. R. 623.

(1) 50 Ind. Cas. 185; (1919) M. W. N. 29; 24 M. L. T. 489; 9 L. W. 90.

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section 15; he has to ascertain the members of the family of the last holder, and then to select from among them the person whom he may consider best qualified.

In making the appointment to a new office which is not hereditary, the choice of the proprietor is limited by section 15 (1) to the family of the last holder, but within that limit he may select the person whom he considers to be best qualified under the rules set out in section 10 (1).

In the case of a vacancy in an hereditary office, under section 9 the proprietor also makes an appointment, but under sub-sections (2) and (3) of section 10, he is bound to have regard to the rule of primogeniture and his choice is, therefore, limited to a particular individual of the family of the last holder. A vacancy may arise otherwise than by the death of the incumbent and the word "succession" is, therefore, not used in the strict sense of the acquisition of an interest upon the death of a person but means "the right to be appointed upon a vacancy in an office."

In the case of a newly created office there has been no death and strictly speaking there is no "succession"; but there is a vacant office and having regard to the express provision contained in the first sentence of section 10 that the proprietor shall observe the rules contained in all the sub-sections, I think that, in this case, the word *succession* must be held to include the right to be appointed to a newly created village office and the word *heir* to include the member of the family of the last holder who would succeed upon the death of a predecessor in the office.

I may also point out that section 9 applies to any vacancy and, therefore, the word "succession" must apply to a vacancy caused by the resignation or dismissal of an incumbent of an hereditary office; the meaning of the word *heir* must in such cases be similarly extended. In the case reported in *Krishnaswami Naidu v. Akkulammal* (1) it was held that the word *succeed* does not apply to a first appointment to a newly created office, but the attention of the Court does not appear to have been drawn to the words "a vacancy" in section 9 and to the extended meaning which must be given to the words *succession*

and *heir* when the vacancy is occasioned otherwise than by the death of the incumbent, or to the provision in section 10, read with section 9, that in making an appointment to a newly created office the proprietor must observe the rule of *succession* contained in sub-sections 2 and 3. With all respect I am unable to follow this decision.

Section 13 provides for the case where a person has a right to be appointed but is disqualified under section 10 (1) (b) by reason of his minority, and directs that no appointment shall be made until he has attained his majority and that some other qualified person shall discharge his duties in the meantime. This section is auxiliary to section 10 (2) and I think that it, therefore, applies in the case of a newly created office.

Under section 13 of the Hereditary Village Offices Act, Madras Act III of 1895, any person may sue before the Collector for a specified village office on the ground that he is entitled under section 10 (2) or (3) of the Act of 1894 to hold such office and by section 21 a Civil Court is debarred from deciding such a claim. The plaintiffs' claim is that one of them is the *persona designata* by section 10, sub-section (2) or (3), and I think that the District Munsif had, therefore, no jurisdiction to entertain the suit. For the same reason I am of opinion that the ruling of Napier, J., in the case already cited does not apply, because the plaintiffs claim a personal right and not as members of the public. I do not understand that ruling to apply to an appointment outside of the family of the last holder, in which case the member of the family might sue on behalf of himself and all other members of the family, because their joint right to be considered had been infringed. For these reasons I am of opinion that the appeal should be dismissed with two sets of costs.

ODGERS, J.—I agree that this second appeal must be dismissed, but as I have come to a different conclusion from my learned brother upon some of the points considered in his judgment, I will state my own opinion although I do so with considerable diffidence.

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This is a case in which the four plaintiffs sued for a declaration that one of them is entitled to the office of Karnam of Sitharrevi village, which has been created from the division of the old village of Aiyampalayam into two, and also for emoluments pertaining to that office. The question arises under the Proprietary Estates Village Service Act, Madras Act II of 1894. The first question raised by the appellants, i.e., the plaintiffs whose suit was dismissed by the lower Courts, is as to jurisdiction under section 21 of the Hereditary Village Offices Act, Madras Act III of 1895. This question of jurisdiction of the Civil Courts in matters of this sort was dealt with by Sadasiva Iyer, J., in the case of *Krishnaswami Naidu v. Akkulammal* (1). That was a case for a declaration that plaintiff was entitled to an hereditary village office but was the converse of the present case as two villages were then amalgamated. The learned Judge came to the conclusion that so far as the suit related to recover emoluments, it was clearly barred by section 21 of Act III of 1895, but with regard to the claim for a declaration, a suit of this kind is not so barred. The learned Judge also decided that the word in section 21 being "succeed" cannot include any claim to be appointed in the first instance to any of the village offices set forth in the Act. I am, therefore, of opinion that this Court has jurisdiction to entertain the appeal in so far as it relates to the declaration.

Turning to the merits, section 9 of Act II of 1894 directs that when a vacancy has occurred "or the District Collector directs that a village officer shall be appointed to a newly created village office" (which latter is the case here), "the proprietor shall appoint." Section 10 (1) contains the rules to be observed by the proprietor in making the appointments under section 9, one of which is that the person to be appointed is to have attained the age of majority. Section 10 then goes on to say that the succession to all hereditary offices shall devolve according to the rule of primogeniture and that, where the next heir is not qualified, the proprietor shall appoint the person "next in order of succession". In section 8 it is stated that every vacancy caused by death or

resignation is to be reported to the Revenue Officer. Now, it is clear that a vacancy caused by death or resignation is to be filled according to the law of succession, that is, by the heir of the last holder; but I cannot see how the rules as to succession are to be read into the rules which are to guide the first appointment of a person in a new village. Section 15 specifically states that the old offices are to cease and new offices which shall be hereditary, if any of the offices they replace were hereditary, are to be created. In my view under section 10 the proprietor is to have regard to the rules in sub-section (1) whether a vacancy strictly so called has occurred or not, but in the present case, there can be no question of succession to an office which by section 15 is now created for the first time.

The first plaintiff has been appointed Karnam of one of the villages and I do not think he has got any right or claim to be appointed Karnam of both. His brothers, the other plaintiffs, were minors at the date of the suit and they claim to be entitled to the benefit of section 13, which allows a qualified person to be appointed "when the person who would otherwise be entitled to succeed to an hereditary village office is a minor." As above already pointed out, there can, in this case, be no question of any title to succeed nor can section 13, in my opinion, apply to the creation of a new office.

No doubt the proprietor has, in fact, selected the brother's daughter's son of the last holder. The plaintiffs except the 1st being minors are, therefore, disqualified under section 10 (1) as I have already stated and they are not, in my opinion, within the benefits of section 13. They are, therefore, unqualified persons and cannot claim even to be eligible for appointment.

It seems to me that the suit must fail on another ground, namely, that pointed out by Napier, J., in the case already referred to "that it is not open to a man who has no right and claim in himself and does not bring the suit as a member of the public affected by the appointment, to ask for a declaration that the person appointed is not a person qualified to hold

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the office," which is what, in effect, the plaintiffs pray for here in paragraphs Nos. 1 and 2 of their prayer in the plaint.

This second appeal must fail and be dismissed with costs. Two sets.

M. C. P.

Appeal dismissed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 928
OF 1918.

December 5, 1919.

Present:—Mr. Justice Coutts and
Mr. Justice Adami.

Musammam SOMARIA—APPELLANT

versus

Musammam BHULARYA—PLAINTIFF

AND SITAL RAUT AND OTHERS

—RESPONDENTS.

*Hindu Widow's Re-marriage Act (XV of 1856),
s. 2—Outcasted widow, whether Hindu—Re-marriage
of outcasted widow, effect of Alienation after re-
marriage, validity of.*

An outcasted Hindu widow does not cease to be a Hindu, and if she re-marries, the provisions of the Hindu Widow's Remarriage Act would apply. Consequently, an alienation by her of her first husband's property after her re-marriage would be invalid. [p. 820, col. 2. p. 821, col. 1.]

Appeal from a decision of the District Judge, Saran.

Mr. Jalgobind Prosad Sinha, for the Appellant.

Mr. Lalmohan Ganguli, for the Respondent.

JUDGMENT.

COUTTS, J.—This was a suit brought by one *Musammam* Bhularya, daughter of one Kari Raut, for confirmation of possession, or in the alternative for possession of certain property belonging to her father and also for a declaration that certain mortgages which had been executed by her mother were not binding on her.

The facts of the case are shortly as follows:—

Kari Raut died leaving a widow and a daughter. The widow came into possession of his property as widow's estate. Sometime after the death of Kari Raut

she began to lead an unchaste life and was outcasted. After being outcasted she married one Sital Ahir in Sagai form. In the year 1914, some three years after this marriage, she mortgaged a portion of the property to the defendants Nos. 3 to 5. It was after these mortgages that the present suit was filed by Kari Raut's daughter.

The suit was contested by the mortgagees defendants Nos. 3 to 5 on the ground that the plaintiff was not the daughter of Kari Raut, that there had been no re-marriage in Sagai form and that the deeds were valid as they were executed for legal necessity and for consideration.

The Court of first instance held that there had been no re-marriage and consequently that there had been no forfeiture but that the debts were not for legal necessity and consequently were not binding.

On appeal to the District Judge it was held that there had been a re-marriage and the suit was decreed in full. Against this decree the defendants have appealed.

The points which are urged before us are —

(1) that there has been no finding as to re-marriage;

(2) that the Hindu Widow's Re-marriage Act is not applicable in this case;

(3) that the transferee is protected and that the plaintiff cannot get a declaration during the lifetime of her mother, the widow of Kari Raut; and

(4) that the judgment is not in accordance with law.

The first of these contentions is concluded by findings of fact. The learned District Judge, after a very full consideration of the evidence and the circumstances of the case, has found that Somaria, the widow of Kari Raut, and mother of the plaintiff, married Sital Ahir in Sagai form.

With regard to the second point, the contention is that since the widow was outcasted, she ceased to be a Hindu and that consequently the provisions of the Hindu Widow's Re marriage Act would not apply. No authority is shown us in support of this contention, and we are unable to accept it.

The third contention that the transferee is protected as the daughter cannot get a declaration during the lifetime of her

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mother, the widow of Kari Rant, is unsustainable in view of the provisions of section 2 of the Hindu Widow's Re-marriage Act. Under the provisions of this section at the time the widow alienated the property in favour of the defendants Nos. 3 to 5 she had in fact no title to the property at all as her daughter, the plaintiff, had already succeeded.

The last contention is that the judgment is not in accordance with law. It is perfectly clear from reading the whole judgment, which is a very careful and elaborate one, that the learned District Judge carefully considered the whole case and his judgment was given after very full consideration.

I would dismiss this appeal with costs.
ADAMI, J.—I agree.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 268 OF 1918.

July 2^d, 1919.

Present:—Mr. Prideaux, A. J. C.

KRISHNA AND ANOTHER—PLAINTIFFS—
APPLICANTS

versus

MAHADEO, MINOR, GUARDIAN TUKARAM
—NON-APPLICANT.

*Civil Procedure Code (Act V of 1908), s. 152—
Decree, mistake in, as to costs—Application to rectify
mistake—Court, power of, to correct decree.*

An application to correct a decree in the matter of costs is correctly made under section 152 of the Civil Procedure Code.

Application for revision of the order of the District Judge, Wardha, dated the 25th June 1918.

Mr. S. Y. Deshmukh, for the Applicants.

ORDER.—In a suit brought by the applicants against the non-applicants for possession of a field they obtained a decree in the lower Court for half the field. On appeal the District Judge, Wardha, amended the decree. He writes:—

"The decree of the lower Court will be amended and the words, 'possession over $\frac{1}{4}$ share in the field in suit,' will be

substituted by 'possession over the whole field in suit'; appellant to bear his own and respondent's costs in the cross-appeal."

The decree recites *inter alia* that the costs of the original suit are to be paid as ordered by the lower Court. This meant that plaintiff will only get half his costs, though his full case had been decreed by the lower Appellate Court. Plaintiff, therefore, asked the Court to correct its decree under section 152, Civil Procedure Code. The District Judge has held that this cannot be done under that section and an application must be made for a review. The section runs:—

"Errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any of the parties."

In *Chessum & Sons v. Gordon* (1) it was held that an accidental slip or omission included the omission of an item from the bill of costs.

There is no doubt that the District Judge in the present case had no intention of stating that the costs of the original suit must be paid as ordered by the lower Court. That was a careless omission on the part of the clerk who drew up the decree not to take instructions regarding the costs of the trial Court and the learned District Judge should have seen that this was necessary. The Court, has the power to correct a mistake of this nature. In my opinion the application did fall within section 152, Civil Procedure Code. I therefore, now direct that the decree in appeal No. 9 of 1918, dated the 23rd April 1918, be corrected and in lieu of the words "the costs of the original suit will be paid as ordered by the lower Court" will be substituted the words "plaintiffs are entitled to their full costs in the lower Court." I make no order as to costs of this application.

Application granted.

(1) (1901) 1 Q. B. 634; 70 L. J. Q. B. 394; 49 W. R. 309; 84 L. T. 137.

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CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 343
OF 1914.

July 28, 1919.

Present:—Justice Sir Asutosh Mookerjee,
Kt., and Mr. Justice Panton.

KALI DAYAL BHATTACHARJEE AND
OTHERS—DEFENDANTS—APPELLANTS

versus

NAGENDRA NATH PAKRASHI AND

OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII,
rr. 4, 11—Appeal—Death of one of several respondents
—Legal representatives of deceased not brought on
record, effect of—Abatement of appeal, whether partial
or total.

Ordinarily an appeal does not abate in its entirety on the death of one of several plaintiffs-respondents because of the failure of the appellant to revive it against the representatives of the deceased: the abatement only takes effect as against the latter. But from the nature of the suit, the result may follow that the appeal has thereafter become imperfectly constituted, so that the appellant can no longer invite the Court to adjudicate upon the matters in controversy. [p. 825, col. 2.]

Where for instance the hearing of such an appeal would result in two contradictory declarations in the same suit, the Court cannot hear the appeal on the merits, in other words, the appeal abates in its entirety. [p. 826, col. 1.]

Appeal against the decree of the Subordinate Judge, 2nd Court, Pabna, dated the 19th of May 1914.

FACTS appear from the judgment.

Babu Jogesh Chandra Roy (with him Babus Haripado Chatterjee, Harish Chandra Roy, Bansori Lal Sarkar and Jatindra Nath Sanyal), for the Appellants.—The defendants are appellants before your Lordships. This appeal arises out of a suit for recovery of possession and declaration of title to an immoveable property.

Proceedings under section 145, Criminal Procedure Code, were started on an apprehension of a breach of the peace in respect of the disputed area. Thereupon the Criminal Court made an order of attachment under section 146, Criminal Procedure Code, which was to remain in force till the Civil Court finally declared the title of a competent party. The suit was instituted in 1910.

The lower Court gave a decree in favour of the plaintiffs.

Babu Dwarka Nath Chakravarty (with him Babus Kamani Mohan Chatterjee and Nilratan

Chatterjee), for the Respondents.—Before I argue on the merits of the case, I shall submit that the whole appeal has abated as one of the respondents who died in November 1915 has not been properly substituted.

The deceased left a widow, three sons and two grandsons by a predeceased son.

Under Article 177 of the present Limitation Act no application was made within six months.

Hence under Order XXII, rule 4, sub-rule (3), and rule 11 the appeal has abated against the deceased.

An attempt was, however, made to make substitution of the three sons of the deceased in February 1917. A false affidavit was made stating that the respondent died in November 1916.

Had the death occurred in November 1916, the application in February 1917 was within time and hence the three sons were represented in usual course. But the three grandsons by a predeceased son were not represented. That application in February 1917 was not made to set aside the abatement.

Under Order XXII, rule 9, sub-rule (2), no application was made to set aside the abatement as required by Article 171 within 60 days from the date of abatement.

Subsequently an application was made to bring on the record the two grandsons but under Order XXII, rule 9, sub-rule (3), and section 5, Limitation Act, it was refused. It was further ordered that the order on the false statement of February 1917 should be cancelled.

Thus the partial abatement of the appeal against one of the plaintiffs has made it impossible for the Court to hear the appeal at all.

Referred to *Bejoy Gopal Bose v. Umesh Chandra Bose* (1), *Tarip Dafadar v. Khotajanessa Bibi* (2), *Dharamjit Narayan Singh v. Ohandeshwar Prosud Narayan Singh* (3), *Basir Sheikh v. Fazle Karim* (4), *Ajimuddin Mandal v. Tara Sankar Ghose* (5), *Sriram Chandra Naik v. Hriday Nath Gupta* (6).

(1) 6 C. W. N. 196.

(2) 10 C. W. N. 981.

(3) 11 C. W. N. 504; 5 C. L. J. 393.

(4) 28 Ind. Cas. 703; 19 C. W. N. 290.

(5) 47 Ind. Cas. 638; 28 C. L. J. 201.

(6) 51 Ind. Cas. 409; 29 C. L. J. 461.

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The appeal in the present form cannot proceed.

The wording of section 368 of the old Act has materially changed in the corresponding section of the new Act, *viz.*, Order XXII, rule 4. Here the new words are "as against the deceased respondent." Here all the plaintiffs claim a joint interest and the interest of one cannot be distinguished from that of another in the same category. Here the prayer is for the joint declaration of title and the interest is indivisible.

The attachment cannot be released by the District Magistrate if there is an order for a partial decree in favour of the appellants.

Babu Jogesh Chandra Roy, in reply.—I submit that the partial abatement of the appeal cannot stand in the way of the appeal being heard. The cases cited by my learned friend are distinguishable. In support of my contention I refer to the following cases: *Ohandarsang Khimabhai* (7), *Upendra Kumar Chakravarti v. Sham Lal Mandal* (8).

The whole estate was under the management of a common manager and it was not necessary to bring on record all the respondents. The manager represents the whole party.

[Babu Dwarkanath Chakravarty pointed out that the manager was appointed with respect to a share only.]

Your Lordships have ample power to substitute the heirs of the deceased under Order XLI, rules 20 and 33. Referred to *Upendra Lal Mukerjee v. Girindra Nath Mukerjee* (9), *Hudson v Basdeo* (10), *Rup Jaun Bibee v. Abdul Kadir* (11).

Babu Sib Ohandra Palit appeared for the Deputy Registrar.

JUDGMENT.—This is an appeal by the defendants in a suit for declaration of title to immoveable property. The case for the plaintiffs is that there were disturbances in connection with the lands in suit which led to the institution of proceedings under section 145, Criminal Pro-

(7) 22 B. 718.

(8) 34 C. 1020; 11 C. W. N. 1100; 6 C. L. J. 715.

(9) 25 C. 565; 2 C. W. N. 425.

(10) 26 C. 109; 3 C. W. N. 76.

(11) 31 C. 643; 8 C. W. N. 496.

cedure Code, with the result that, on the 24th July 1910, the Criminal Court made an order of attachment under section 146, Criminal Procedure Code, to remain in force until the title to the lands was declared by a Civil Court of competent jurisdiction. Accordingly, on the 28th September 1910, the plaintiffs instituted the present suit for declaration that the disputed lands appertained in Zemindary right, and right acquired by adverse possession, to their property known as Thal Chur or as Khas Thal Mouza. The defendants repudiated all the material allegations in the plaint. After a protracted trial in the Court below, the suit was decreed by the Subordinate Judge. The decree in favour of the plaintiffs was in the following terms: "The title of the plaintiffs is declared to the entire lands included in the survey map of Mouza Chur Thal *alias* Khas Thal in claim, and also to such quantity of land as is shown in the map of the Commissioner as included in the survey of Mouza Khas Thal and lies within the lands claimed." The present appeal by the defendants is directed against this decree. The appeal was heard for several days and the respondents were called upon to answer the arguments advanced on behalf of the appellants. It then transpired that Lal Mohan Pakrashi, one of the plaintiffs respondents, had died in November 1915, and that adequate steps had not been taken to revive the appeal as against his representatives-in-interest. Lal Mohan Pakrashi has left a widow, three sons and two grandsons by a predeceased son. No application was made by the appellants to bring on the record the legal representatives of the deceased respondent within the time allowed by law, that is, within a period of six months from the date of the death of the deceased respondent, under Article 177 of the First Schedule to the Indian Limitation Act, 1908. The consequence was that under Order XXII, rule 4, sub-rule 3 of the Code of Civil Procedure, 1908, read with rule 11, the appeal abated as against the deceased respondent. On the 23rd February 1917, an application was made to this Court to bring on the record the three sons of the deceased respondent. This was not made in the form of an application to set aside the abatement

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as contemplated by Order XXII, rule 9, sub-rule (2). It was also made beyond the time prescribed by Article 171 of the First Schedule to the Indian Limitation Act, 1908, that is, after the expiry of 60 days from the date of abatement. The application was made *ex parte* and was based on an affidavit which contained an untrue statement, namely, that Lal Mohan Pakrashi had died in November 1916. If he had really died in November 1916, the six months prescribed by Article 177 of the Indian Limitation Act would have expired in May 1917 and consequently no question of limitation could possibly arise in respect of an application made on the 23rd February 1917. The result of the misstatement was that the application was granted as a matter of course. This was brought to the notice of the Court on behalf of the respondents when they were called upon to answer the arguments of the appellants. The position thus was that two of the representatives of Lal Mohan Pakrashi, namely, his two grandsons by a predeceased son, were not on the record, while the names of his three sons had been placed on the record, on the basis of an untrue statement contained in the affidavit filed in support of the application for substitution. An attempt was subsequently made to induce this Court to bring on the record the two grandsons by the predeceased son. The explanation offered for the delay was, however, unsatisfactory, and under Order XXII, rule 9, sub-rule (3), which makes the provisions of section 5 of the Indian Limitation Act applicable, no order could be made in favour of the applicants, as they had failed to satisfy the Court that they had sufficient cause for not making the application within the prescribed time. We accordingly directed, on the 2nd July last, that the *ex parte* order made on the 23rd February 1917, on the basis of an untrue statement, be cancelled, and, further, that the application to bring on the record the grandsons by the predeceased son be refused. The position accordingly is that the appeal has abated as regards Lal Mohan Pakrashi, and the application to revive the appeal against his representatives has failed. The appeal has now been taken up for final disposal.

On behalf of the respondents, a preliminary objection has been taken that in the events which have happened the appeal cannot proceed and must be dismissed. It is conceded that under the provisions of Order XXII, rule 4, read with rule 11 the appeal has abated only as against the deceased respondent. Consequently, we have to determine whether, in view of the nature of the suit, such partial abatement has made it impossible for the Court to hear the appeal as against the other respondents, and, if necessary, to reverse the decision of the trial Court in their favour. The respondents have contended that this question should be answered in the affirmative, in view of the decisions in *Bejoy Gopal Bose v. Umesh Chandra Bose* (1), *Tarip Dafadar v. Khotaiannessa Bibi* (2), *Dharamjit Narayan Singh v. Chandeshwar Prosad Narayan Singh* (3), *Basir Sheikh v. Fazle Karim* (4), *Azimuddin Mandil v. Tara Sankar Ghose* (5) and *Sriram Chandra Naik v. Hriday Nath Gupta* (6). The appellants have, on the other hand, invited our attention to the cases of *Chandarsing v. Khimabhai* (7) and *Upendra Kumar Chakravarti v. Sham Lal Mandil* (8), which it is urged support the contrary view.

In *Bejoy Gopal Bose v. Umesh Chandra Bose* (1) and *Tarip Dafadar v. Khotaiannessa Bibi* (2) the question arose as to the effect of the death of one of several plaintiffs respondents in an appeal preferred against a joint decree for arrears of rent, in favour of all the plaintiffs. In both these cases, the Court held that the appeal could not proceed for defect of parties. In the first case Mr. Justice Banerjee pointed out that if the appeal were heard and allowed on the merits, the result would be that the decree would be set aside in respect of some of the plaintiffs, but would remain intact in so far as the representatives of the deceased plaintiff were concerned. The decree was a joint decree in favour of all the plaintiffs and if the defendant desired to question the correctness of that decree, he was bound to bring before the Court all the parties affected by that decree. In the second case, Mr. Justice Rampini adopted the same view and dismissed the appeal, as it could not proceed by reason of defect of parties. Mr. Justice Rampini, however, in the case of *Upendra Kumar Chakravarti v. Sham Lal Mandil* (8) took a different view on the

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authority of the decision in *Ohandarsang v. Khimabhai* (7). No reasons were assigned in support of the conclusion and the earlier decisions were not brought to the notice of the Court. We observe that in that case a question was raised as to the area and the amount of rent annually payable in respect of the holding. The Court dismissed the appeal on the merits; but if the appeal had succeeded, the result would have been two contradictory decisions in the same suit in respect of the same matter, namely, the terms and conditions of the tenancy, one given by the lower Appellate Court in favour of the deceased plaintiff which would enure to the benefit of his representatives-in-interest, the other given by the High Court in favour of the successful appellant.

The case of *Dharamjit Narayan Singh v. Chandeshwar Prosad Narayan Singh* (3) arose out of a suit for the cancellation of a sale for arrears of land revenue. The trial Court set aside the sale. During the pendency of an appeal to this Court, two of the plaintiffs-respondents died. No application was made to bring their legal representatives on the record within the prescribed period. The Court held that the appeal could not proceed. Mr. Justice Harington applied the test, whether the suit would have been tried, if the deceased persons had not been joined either as plaintiffs or as defendants. He held that the suit could not have been tried in their absence, and that consequently the appeal also could not be decided in the absence of their legal representatives. The decree could not be reversed and the sale directed to stand in respect of some of the plaintiffs, while the decree for cancellation made by the primary Court would remain in operation as regards the others. The Court further declined to accede to the contention that the share of the plaintiffs other than those of the deceased persons could be vacated by an order of this Court. The contention was negatived on the ground that as the decree under appeal had set aside the sale of the entire joint estate, under no circumstances could that be affirmed as to the unascertained shares of some joint shareholders and reversed as to the unascertained shares of other joint shareholders.

This principle was applied to suits for possession in *Basir Sheikh v. Fazle*

Karim (4) and *Sriram Chandra Naik v. Hriday Nath Gupta* (5). In the first of these cases it was pointed out that as the decree was one for joint possession of land, whatever view might be taken by this Court on the merits, the entire decree could be executed by the representatives of the two plaintiffs who were dead and against whom the appeal had not been revived. In the second case, the Court observed that the appeal was not properly constituted in the absence of the infant representatives of one of the deceased respondents and the Court could not be called upon to make two contradictory decrees in the same litigation. The infant plaintiff had got a declaration of the true character of the property and was entitled to take possession of it from the hands of the first defendant by execution of his decree; the Court could not declare that the other plaintiffs, although they stood in the same relation to the property in suit as the infants, were not entitled to the same relief.

Another example of the application of the principle deducible from the cases mentioned is furnished by *Azimuddin Mandal v. Tara Sankar Ghose* (5). A and B (landlords) had applied under section 105, Bengal Tenancy Act, for settlement of fair rent and for enhancement of rent. A died after the decision of the lower Appellate Court, leaving a major son C and a minor son D as his heirs. The tenant defendants-appellants did not take steps to have the minor properly represented and the appeal was dismissed against him for non-prosecution. It was ruled that the entire appeal had become incompetent for want of necessary parties.

These decisions do not contradict Order XXII, rule 4, which contains the words—"as against the deceased respondent"—not found in the corresponding provision (section 368) of the Code of 1882. The appeal does not abate in its entirety, because the appellant has failed to revive it against the legal representatives of the deceased respondent, the abatement takes effect only as against him; but from the nature of the suit, the result may follow that the appeal has thereafter become imperfectly constituted, so that the appellant can no longer invite the Court to adjudicate upon the matters in controversy.

The question now arises, whether this doctrine is applicable to the case before

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us. In our opinion, there is no escape from the position that the answer must be against the appellants. In fact the present case is, in some respects, stronger than any brought to our notice. The plaintiffs jointly sought a declaration that the lands attached by order of the Criminal Court were included in their estate. No question of shares was in controversy; the Subordinate Judge made in favour of the plaintiffs a declaratory decree in respect of the whole property. The representatives of the deceased plaintiffs are entitled to the full benefit of this decree. If we proceed to hear the appeal at the instance of the defendants against the other plaintiffs, the result will follow, should the contention of the appellants prevail on the merits, that there will be two contradictory declarations in the same suit—one by the Subordinate Judge in favour of one of the plaintiffs that the disputed lands are included within Thal Chur, and another by this Court that they are not so included. If these contradictory declarations are produced before the Collector, it is difficult to see how he can give effect to both of them. It may further be observed that the defendants have not brought a suit for declaration of their title and their right to institute such a suit is barred by limitation. In our opinion it is manifest that in the events which have happened the appeal is now not properly constituted, and in the absence of necessary parties we cannot proceed to hear it on the merits. The appellants alone are to blame for the unfortunate position in which they now find themselves.

The appellants have next argued that as the estate was in the hands of a common manager appointed under the provisions of the Bengal Tenancy Act, it was not necessary for them to bring on the record the heirs of the deceased plaintiff. In support of this contention, they have relied upon *Sibo Sundari v. Raj Mohun* (12), *Kirtibash Das v. Umesh Ohandra* (13). These decisions are of no assistance to the appellants. In the first

place, the suit was not brought by the common manager on behalf of the plaintiffs. Whether he was competent to institute a suit of this character on their behalf without naming them as parties on the record, need not, consequently, be considered. From this point of view, it is also unnecessary to determine whether the two decisions just mentioned did not take an unduly comprehensive view of the powers of a common manager. In the second place, our attention has been drawn to the fact that the common manager was appointed without jurisdiction (as the appointment was made in respect of a share only of an estate) and that on this ground the appointment was cancelled by this Court on the 3rd February 1919.

As a last resort, the appellants have contended that we should proceed, under Order XLI, rules 20 and 33, to add the representatives of the deceased respondent as parties to the appeal. In support of this argument, reference has been made to *Upendra Lal Mukerjee v. Girindra Nath Mukerjee* (9), *Hudson v. Basdeo* (10) and *Rup Jaun Bibee v. Abdul Kadir* (11). We are clearly of opinion that assuming that the Court is competent to take action under the rules mentioned, this is a case in which the powers should not be exercised for the benefit of the appellants and to the detriment of the legal representatives of the deceased respondent. The appellants obtained an *ex parte* order against some of them on a misrepresentation of fact; that order has been cancelled. As regards the other representatives of the same respondent, the omission to proceed against them was due solely to negligence. We feel no doubt that it will be wrong to allow the appellants to invoke the aid of the rules in question in these circumstances.

The result is that this appeal is dismissed. We make no order as to costs, inasmuch as the respondents should have brought this matter to the notice of the Court as soon as the appeal was taken up for disposal.

Appeal dismissed.

(12) 8 C. W. N. 214.

(13) 11 Ind. Cas. 397; 14 C. L. J. 61; 16 C. W. N.

HUKAM CHAND v. UMAR DIN.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 3350 OF 1917.

January 10, 1919.

Present:—Mr. Justice Shadi Lal.

HUKAM CHAND—DEFENDANT—

APPELLANT

versus

UMAR DIN—PLAINTIFF—RESPONDENT.

Attachment, wrongful—Damages, suit for—Malice, proof of, whether necessary.

In order to sustain a claim for damages for wrongful attachment of property, the plaintiff must establish not only want of reasonable and probable cause but also malice in fact on the part of the person attaching the property.

Nanjappa Chettiar v. Ganapathi Goundan, 12 Ind. Cas. 517; 35 M. 598; 10 M. L. T. 365; (1911) 2 M. W. N. 414; 21 M. L. J. 1052, followed.

Second appeal from the decree of the District Judge, Jullundur, dated the 12th November 1917, reversing that of the Munsif, 2nd Class, Jullundur, dated the 2nd July 1917, dismissing the claim.

Lala Jagan Nath, for the Appellant.

Mr. Ghulam Rasul, for the Respondent.

JUDGMENT.—This appeal arises out of an action brought by the respondent for the recovery of damages for the wrongful attachment of his cattle by the appellant in execution of his decree. It is a well established principle of law that in order to sustain such a claim for damages the plaintiff must establish not only want of reasonable and probable cause but also malice in fact on the part of the person attaching the property, *vide, inter alia, Nanjappa Chettiar v. Ganapathi Goundan* (1). Now, the Munsif, Sayad Zulifkar-ud-Din, holding that the plaintiff had failed to prove malice, dismissed the suit. The District Judge on appeal has set aside that judgment and passed a decree in favour of the plaintiff for damages. The learned Judge has found that the attachment was applied for on insufficient grounds, but he has made absolutely no reference to the question of malice. Mr. Ghulam Rasul for the respondent, while admitting that no finding as regards malice has been given by the learned Judge and that a finding in the affirmative is essential to the success of his client's suit, asks me to draw an inference of malice from the fact that the defendant had absolutely no justification for attaching the cattle. It seems to me that the Munsif arrived at the correct conclusion, and that

(1) 12 Ind. Cas. 507; 35 M. 598; 10 M. L. T. 365; (1911) 2 M. W. N. 414; 21 M. L. J. 1052.

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there is no foundation for the allegation that the attaching creditor was in any way actuated by malice.

I must hold that the plaintiff cannot succeed without establishing malice, which he has failed to prove. Accordingly I accept the appeal and dismiss the suit with costs throughout.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 12 OF 1919.

November 18, 1919.

Present:—Mr. Mittra, A. J. C.

POONABAI—PLAINTIFF—APPELLANT

versus

D. B. SETH BALLABHDAS AND OTHERS
—DEFENDANTS—RESPONDENTS.

C. P. Tenancy Act (XI of 1898), ss. 95, 97—Jurisdiction of Civil and Revenue Courts—Landlord and tenant—Suit for possession by occupancy tenant, whether cognisable by Civil Court—Claim for mesne profits, whether changes nature of suit.

A suit for possession of land of which the plaintiff became an occupancy tenant by operation of law upon the sale of the proprietary rights in *sir* is a suit between landlord and tenant and must be tried by a Revenue Officer, even though the plaintiff has not obtained possession of the land as tenant and has not been recognised as such by the defendant landlord.

In such a suit a claim for *mesne profits* and for a house which the plaintiff seeks to recover as an agriculturist is ancillary to the main relief asked for and does not change the nature of the suit.

Appeal against the decree of the Additional District Judge, Jubbulpore, in Civil Suit No. 32 of 1918, dated the 28th March 1919.

Mr. J. O. Ghosh, for the Appellant.

Sir B. K. Bose, for the Respondents.

JUDGMENT.—The plaint was originally filed in the Court of the Additional District Judge, Jubbulpore. It was returned by him for presentation to the proper Court. It was then presented in the Court of the Additional Judge to the Court of the Subordinate Judge, who has again returned it for presentation to the Court of the Additional District Judge.

The learned Advocates who appear for the parties in this appeal are only anxious that it should be finally decided where the case is to be tried.

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The plaintiff appellant became an occupancy tenant by operation of law. The fact that she has not yet obtained possession and has not been recognised as a tenant by the defendant *malguzar* is immaterial, and the cases cited relating to agreements for a lease, being cases of tenancy by contract, are irrelevant. Upon the sale of the proprietary rights in *si*, the plaintiff became an occupancy tenant under the provisions of the Tenancy Act, and the defendant became her landlord. The suit for possession of the land is a suit between landlord and tenant as such, and must be tried by a Revenue Officer. The claim for mesne profits and for the house which she seeks to recover as an agriculturist are ancillary to the main relief asked for. The whole of the claim is within the competency of the Additional Judge to the Court of the Subordinate Judge who is, moreover, invested with all the powers of the Subordinate Judge. His order, dated the 3rd April 1919, is set aside, and the plaint is ordered to be presented to the Court of the Additional Judge to the Court of the Subordinate Judge.

Each party will bear his costs of this appeal.

Order set aside.

ODDH JUDICIAL COMMISSIONER'S COURT.

PRIVY COUNCIL APPEAL No. 24 OF 1919.
September 19, 1919.

Present:—Mr. Stuart, A. J. C., and
Mr. Lyle, A. J. C.

Rawat SHEO BAHADUR SINGH
—PLAINTIFF—APPELLANT
—APPLICANT

versus

BENI BAHADUR SINGH—DEFENDANT—
RESPONDENT—OPPOSITE PARTY.

*Civil Procedure Code (Act V of 1908), s. 109 (c)—
Appeal to His Majesty in Council—Question of fact—
"Any decree or order," meaning of—Judges arriving at
opposite conclusions on vital question—Fitness of case
for appeal.*

Under section 109 (c) of the Civil Procedure Code a High Court can, if persuaded that a case is a fit one for appeal to His Majesty in Council, grant leave to appeal in any case even upon a question of fact [p. 829, col. 1.]

The words "any decree or order" in clause (c) of section 109 of the Civil Procedure Code do not mean any decree or order other than a decree or final order passed on appeal by a High Court or by any other Court of final appellate jurisdiction. [p. 829, col. 1.]

Where two Judges have arrived at diametrically opposite conclusions on the vital question on which the suit should be decided, the case is a fit one for appeal to His Majesty in Council. [p. 829, col. 1.]

Application for leave to appeal to His Majesty in Council against the judgment and decree of the First Additional Judicial Commissioner, who allowed the appeal, and Second Additional Judicial Commissioner, who dismissed the appeal, dated the 17th February 1919, reported as 51 Ind. Cas. 419.

JUDGMENT.—This was a suit for proprietary possession of certain property and mesne profits. The property belonged to Rawat Jageshwar Bakhsh Singh. He died leaving a widow *Musammatt Sakhray Kuar*, who succeeded to his property. *Musammatt Sakhray Kuar* died. Sheo Bahadur Singh, the plaintiff-appellant, sued for possession of the property as a collateral heir of the deceased Jageshwar Bakhsh Singh. Beni Bahadur Singh was in possession of the property. He had been adopted by Sakhray Kuar, who professed to be authorised to make the adoption under the provisions of a document, which she alleged to be a Will executed by her husband on the 15th July 1907. The decision of the case rested on one point alone—was this Will genuine? If the Will was genuine, Sakhray Kuar had no right to make the adoption and the collateral heir succeeded her. The trial Judge found that the Will was genuine. The appeal was heard by a Bench of two Judges. The senior Judge found that the Will was not genuine. The junior Judge found that the Will was genuine. Under the provisions of section 98 of the Code of Civil Procedure the appeal was dismissed. The plaintiff asks for leave to appeal to His Majesty in Council.

The property in dispute is worth about Rs. 29,000. The case cannot fall under the provisions of section 109, clauses (a) and (b) of the Code of Civil Procedure, because the decree or final order affirmed

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the decision of the Court immediately below and the appeal does not involve any substantial question of law. It remains to be decided whether the case falls under the provisions of section 109, clause (c), and whether in view of the fact that the Judges were equally divided in opinion and no appeal lies to this Court in view of this disagreement, the case should not be certified to be a fit one for appeal to His Majesty in Council. We consider that the provisions of section 109 are very wide and that under the provisions of section 109 (c) this Court can, if persuaded that a case is a fit case for appeal to His Majesty in Council, grant leave to appeal in any case even upon a question of fact. It stands to reason that such leave would be very sparingly granted in view of the provisions of section 110. But there are occasions when such leave should be granted, and we think this is one of them. We do not consider that clauses (a), (b) and (c) are mutually exclusive. We consider that the words "any decree or order" must be taken to include the words "any decree or final order passed on appeal by a High Court or by any other Court of final appellate jurisdiction" and that the words "any decree or order" in clause (c) cannot mean "any decree or order other than a decree or final order passed on appeal by a High Court or by any other Court of final appellate jurisdiction." In these circumstances we must decide this matter on the merits and we are of opinion that, in a case such as this where two Judges have arrived at diametrically opposite conclusions on the vital question on which the suit should be decided, the case is undoubtedly a fit one for appeal to His Majesty in Council. We grant the certificate accordingly with costs.

Application granted.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2214 OF 1918.

December 23, 1919.

Present:—Mr Justice Abdul Raoof.

MUHAMMAD BEG AND ANOTHER

—PLAINTIFFS—APPELLANTS

versus

AMAR NATH AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Cantonments Act (XIII of 1889), s. 32, scope of—
Oral gift of property situate in Cantonment, validity of.*

The effect of section 32 of the Cantonments Act is that a gift of property situate in a Cantonment must be made in the manner provided by section 123 of the Transfer of Property Act. [p. 831, col. 1.]

An oral gift by a Muhammadan of such property is, therefore, not valid. [p. 83, col. 1.]

First appeal from the decree of the District Judge, Jullundur, dated the 17th June 1913, decreeing the plaintiffs' claim partly, without costs.

Syed Mohsin Shah, for the Appellants.

The Hon'ble Pandit Sheo Narain, R. B., for the Respondents.

JUDGMENT.—This appeal has arisen out of a suit brought by *Musammât Amir-un-Nisa* claiming property in certain houses under the following circumstances:—

One *Musammât Piran* was married to *Mirza Jan*. She had three sons, *Hayder Beg*, *Rustam Beg* and *Abdulla Beg*, and a daughter *Musammât Amir-un-Nisa*, the plaintiff. She was married to one *Kharati*. The dispute relates to four houses: (1) Half of a house in *Mohalla No. 18*, (2) another house in *Mohalla No. 18* in which she claimed proprietary right in the whole house, (3) a shop in *Mohalla No. 14* in which also she claimed proprietary right in the entire shop, and (4) a block of three houses in the *regimental Bazar Lalkurti*, in which she claimed one-seventh share.

These properties were mortgaged to one *Amar Nath* by *Hayder Beg* by a registered deed dated the 13th of December 1908. *Amar Nath* obtained a decree on the mortgage against *Hayder Beg* and attached the houses in execution of the decree and asked for their sale. *Amir-un-Nisa* then objected to the attachment on the ground that the houses were not saleable in *Amar Nath's* decree. Her objection was disallowed and she had to bring the present suit for a declaration. As regards the house No. 1 the Court held on the evidence that the house had been pure

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chased by Hayder Beg and Kharati jointly and that, therefore, the plaintiff was entitled to a half share in it. There is no dispute or question about this house now, as the correctness of the decision with regard to this house is admitted by both the parties before me. With regard to the house No. 2 and a shop No. 3, the title set up by the plaintiff was that both these houses had been orally gifted in her favour by *Musamm*at Piran her mother. This claim was resisted by Amar Nath on two grounds, namely, that the story of the oral gift was untrue and that in any case the alleged gift was ineffective in law, as it had not been effected by means of a registered deed as required by section 32 of the Cantonments Act No. XIII of 1889. The decision of the Court as to the *factum* of the oral gift is not very clear, but it may be taken that the Court intended to find that an oral gift had been made. It, however, held that having regard to the provisions of section 32 of the Cantonments Act no binding gift had taken place. With regard to the remaining three houses in Lalkurti Bazar the Court found that the plaintiff had failed to establish that they belonged to her mother *Musamm*at Piran and that she was entitled to a one-seventh share in them. In the result the Court of first instance gave the plaintiff a decree to the effect that she owned half a share in property No. 1 and one-seventh share in property Nos. 2 and 3, and declared that those shares were not liable to attachment and sale in execution of Amar Nath's decree against the defendant Hayder Beg. The rest of the claim was dismissed. An appeal was preferred to the Divisional Judge by the plaintiff and cross-objection was taken by the defendant Amar Nath. The appeal was accepted and the cross-objection was dismissed. Against this decree the defendant Amar Nath appealed to the Chief Court, which set aside the decree in appeal on the ground of want of jurisdiction on the 8th of May 1918. The record was returned to the Court of the District Judge of Jullundur, directing him to return the memorandum of appeal to the appellant for presentation to the Chief Court. In the meantime *Musamm*at Amir-un-Nisa had died. The present appeal was presented to this Court. As mentioned above

*Musamm*at Amir-un-Nisa having died, the names of Muhammad Beg's son and *Musamm*at Ilahi Jan daughter of Hayder Beg were substituted as legal representatives of the deceased appellant on the basis of a Will dated the 5th of April 1916, which purported to have been executed by *Musamm*at Amir-un-Nisa in their favour. The respondent Amar Nath challenged the genuineness and the validity of the Will. The matter was, therefore, referred to the lower Court for determination, whether the present appellants were the legal representatives of *Musamm*at Amir-un-Nisa. The learned senior Subordinate Judge has determined the question in favour of the appellant and has sent up his report. The first question that has been argued before me is whether the Will is proved and is genuine. Merely the *factum* of the Will has been challenged on behalf of the respondent Amar Nath. No question as to its validity under the Muhammadan Law has now been raised. In fact, Pandit Sheo Narain, on discovering that Hayder Beg in his deposition had stated that even now he consented to the Will very frankly gave up the objection that the Will could not take effect in absence of the consent of the legal heirs of *Musamm*at Amir-un-Nisa after her death. The only question which I have to determine relating to this preliminary matter is whether the Will has been proved. Of the five marginal witnesses, Abdul Rahim is dead and Amir Beg could not be found, as he is reported to be somewhere in the Central Provinces. The remaining witnesses Abdul Salam, Isa Beg and Hayder Beg have given their evidence supporting the Will. The evidence remained unshaken in cross-examination and nothing is shown at the argument why their evidence should not be believed. The Court below has accepted their evidence and I am not prepared to disagree with it. The main ground on which the report of the Court below is challenged before me is that the evidence of the head constable relating to the thumb mark makes the execution of the Will by *Musamm*at Amir-un-Nisa doubtful. The evidence of the head constable is not very clear. In fact his cross-examination clearly shows that his opinion cannot be absolutely relied upon for the purpose of holding that the thumb mark was not made by *Musamm*at

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Amir-un-Nisa. In the face of the positive evidence in proof of this Will, in my opinion the learned Judge of the Court below was justified in not relying upon the evidence of the head constable and I am not prepared to take a different view in the matter. Coming to the appeal itself I must confess that I feel a great deal of difficulty in accepting the argument of the appellant's Vakil relating to the validity of the oral gift alleged to have been made by *Musammât Piran* in favour of *Amir-un-Nisa*. So far as the *factum* of the oral gift is concerned, I am inclined to think that the lower Court did find that it had been made. The only question then to determine is whether an oral gift, by a Muhammadan, of property situate in the Cantonment can be made under section 32 of the Cantonments Act. The provisions of section 123 of the Transfer of Property Act IV of 1882 have been made applicable to all gifts whether made by a Hindu, Muhammadan or a Buddhist. It is, however, contended that section 123 cannot be read without section 129 of the Transfer of Property Act. The omission of the inclusion of section 129 of the Transfer of Property Act in section 32 of the Cantonments Act may be intentional or accidental. It is not, however, necessary for me to determine what the exact reasons for this omission may be, for I must take the law as it stands and interpreting it according to the well recognized rules of Statutes relating to construction, I cannot but hold that the effect of section 32 of the Cantonments Act is that a gift must be made in the manner provided by section 123 of the Transfer of Property Act. The decision, therefore, of the Court below relating to the houses Nos. 2 and 3 is correct. With regard to the three houses in Lalkurti Bazar I am inclined to think that the Court below has disallowed the claim for insufficient reasons. From the evidence it is clear that *Musammât Piran* paid *Chaukidari* tax from 1877 to 1878. The Court below gets rid of this documentary evidence by remarking that "it is quite possible that Hayder Beg's mother may have acquired the house on behalf of Hayder Beg and thus paid *Chaukidari*". There is no foundation for this remark in the evidence on the record.

Besides this documentary evidence there is oral evidence also to prove that the house belonged to *Musammât Piran*. It is true that the oral evidence is not very strong, but taking the oral evidence along with the documentary evidence one can safely come to the conclusion that the houses did belong to *Musammât Piran*. This being so, the plaintiff was entitled to a one-seventh share in them. No other ground raised in the memorandum of appeal has been argued. I must, therefore, modify the decree of the Court of first instance in this respect. The result is that I pass a decree in favour of the appellants to the effect that they own a half share in the house No. 1 situate in Mohalla No. 18 and one-seventh share in house No. 2, in shop No. 3 and the three houses situate in Lalkurti Bazar. The appeal is allowed in part and the decree of the Court below is modified accordingly. The parties will give and receive costs in proportion to their failure and success. Cross-objection taken by the respondent necessarily fails and is dismissed with costs.

Appeal partly allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 239 OF 1919.

September 17, 1919.

Present:—Mr. Lyle, A. J. C.

Musammât IQBAL JEHAN BEGAM—

DEFENDANT—APPELLANT

versus

Babu MATHURA PRASAD—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s. 12—Exclusion of time—Time requisite for obtaining copies—Copies asked to be sent by post, effect of.

Where in an application for copies the applicant asks that they should be sent to him by post, the time requisite for obtaining the copies under section 12 of the Limitation Act is the time from the date of the application to the date of posting the copies, irrespective of the fact that the copies are ready for delivery before the latter date. [p. 832, col. 1.]

Appeal from the decree of the District Judge, Lucknow, dated the 14th May 1919, upholding the decree of the Subordinate Judge Bara Banki, dated the 27th February 1919.

LOCHANGIR v. SADA.

Mr. *Haidar Husain*, for the Appellant.
 Saiyed *Ahmad Husain*, General Agent,
 for the Respondent.

JUDGMENT.—This is a second appeal from the decision of the learned District Judge of Lucknow, who has dismissed the appeal to his Court on the ground that it was barred by limitation.

The suit out of which the appeal arose was decided by the Court of first instance on the 27th February 1919. Applications for copies of the judgment and decree were filed on the 21st of March 1919. On those copies which were filed along with the memorandum of appeal in the lower Appellate Court it is noted that the copies were ready for delivery on the 7th of April 1919.

If it be taken from the 21st of March to the 7th of April as the time requisite for obtaining copies, the decision of the learned District Judge that the appeal was barred by limitation would be correct. But we find that in the application for copies it was asked that the copies should be sent by post from Bara Banki to Lucknow and the appellant along with his memorandum of appeal filed an envelope, which he alleges was the envelope in which copies were received and which shows that the date of posting at Bara Banki was the 10th of April. The appellant must be allowed an opportunity of proving that in fact the copies were posted to him on the 10th of April as he alleges. If he can do so, it is clear that he must be allowed from the 21st of March up to the 10th of April as the period requisite for obtaining copies and if this period is allowed, the appeal will not be barred by limitation. The appeal might in such a case have been filed on any date on or before the 19th of April, but as the Courts were closed for the Easter holidays from the 18th to 21st inclusive and as the appeal was actually filed on the 22nd of April, it would not in that case be barred by limitation.

The appeal is, therefore, allowed. The case will go back to the learned District Judge, with the direction that he institute an inquiry as to the actual date on which the copies were posted and having come to a finding on that point, that he decide the question of limitation in view of the

above observations; and if he finds that the appeal is not barred by limitation that he proceed to decide it according to law. Costs of this appeal will follow the result.

S. N. Din *Appeal allowed.*

Advocate High Court

Jammu & Kashmir

Srinagar.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2647 OF 1917.

May 28, 1918.

Present:—Mr. Justice Shah Din.

LOCHANGIR—PLAINTIFF—APPELLANT

versus

SADA AND OTHERS—DEFENDANTS—

RESPONDENTS.

Punjab Tenancy Act (XVI of 1887), s. 50—Wrongful dispossession of tenant—Suit for recovery of possession—Limitation.

A person wrongfully dispossessed of his tenancy is bound to bring his suit for recovery of possession in a Revenue Court within one year from the date of his dispossession.

Second appeal from the decree of the District Judge, Gurdaspur, dated the 12th July 1917, affirming that of the Munsif, 2nd Class, Shakargarh, District Gurdaspur, dated the 17th April 1917, dismissing the claim with costs.

Lala Balwant Rai, for the Appellant.

Lala Durga Das, for the Respondents.

JUDGMENT.—It is unnecessary to deal with this appeal on the merits, as I must hold, following the recent Full Bench decision in Civil Reference No. 36 of 1917 [*Akbar Hussain v. Karm Dad (1)*], that since the plaintiff had been wrongfully dispossessed of his tenancy, he was bound to bring his suit in a Revenue Court for recovery of possession within one year from the date of his dispossession under section 50 of the Punjab Tenancy Act. As he allowed the period of one year laid down in section 50 aforesaid to elapse without bringing a suit in a Revenue Court, he is now precluded from seeking the same remedy in a Civil Court. Upon this ground alone the appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 48 Ind. Cas. 8; 90 P. R. 1913 (F. B.).

KALI PRASAD v. MUHAMMAD YASIN KHAN.

ODDH JUDICIAL COMMISSIONER'S
COURT.

SECOND CIVIL APPEAL No. 356 OF 1918.

September 16, 1919.

Present:—Mr. Lyle, A. J. C.

KALI PRASAD AND OTHERS—PLAINTIFFS
—APPELLANTS

versus

MUHAMMAD YASIN KHAN AND OTHERS
—DEFENDANTS—RESPONDENTS.

*Contract Act (IX of 1872), s. 74—Mortgage—Interest,
high rate of, in case of default—Penalty—Court, duty
of—Reasonable rate.*

A mortgage-deed provided that the principal sum should be paid within six months from the date of the mortgage and that in case of default interest at the rate of $3\frac{1}{2}$ per cent should be charged. In a suit on the mortgage interest at the rate of $37\frac{1}{2}$ per cent was claimed. The Court, however, held that the stipulation for payment of interest was by way of penalty and awarded interest at the rate of $12\frac{1}{2}$ per cent. On appeal:

Held, that the decision was correct and that the rate of interest awarded was reasonable, but that interest at that rate should have been allowed up to the date fixed for payment and interest at 6 per cent after that date.

Appeal from the decree of the District Judge, Gonda, dated the 29th May 1918, modifying that of the Subordinate Judge, Gonda, dated the 6th April 1918.

Mr. Muhammad Wasim holding brief of the Hon'ble Pandit Gokaran Nath Misra and Babu Jiban Krishna Bannerji, for the Appellants.

Pandit Jagmohan Nath Ohak, for the Respondents.

JUDGMENT.—This was a suit on the basis of a mortgage dated the 6th of July 1905. The mortgage-deed provided that the principal sum should be paid within six months from the date of the mortgage and that if the mortgagor failed to pay within that time, interest at the rate of $37\frac{1}{2}$ per cent. should be charged.

The Court of first instance held that this provision was not a provision by way of penalty and gave the plaintiff a decree for the mortgage money with interest at the stipulated rate up to the date of the suit, but it declined to award any interest after that date.

The learned District Judge has held that the stipulation with regard to the payment of $37\frac{1}{2}$ per cent interest is a stipulation by way of penalty and has,

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therefore, awarded interest at the rate of $1\frac{1}{2}$ per cent.

The only question in second appeal is whether the stipulation is by way of penalty or not. In my opinion the learned District Judge has come to a right conclusion. An increase of interest from *nil* to $37\frac{1}{2}$ per cent. made because of failure to pay within a stipulated period is clearly made by way of penalty. In that view of the case the lower Appellate Court was right in reducing the rate of interest to the reasonable rate of $12\frac{1}{2}$ per cent. But that rate should have been allowed on the principal mortgage money up to the date fixed for payment and interest at the rate of 6 per cent. should have been allowed after that date.

I allow this appeal to the extent that the interest at the rate of $12\frac{1}{2}$ per cent. will be allowed up to the date fixed for payment by the lower Appellate Court and interest at the rate of 6 per cent. per annum will be allowed thereafter till realization. The parties will pay and receive costs in proportion to their failure and success.

Appeal partly allowed.
S. N. Datta
Advocate High Court
Jammu & Kashmir

Srinagar.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2798 OF 1915.

July 17, 1919.

Present:—Mr. Justice Shadi Lal, and
Mr. Justice Dundas.

BUA DITTA—PLAINTIFF—APPELLANT
versus

LADHA MAL—DEFENDANT RESPONDENT.

Court Fees Act (VII of 1870), s. 7 (iv) (c), Sch. II, Art. 17.—Suit for declaration that decree passed against plaintiff shall not affect him, whether maintainable—Prayer for general relief, effect of—Injunction, prayer for, whether necessary—Consequential relief

The mere prayer for general relief is not necessarily a prayer for consequential relief so as to take the suit out of the class of suits for declaration only [p. 835, col 1.]

Plaintiff sued for a declaration that a certain decree being based on fraud shall not affect his rights and for any other relief which the Court might deem fit to grant. The Subordinate Judge,

BUA DITTA v. LADHA MAL,

holding that this was a suit for a declaratory decree and other consequential relief, called upon the plaintiff to pay *ad valorem* Court-fee and on his failure to do so, rejected his plaint. The plaintiff appealed:

Held, (1) that the suit as brought was one for a declaration only; [p. 835, col. 2.]

(2) that a suit for a mere declaration was not competent in this case, unless followed up by a prayer for consequential relief by injunction or otherwise; [p. 836, col. 1.]

(3) that the Court ought to have allowed the plaintiff an opportunity to amend his plaint so as to include the necessary prayer for consequential relief by injunction or otherwise. [p. 836, col. 1.]

First appeal from the order of the Senior Subordinate Judge, Gujrat, dated the 29th June 1919, dismissing the claim with costs on account of non-payment of deficient Court-fee on plaint.

FACTS.—Plaintiff and defendant, real brothers, appointed an arbitrator to settle their disputes about property. The arbitrator's award was filed in Court and a decree passed in compliance therewith. Plaintiff then brought the present suit for a declaration to the effect that since the award of the arbitrator and the decree passed in accordance therewith are based on fraud, they are ineffectual and inoperative as against the right of the plaintiff, adding a prayer for "any other relief which according to justice and the circumstances of the case the Court might deem fit to grant." The defendant pleaded that the declaratory suit could not proceed as the plaintiff was entitled to a further relief for possession by partition, and that an *ad valorem* Court-fee should be levied. The senior Subordinate Judge held that the suit could proceed as framed but that the plaint must be stamped under section 7 (iv) (c) of the Court Fees Act. He rejected the prayer of the plaintiff for permission to amend the plaint and ordered him to pay *ad valorem* Court-fee. On his failure to do so, the Court rejected the plaint under Order VII, rule 11, Civil Procedure Code. The plaintiff appealed to the High Court.

Dr. Shujauddin, for the Appellant.—It is a suit for a mere declaration. The Court below is wrong in holding that the second prayer of the plaintiff excludes it from the scope of Article 17 (iii) of the Court Fees Act. The second prayer is mere surplusage. The test is the substance of the claim and not the mere words which the

plaintiff uses in his plaint. *Malik'a Meladathil v. Kunji Achammal* (1).

The rulings relied on by the Court below do not apply. In *Deokali Koer v. Kedar Nath* (2) the plaintiff prayed for a declaration that without the deduction of a fair value of certain *mauzas* and excluding the same, the defendants had no right to lay the whole charge on the remaining property in claim and to bring about the sale of the said property. The Court held that this was a prayer for injunction which is a consequential relief and that, therefore, the suit was not such as is contemplated by section 42, Specific Relief Act. Similary in *Nanak Chand v. Jiwan Mal* (3) the plaintiff sued for a cancellation of a deed of release and the Court held that the plaintiff was really suing for consequential relief and could not take advantage of Article 17 (iii).

On the contrary it has been held that a suit in which the only prayer is to have a decree set aside as null and void is a suit for a declaratory decree without consequential relief and is governed by Article 17 (iii). *Shrimant Sagajirao v. Smith* (4). The same view was taken in *Zinnat-un-nessa Khatun v. Girindra Nath Mukerjee* (5). The learned Judge of the Court below was wrong in holding otherwise.

In any case, the plaintiff ought to have been allowed to amend his plaint. Under the circumstances of the case it was the duty of the Court to allow amendment. Referred to *Hazara Singh v. Bishen Singh* (6) and *Kalabhai v. Secretary of State* (7).

Diwan Mehr Chand, for the Respondent.—We have to see here what is the real claim. From the facts set out in the plaint it is clear that there has been a partition of the property and the real object of the plaintiff is to undo the partition. Plaintiff has mortgaged a portion of the property. He has to get only half. This portion has to be included in his share and that is the reason of the suit.

(1) 5 Ind. Cas. 927; 7 M. L. T. 177; 20 M. L. J. 791.

(2) 15 Ind. Cas. 427; 39 C. 704; 16 O. W. N. 838.

(3) 25 Ind. Cas. 435; 36 P. R. 1914; 237 P. L. R. 1914.

(4) 20 B. 736.

(5) 30 C. 788.

(6) 128 P. R. 1907; 58 P. L. R. 1908; 97 P. W. R. 1907.

(7) 29 B. 19; 6 Bom. L. R. 648.

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In *Arunachalam Chetty v. Rangasamy Pillai* (8) a Full Bench held that a suit for a declaration that a decree passed against the plaintiff for a debt is not binding on him is not a mere declaratory suit, but is one with consequential relief falling under section 7 (iv) (c). Their Lordships laid down a general principle: see pages 925-926.*

The suit as framed does not lie. Plaintiff must pray for an injunction restraining defendants from executing the decree. No amendment can be allowed now. *Vide Kunhamed v. Kutti* (9) followed in *Ramanadhan Chettiar v. Annamalai Chetty* (10).

Dr. Shujauddin replied briefly.

JUDGMENT.—The plaintiff-appellant brought a suit asking for a declaratory decree to the effect that the award of an arbitrator as well as a decree passed against him on the strength of this award, being based on fraud, should not have any effect against his rights and also asking for any other relief which according to justice and circumstances of the case the Court might deem fit to grant. The learned Senior Subordinate Judge has held this to be a suit asking for a declaratory decree and other consequential relief, in which the plaintiff is bound to value the relief which he seeks and pay a Court-fee thereon under section 7 (iv) (c) of the Court Fees Act, and as the plaintiff had valued his suit at Rs. 14,750, he called upon him to pay a Court-fee on that valuation and on his failure to do so has rejected his plaint under Order VII, rule 11, Civil Procedure Code. The plaintiff appeals.

We are satisfied that the mere prayer for general relief is not necessarily a prayer for consequential relief so as to take the suit out of the class of suits for declaration only, and on this point we do not think that the decree of the learned Senior Subordinate Judge can be supported. But it is argued for the defendant-respondent that a suit for a mere declaration does not lie in this case. There is no Punjab authority

directly in point, at least none has been quoted to us, and we have been compelled to fall back on rulings of other High Courts in which there is, perhaps, some apparent conflict. The first case directly in point is *Shrimant Sagajirao v. Smith* (4). The suit was one brought by a judgment-debtor for a declaration that a money decree obtained against him by the defendant was null and void. The question was whether Court-fee should be levied under section 7 (iv) (c) or under Article 17 of the II Schedule of the Court Fees Act. Having reviewed the decisions there quoted, the learned Judges observed that some of them were based on ascertained facts in which the Judges were in a position to say what the real claim was. In such cases the plaintiff is usually called upon to value his relief. In that case, however, the Court had no knowledge beyond that derived from the plaint, nor was it in a position to say whether the case was one to which the proviso to section 42 of the Specific Relief Act applied. The conclusion arrived at was that on the plaint the suit was apparently one for a mere declaration and that a Court-fee of Rs. 10 might be paid accordingly. This decision was followed in the Calcutta High Court in *Zinnat-un-nessa Khatun v. Girindra Nath Mukerjee* (5). In that case the plaintiffs asked to have it declared that certain decrees were ineffectual and inoperative against them, and it was remarked: "The safest course in these cases is to ascertain what the plaintiff actually asks for by his plaint, and not to speculate upon what may be the ulterior effect of his success. It may very well be that as the result of setting aside the decree in question, some ulterior benefit may directly or indirectly flow to the plaintiff. But what we have to look at is what he asks for by his plaint. It is clear, looking at the plaint, that all that the plaintiff asks for is a declaratory decree, and he does not for any consequential relief. The case of *Shrimant Sagajirao v. Smith* (4) accords with this view."

The views taken in the above two decisions have not been followed in a recent Full Bench decision of the Madras High Court in *Arunachalam Chetty v. Rangasamy Pillai* (8). In that case it was remarked that a decree declaring that a

(8) 28 Ind. Cas. 79; 38 M. 922; 28 M. L. J. 118; 17 M. L. T. 164; (1915) M. W. N. 118.

(9) 14 M. 167; 1 M. L. J. 338.

(10) 29 Ind. Cas. 132.

*Pages of 38 M.—Ed.

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decree is not binding on the plaintiff had the effect of cancellation of the decree and did not bear the appearance of a mere declaratory decree, although the case might be different where a declaration was sought by a person who was not a party to the decree impugned. In a case like that the suit might properly be regarded as one for declaration only, but in other cases where the plaintiff seeks for consequential relief it was more properly a suit to get rid of an already existing obligation. The Full Bench concluded that a suit to avoid a decree passed against the plaintiff was in any case a suit for a declaratory decree with consequential relief within the meaning of clause (iv) (c) of section 7 of the Court Fees Act. This view was followed by other Judges in Madras in *Ramanadhan Ohettiar v. Annamalai Ohetty* (10), where it was held that a suit to declare that a decree is fraudulent and void will not lie unless followed up by a prayer for consequential relief, such as an injunction restraining the decree-holder from executing the decree. We are of opinion that this decision can well be applied in the present case. It is clear that a partition decree for the prosession of immoveable property has been passed in this case; although we are not in a position to say whether it has actually been executed, but if not, it is presumably capable of execution.

We must, therefore, accept the appeal, set aside the order of the Senior Subordinate Judge and direct him to allow the plaintiff an opportunity to amend his plaint so as to include the necessary prayer for consequential relief by injunction or otherwise against the defendant and to value his relief and to pay Court-fees on his valuation. It will, of course, be open to the learned Judge to again reject the plaint, should the plaintiff fail to comply with these orders. No order is passed as to costs in this Court.

Appeal accepted.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 36
OF 1919.

July 7, 1919.

Present:—Sir Lancelot Sanderson, Kt.,
Chief Justice, and Justice Sir John
Woodroffe, Kt.

KORAMALL RAMBULLOBH—
PLAINTIFF—APPELLANT

versus

MUNGILAL DALIM CHAND—

DEFENDANT—RESPONDENT.

Letters Patent (Cal.), cl. 15—Decision rejecting application for judgment on pleadings, whether judgment—Appeal, whether lies—Civil Procedure Code (Act V of 1908), O. XII, r. 6—Admission, ambiguous, in written statement, whether justifies judgment.

A decision by a Judge on the Original Side of the High Court rejecting an application by the plaintiff for an immediate judgment upon the pleadings is a "judgment" within the meaning of clause 5 of the Letters Patent, and is appealable as such. [p. 837 col. 1.]

An ambiguous admission in a written statement that a certain sum of money was due to the plaintiff is not such an admission as would justify an order under Order XII, rule 6 of the Civil Procedure Code. [p. 837, col. 2.]

Appeal from the decision of Mr. Justice Greaves, dated 7th April 1919.

Messrs. N. Sircar, Nisith Sen and P. K. Chakravarty, for the Appellant.

Messrs. I. B. Sen and D. N. Sen, for the Respondent.

JUDGMENT.

SANDERSON, C. J.—In my judgment there is a right of appeal in this case, on the ground that the decision of my learned brother Mr. Justice Greaves was a 'judgment' within the meaning of clause 15 of the Letters Patent. The question before the learned judge was whether the plaintiff was entitled to have judgment for the sum of Rs. 9,535 add on the state of the pleadings on the date of his application, and it is hardly necessary to point out that the alleged right might be a valuable right to the plaintiff, because if it were held by the learned Judge that the plaintiff was not entitled to the judgment for which he was asking on the state of the pleadings, it would mean that the plaintiff must wait at all events for a considerable time before he could get the judgment he was seeking; it might be months or conceivably even as much as a year. Farther than that if it was held that the plaintiff was not entitled to a

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judgment for the amount alleged to be admitted on the pleadings, he would have to go to the expense and trouble of a trial on the original side. There are other matters to which I need not refer, to show that the right which the plaintiff was asserting might be a valuable and important right. Under those circumstances, I think the decision of the learned Judge did affect the merits of the question which was before him, viz., whether the plaintiff was entitled to have an immediate judgment upon the pleadings or whether he should be compelled to go to trial in the ordinary way, the decision, in my opinion, was a judgment within the meaning of the clause and there is a right of appeal.

WOODROFFE, J.—I am also disposed to think that there is an appeal in this case.

SANDERSON, C. J.—This is an appeal from the judgment of my learned brother Mr. Justice Greaves.

The suit was for the sum of Rs. 9,745-15 annas, for the price of goods sold and delivered. The plaintiff made an application to the Court under Order XII, rule 6, of the Civil Procedure Code asking for an order that the defendant's firm may pay to the plaintiff's firm, without prejudice to the latter's right to proceed with the suit for the recovery of the balance of its claim mentioned in the plaint, the sum of Rs. 9,535-15-0 admitted by the defendant firm in its written statement to be due and payable by it to the plaintiff's firm. This application was based upon the written statement of the defendant.

The written statement began by alleging that the suit was premature. It then set out in paragraph 5 that as regards the balance of the goods which had not been paid for, the plaintiff firm, in spite of the defendant firm's readiness and willingness and even repeated offers to pay the price of the same after making reasonable deduction therefrom for damage, failed and neglected and in fact refused to accept the same, as appeared from what was stated below. The further allegation was that in view of the common practice and custom in the market which was also made an express term of the contract as stated in paragraph 3 of their written statement, the price of the said five bales

had not become due on the 7th day of February 1919, when this suit was instituted. The allegation in the written statement that the suit was premature was no doubt by reason of the alleged term of the contract, whereby the price of the goods had not become due on the day the suit was instituted, namely, the 7th of February 1919. The written statement, so far, seems to me to involve a denial that the plaintiff was entitled to sue for any sum on the 7th of February. Then came paragraph 6, and therein it was alleged that there was a meeting between the Gomasta of the plaintiff's firm and the defendant or somebody on his behalf; and, it was agreed on or about the 28th of December 1918 that Rs. 210 was a reasonable allowance for the alleged damaged condition of the goods and that the defendant was to pay Rs. 9,535-15 annas instead of the amount claimed, and the plaintiff was to accept that sum but that although the defendant was ready and willing on that date and had all along been ready and willing from that date up to the time when the written statement was put in to pay that sum, the plaintiff in fact refused to accept it, and was on the date of the written statement still refusing to accept it. That paragraph taken by itself, to my mind, does amount to an unconditional admission that the plaintiff was entitled to Rs. 9,535-15 annas. Then the next paragraph states: "The defendant firm deny that the plaintiff firm have any cause of action as against the defendant as incorrectly stated in paragraph 6 of the plaint." Under these circumstances, can I say that there is an unambiguous admission that there was owing to the plaintiff the sum of Rs. 9,535-15 annas which could be recovered in this suit? I think it is clear that there must be an admission to that effect. It was said by Lord Justice Lopes in the case of *Landergan v. Feast* (1) (which was a decision in respect of Order XXXII, rule 6 of the English Rules, which is similar in all material respects to Order XI, rule 6 of the Civil Procedure Code here) that "There must be a clear admission that the money is due and recoverable

(1) (1886) 34 W. R. 691; 55 L. T. 42.

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in the action in which the admission is made." Having regard to the matters to which I have referred, and especially to the first paragraph of the defence where the defendant relied upon the plea that the suit is premature, I am unable to say that there was in the written statement, taking it as a whole, an unambiguous admission that there was the sum of Rs. 9,535-15 annas due to the plaintiff, which could be recovered in this suit. Consequently I think that this appeal should be dismissed.

It must not be taken that I express any opinion as to the merits of the case set up by the defendant in the written statement. My judgment is with reference merely to the question whether the written statement contained such an admission as would justify an order under Order XII, rule 6 of the Code.

(After discussion.)

We are of opinion that each party should pay his own costs in this appeal. We do not interfere with the learned Judge's order as regards the costs in the Court below.

WOODROFFE, J.—I agree.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1189 OF 1916.

July 21, 1919.

Present :—Mr. Justice Shadi Lal and
Mr. Justice Dundas.

MIRAN DITTA AND ANOTHER—PLAINTIFFS—
APPELLANTS

versus

BIHARI LAL AND ANOTHER—DEFENDANTS
—RESPONDENTS.

Limitation Act (IX of 1908), s. 6—Minor when can take advantage of exemption—Right of action, accrual of, before birth, effect of.

A plaintiff cannot take advantage of the exemption provided for by section 6 of the Limitation Act unless he is a minor and was in existence at the time when the right to sue accrued. [p. 838, col. 2.]

A minor is not entitled to the benefit of section 6 of the Limitation Act in respect of a right to sue which accrued before his birth. [p. 839, col. 1.]

Second appeal from the decree of the District Judge, Hissar, dated the 3rd March 1916, affirming that of the Subordinate Judge, 2nd Class, Hissar, dated the 9th January 1915, dismissing the suit with costs.

Pandit Nanak Chand, for the Appellants.

The Hon'ble Mr. Muhammad Shafi and Mr. M. Shah Niwaz, for the Respondents.

JUDGMENT.—On the 22nd September 1886 one Phuman, a collateral of the plaintiffs, mortgaged the land in dispute by way of conditional sale. After the expiry of the period fixed for the payment of the mortgage money the mortgagee took foreclosure proceedings and after the expiry of the year of grace he instituted a suit for possession as owner, and obtained a decree on the 3rd February 1893. In execution of the decree he got possession of the property, which resulted in a mutation attested in his favour on the 19th December 1893.

The alienor died in 1901, and the plaintiffs, who were born after the date on which the mutation referred to above was effected in favour of the alienees, instituted the present suit in August 1914 for possession of the property. The sole question for determination is whether their suit is within time. Now, considering that the alienor died after the enforcement of the Punjab Limitation Act I of 1900, we have no hesitation in holding that the action is governed by the provisions of that Act. The *terminus a quo* is, therefore, the date of the mutation and the suit is clearly barred by time.

It appears that one of the plaintiffs, Miran Ditta, was born in May 1894, and Mr. Nanak Chand for the appellants consequently contends that, as Miran Ditta was in his mother's womb in December 1893 when the mutation was effected, he is entitled to invoke the assistance of section 6 of the Limitation Act, and that the period of limitation should be counted from the date of the cessation of minority. This contention is, in our opinion, erroneous and must be rejected. The principle of law is perfectly clear that a plaintiff cannot take advantage of the exemption, unless he is a minor and in existence at the time when the right to sue accrues.

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and that a minor is not entitled to the benefit of the provisions of section 6 in respect of a right to sue which accrued before his birth. As observed above, the period of limitation in this case began to run in December 1893 when neither of the plaintiffs was in existence, and section 6 of the Limitation Act has consequently no application.

We, therefore, affirm the decree of the lower Appellate Court and dismiss the appeal with costs,

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 267 OF 1918.

June 23, 1919.

Present :—Mr. Justice Newbould and
Mr. Justice Cuming.

ANNADA PRASANNA SEN—

JUDGMENT-DEBTOR—APPELLANT

versus

SOMORUDDI MIRDHA—DECREE-

HOLDER—RESPONDENT.

*Limitation Act (IX of 1908), Sch. I, Art. 182 (5)—
Execution of decree—Decree-holder auction-purchaser,
application by, to be put in possession, whether step-in-
aid of execution.*

Per Newbould, J.—An application by a decree-holder to be put in possession of property purchased by him at a sale in execution of his decree, is an application to the Court to take a step-in-aid of execution within the meaning of clause (5) of Article 182 of the First Schedule to the Limitation Act, [p. 839, col. 2; p. 840, col. 1.]

Per Cuming, J.—An application, to be a step-in-aid of execution, must be one by the decree-holder in his capacity of decree-holder and not in his capacity of auction-purchaser. [p. 841, col. 2.]

Appeal against the order of the Additional District Judge, Backergunge, dated the 17th June 1918, affirming that of the Subordinate Judge, 2nd Court of that District, dated the 3rd December 1917.

FACTS appear from the judgment.

Babu Prokash Ohandra Majumdar, for the Appellant.—The previous application for execution is dated 29th May 1913. Some properties were sold on 20th November 1913. On the 7th September 1914 the sale was confirmed. On the 18th November 1914 the decree-holder applied for delivery of

possession. On the 11th April 1917 the present application for execution was filed. The main question to be decided is, whether the application is time-barred. The decree-holder was the purchaser. He seeks relief under Article 182, clause (5), of the Limitation Act. The decision in *Pran Krishna v. Juramoni* (1) is in favour of the decree-holder, but *Umesh Chandra Dass v. Shib Narain* (2) is in my favour. Cites *Panchanan v. Nrisingha Prosad Roy* (3). What is the test to see if an act is a step-in-aid of execution? Refers to Order XXI, rule 95, Civil Procedure Code. The decisions are conflicting. So, there should be a reference to the Full Bench. I submit that the application must be by a decree-holder as such. *Umesh Ohandra Dass v. Shib Narain* (2) has not been discussed in any later case.

Babu Preo Sankar Majumdar, for the Respondent.—*Umesh Ohandra Dass v. Shib Narain* (2) says that separate application must be made for delivery of possession. This case has no application to the present case. *Sariatoolla v. Raj Kumar* (4) is on all fours with this case.

Babu Prokash Ohandra Majumdar, in reply.—No answer has been given as to conflict of principles. The real question is what is the proper test to determine, what is a step-in-aid of execution. The authority of *Sariatoolla v. Raj Kumar* (4) has been much shaken. This case has been discussed in *Baij Nath Prosad v. Ghanshyam Dass* (5), *Sadananda Sarma v. Kali Sankar Bajpai* (6), *Maazzam Hussien Mandai v. Sarat Oomary Debi* (7) and *Pran Krishna v. Juramoni* (1).

JUDGMENT.

NEWBOULD, J.—This is an appeal by the judgment-debtor in execution proceedings, his contention being that the application for execution by the decree-holder is barred by limitation. The decision of this appeal depends entirely on the answer to the question whether an application by a decree-holder to be put in possession of property purchased by him at a sale in execution of his decree, is an applica-

(1) 1 Ind. Cas. 430; 13 C. W. N. 694.

(2) 31 C. 1011; 9 C. W. N. 193.

(3) 6 Ind. Cas. 264; 11 C. L. J. 356.

(4) 27 C. 709; 4 C. W. N. 681.

(5) 8 C. W. N. 382.

(6) 10 C. W. N. 28; 3 C. L. J. 95.

(7) 5 Ind. Cas. 89; 11 C. L. J. 357; 14 C. W. N. 433.

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tion to the Court to take a step-in-aid of execution within the meaning of clause 5 of Article 182 of the First Schedule of the Indian Limitation Act, 1908. Both the lower Courts, relying on the decisions of this Court in *Sariatoolla v. Raj Kumar* (4) and *Pran Krishna v. Juramoni* (1), have answered the question in the affirmative. For the appellant it is contended that an application by a decree-holder to be put in possession of property after a sale by the Court is made by him in his capacity as auction-purchaser and not as decree-holder and, therefore, is not an application for a step-in-aid of execution. It is urged that on the sale of the property the execution proceedings come to an end, and consequently the decree holder, when applying to be put in possession, is not executing his decree. It is also pointed out that rules 95 and 96 of Order XXI of the Code of Civil Procedure require an application for delivery of possession to be made by the 'purchaser.' Our attention has also been drawn to Article 180 of the First Schedule to the Indian Limitation Act, 1908. The wording of this Article adds nothing to the argument based on the wording of rules 95 and 96 of Order XXI, since the former would naturally be in the same terms as the latter. In support of the appellant's contention the cases *Panchanan v. Nrisingha Prosad Roy* (3) and *Umesh Chandra Dass v. Shib Narain* (2) are cited. It is contended that these decisions are at variance with the decisions on which the lower Courts have relied and we are asked to refer this appeal to a Full Bench for decision of this question.

In my opinion we should follow the decisions in the cases of *Sariatoolla v. Raj Kumar* (4) and *Pran Krishna v. Juramoni* (1). Those cases are clearly in point and are decisions on the actual questions that arise in this appeal. In both cases on which the appellant relies the point for decision was different, namely, whether an application for confirmation of sale was a step-in-aid of execution. It is true that there are remarks in the judgments in these cases that such an application cannot be a step-in-aid of execution because the application was made on behalf of the decree holder as auction-purchaser. But in the case of *Umesh Chandra Dass v. Shib Narain* (2) the learned Judges, after

remarking that an application made not by the decree-holder as such but by the auction-purchaser could hardly be said to be an application in aid of execution, proceed to give another and entirely different reason for dismissing the appeal. In the other case, *Panchanan v. Nrisingha Prosad Roy* (3), the learned Judges, after pointing out that the application was made on behalf of the decree holder as auction-purchaser, add that no authority had been cited in support of the contention that such an application was a step-in-aid of execution. That case was decided in 1893. Had the question at issue been the same as in the present case, different considerations would have arisen and it seems to me quite possible that so much importance might not have been given to the difference between an application by the decree-holder as such and by him in his capacity of auction-purchaser. Though the argument based on this difference is plausible, it does not appear to me to be sound. Even though the decree-holder has become the auction-purchaser, he has obtained no benefit from his decree until he gets possession of the property purchased by him and an application to be put in possession is, therefore, an application for a step-in-aid of execution of his decree. This is the view that has been also taken by other High Courts in India: *Moti Lal v. Makund Singh* (8), *Lakshmanan Chettiar v. Kannanmal* (9) *Sadashiv Mahadu v. Narayan Vithal* (10).

For these reasons and with this weight of authority behind it I think the decision of the lower Appellate Court is right and should be upheld. The apparent differences of opinion expressed by the learned Judges in the cases on which the appellant relies are not such as to require a reference to a Full Bench.

As my learned brother agrees with me as to the final order, though on other reasons, this appeal must stand dismissed with costs.

The hearing fee is assessed at three gold mohurs.

(8) 19 A. 477; A. W. N. (1897) 117.

(9) 24 M. 185.

(10) 11 Ind. Cas. 987; 35 B. 452 at p. 430; 13 Bom. L. R. 661.

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CUMING, J.—This appeal arises out of an application for execution of a decree, and the short point for decision is whether an application for delivery of possession by the decree holder or auction-purchaser at a sale held in execution of the decree is a step-in-aid of execution.

It would appear that the previous application for execution was made on 29th May 1913. The property was sold on 29th November 1913, and the sale confirmed on 7th September 1914. On 18th November 1914, the decree-holder as auction purchaser applied for delivery of possession. The present application for execution is made on 11th April 1917.

Both the lower Courts have held that the application for confirmation of the sale is not a step-in-aid of execution, but they have held that the application for delivery of possession by the decree holder as auction-purchaser is a step-in-aid of execution and hence the present application is within time.

The appellant contends that neither the application for confirmation of sale nor the application for delivery of possession by the auction-purchaser decree-holder are steps-in-aid of execution. The respondent has not contended that the application for confirmation of the sale is a step-in-aid of execution, but he contends that the application for delivery of possession is such a step and so limitation in this case has been saved.

The appellant has relied on two rulings of this Court in support of his contention, the case of *Umesh Chandra Dass v. Shib Narain* (2) and the case of *Panchanan v. Nrisingha Prosad Ray* (3). The respondent has relied on the two rulings, *Saritoolla v. Raj Kumar* (4) and *Pran Krishna v. Juramoni* (1). The respondent has urged that the two cases cited by him are directly in point, while in the cases relied on by the appellant the question to be decided was whether an application for confirmation of the sale was a step-in-aid of execution. No doubt this is correct. But it seems to me that the principle which the learned Judges laid down in deciding the case of *Umesh Chandra Dass v. Shib Narain* (2), although strictly speaking they did not rely on it for the decision of the case, would apply to the case of an application for delivery of pos-

session. Ghose and Geidt, JJ., state:—"Referring to the application itself, in this case we find it was really made by the decree-holder in his capacity as purchaser of the plot in question. It was indeed made not by the decree-holder as such, but by the auction-purchaser and viewing it in this light it could hardly be said that it was an application in aid of execution of the decree."

The principle underlying these remarks was that the application to be a step-in-aid of execution must be one by the decree-holder in his capacity of decree-holder, and not in his capacity of auction purchaser. If we apply that principle to the present case, it would be clear that application by the decree-holder as auction-purchaser for delivery of possession would not be a step-in-aid of execution.

With the greatest respect to the learned Judges who decided the cases of *Saritoolla v. Raj Kumar* (4) and *Pran Krishna v. Juramoni* (1) it seems to me that this is the correct principle and that the application by an auction-purchaser for delivery of possession, even though he be the decree-holder, is not a step-in-aid of execution. The execution of the decree is complete when the property is sold and the money paid. I am fortified in the conclusions by the remarks of the learned Judges in the case of *Ananda Mohan Roy v. Hara Sundari* (11), where they state: "It seems to us that when the sale of the property attached in execution has been completed and the purchase-money paid into Court, nothing more remains to be done in respect of the execution of the decree as against that property and no application as regards the purchase money, either to draw it out of Court or set it off against the decree when the decree-holder is himself the purchaser, can properly be said to be an application to the Court to take some step in execution of the decree."

Even though the auction-purchaser was unable to get possession, that would not entitle the decree holder to take out further execution for that portion of his money represented by the property he had bought.

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It may no doubt be argued that to apply for delivery of possession is to give effect to the sale which is the result of the decree. It does not seem, however, to me that giving effect to the result of the execution of the decree is the same thing as executing the decree.

I am of opinion that all steps in execution of a decree which can save limitation must be taken by the decree-holder as decree holder and not as auction-purchaser.

In my opinion the two rulings *Sariatoola v. Raj Kumar* (4) and *Pran Krishna v. Juramoni* (1) were wrongly decided. As my learned brother is of the opinion that he should follow the two rulings already referred to which undoubtedly are directly in point, the appeal will be dismissed.

Appeal dismissed.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 3 OF 1919.

December 22, 1919.

Present:—Mr. Justice Shadi Lal and
Mr. Justice LeRossignol.

JHANDU—DEFENDANT—APPELLANT

versus

NIAMAT KHAN—PLAINTIFF, HEMMU

KHAN AND ANOTHER—DEFENDANTS—

RESPONDENTS.

Custom—Alienation—Ancestral property—Antecedent debts—Necessity—Duty of alienee to make enquiry.

Per *Shadi Lal, J.*—An alienee discharging an antecedent debt is not required to make an enquiry into the nature thereof. [p. 843, col. 2.]

But an alienee paying off an antecedent creditor gets no advantage, if he has knowledge of the true nature of the debt or acts in bad faith. [p. 844, col. 1.]

An alienee who is identified with the antecedent creditor, so that he and the creditor cannot be viewed as two separate persons, is in the same position. [p. 844, col. 1.]

Per *LeRossignol, J.*—It is the duty of an alienee of ancestral land to make enquiry not merely as to the existence of antecedent debts but also as to their nature, if the result of the first enquiry would raise doubts in the mind of an ordinary man as to the immorality or reasonableness of the debts. [p. 845, col. 2; p. 846, col. 1.]

Plaintiff sued for a declaration that a certain sale-deed executed by defendants Nos. 2 and 3 in favour of defendant No. 1 shall not affect his reversionary

rights. The major portion of the consideration was paid to antecedent creditors to whom the alienors were actually indebted. It appeared, however, that the alienors had embarked upon a career of reckless extravagance and were wasting the property to injure the reversioners:

Held, (1) that the alienee, who was the next door neighbour of the alienors, must have known that the debts due to antecedent creditors had been contracted recklessly and without necessity and could not be regarded as just debts; [p. 844, col. 1; p. 846, col. 1.]

(2) that under the circumstances the sale could not be held to be binding on the plaintiff's reversioner. [p. 844, col. 1; p. 846, col. 1.]

Appeal, under clause 10 of the Letters Patent, against the order of Mr. Justice Bevan Petman, passed on the 13th May 1919, in Civil Appeal No. 514 of 1919.

Lala Faqir Ohand, for the Appellant.

JUDGMENT.

SHADI LAL, J.—This is an appeal under clause 10 of the Letters Patent from the judgment of a single Bench, and the main question for determination is whether an alienee of ancestral immovable property from a person governed by customary law is bound to prove necessity or enquiry as to necessity with respect to a debt which was due by the alienor to an antecedent creditor and which has been discharged by the alienee. In other words, is it the duty of the alienee to enquire, not only into the existence of the antecedent debt, but also into the nature and necessity thereof?

Now, the passage in the Full Bench judgment in *Devi Ditta v. Saudagar Singh* (1), which deals with the subject, is in the following terms:—"An outsider who pays antecedent debts in consideration of a transfer of the property, if he acts honestly and makes proper enquiry whether the debts are actually due, is not responsible if he has been deceived and is entitled to ask for his alienation to be treated as binding. He can, however, be put in the same position as the other alienee, if the circumstances show that he had knowledge of the true nature of the debts, or that he made no enquiry whatever or acted with bad faith. The difference between the two kinds of alienees may, perhaps, be best illustrated by the case of a decree against the proprietor. The decree holder, by taking a transfer of land to pay off the decree, does not

(1) 65 P. R. 1900; P. L. R. 1900, p. 322.

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put himself in a better position than before if the original debts were not just debts, but an alienee who is an outsider is not bound to go behind the decree. In his case, in order to avoid the alienation, it would have to be specially shown that he was fully aware of the nature of the previous debts or acted in collusion with the former creditor. The main difference between the two classes of alienees thus appears to lie in the greater strictness of proof, required from the alienee who is also the antecedent creditor, that the debts were actually incurred and that they were not of the character mentioned above."

The first sentence of the above passage shows that the enquiry to be made by the alienee relates only to the existence of the antecedent debt, and that he is not required to enquire into the nature of the debt. According to this view he has discharged his duty if he shows that he made a proper enquiry into the matter whether the debt was actually due to the antecedent creditor, and the result of the enquiry was that the debt was so due. He is not required to go further and enquire into the character or the necessity of the antecedent debt.

If the matter depended upon the aforesaid sentence alone, there would be no difficulty whatever in defining exactly the duty of the alienee. But the second sentence in the passage cited above attempts to lay down the consequence of an omission to make the enquiry, and it is difficult to reconcile it with the first sentence. Does it mean that the alienee's omission to make the enquiry places him in the same position as an alienee who has not paid off an antecedent debt, and imposes upon him the duty of establishing necessity for the antecedent debt, even if he satisfies the Court that the antecedent debt discharged by him was actually due by the alienor? One would suppose that, as the sole object of the enquiry is to ascertain the existence of the debt, the alienee not making an enquiry should be in no worse position, if he succeeds in establishing the very fact for which the enquiry was required, viz., that the debt paid off by him was, as a matter of fact, due to the antecedent creditor. The only

difference in his position would be that in the event of making a proper enquiry he would be entitled to protection, even if it turned out that the debt did not exist and that he had been deceived; while in the case of non-enquiry he must prove that the debt discharged by him was actually due to the antecedent creditor. If the second sentence in the passage cited above determines the duty of the alienee, i. e., that an alienee omitting to make an enquiry is required to prove necessity for the antecedent debt, then it may be urged with some reason that the inference to be deduced from that sentence is that the duty of the alienee is not over when he has ascertained the existence of the debt, but that he should go further and enquire into the character of that debt.

It is unfortunate that there should be any ambiguity or uncertainty on a question of this kind which repeatedly comes up for decision before the Subordinate Courts. It, however, seems to me that the alienee discharging an antecedent debt is not required to make an enquiry into the nature thereof, and this is the view which finds expression in at least two Division Bench judgments, viz., *Muhammad Hayat Khan v. Sandhe Khan* (2) and Civil Appeal No. 350 of 1911 [*Muhammad Islam v. Hari Lal* (3)]. It appears that the dicta contained in those judgments were not absolutely necessary for the decision of the cases before the Court, but they certainly go to show how the learned Judges interpreted the rule laid down by the Full Bench judgment in the two sentences quoted above, and what they considered to be the duty of the alienee. It may not be out of place to point out that the rule of Hindu Law on the subject is to the effect that a vendee or a creditor claiming under a sale or a mortgage has to prove either that the antecedent debt existed or that he made due enquiry and honestly believed that it existed. He is not required to prove either actual necessity or enquiry as to necessity, vide Trevelyan's Hindu Law, page 310, and the remarks in *Maharaj Singh v. Balwant Singh* (4).

(2) 55 P. R. 1908; 105 P. W. R. 1908.

(3) 21 Ind. Cas. 944; 7 P. W. R. 1914; 16 P. L. R. 1914.

(4) 28 A. 508 at p. 541; 3 A. L. J. 274; A. W. N. (1906) 117.

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It is true that this view of the law as to antecedent debts may in some cases lead to an absurdity; and it may be urged with considerable force that an alienor has only to interpose an antecedent creditor in order to make his alienation unassailable. It is, however, clear that a debt incurred without valid necessity does not become a just antecedent debt merely by its colourable inclusion in a subsequent transaction. If the alienee was no party to this device and acted in good faith, there is no valid reason why he should be required to prove necessity for an antecedent debt. If he has to prove necessity or an enquiry as to necessity with respect to an antecedent debt, then he is in no better position than a person who takes an alienation in consideration of money paid to the alienor at the time of the alienation, and the doctrine of antecedent debt would then have no meaning.

But the law enunciated above helps only an honest alienee who acts in perfect good faith. There can be little doubt that an alienee paying off an antecedent creditor gets no advantage, if he has knowledge of the true nature of the debt or acts in bad faith. The same remarks would apply to an alienee who is identified with the antecedent creditor, so that he and the creditor cannot be viewed as two separate persons. Now, the facts of the present case show that though the alienee made no enquiry whatsoever, he paid the major portion of the consideration to antecedent creditors to whom the alienors were actually indebted. It is, however, clear that the latter had embarked upon a career of reckless extravagance and were wasting their property to injure the reversioners. The circumstances disclosed in the judgment of the District Judge, especially the facts relating to a previous attempt on the part of the alienors to sell their ancestral land, which attempt led to a suit by the reversioner, point to the conclusion that the alienee, who is their next door neighbour, must have been aware of their previous dealings with the ancestral land, and must have come to know that the debts due to the antecedent creditors had been contracted recklessly and without necessity and could not be regarded as just debts. Upon this finding I

would dismiss this appeal, but considering that there was no appearance by or on behalf of the respondent I would make no order as to costs.

LE ROSSIGNOL, J.—*Devi Ditta v. Saudagar Singh* (1) is, of course, binding on us, but with all deference I find it somewhat difficult to reconcile various passages which occur in it, and it is desirable that the Courts below should be in no doubt as to the true state of the law.

The expression "just debt" was defined in *Duni Chand v. Jagat Singh* (5) to mean a debt which is actually due, is not immoral, illegal nor opposed to public policy. It also means, at any rate when the rights of reversioners under customary law are involved, a debt not contracted as an act of reckless extravagance or of wanton waste or with the intent to destroy the interests of the reversioners. After quoting this definition of the expression "just debt," the judgment (*Devi Ditta v. Saudagar Singh* (1)) goes on to discriminate between the alienee who is also an antecedent creditor, and an outsider who pays antecedent debts in consideration of his alienation, and with regard to the latter class, the first and, to judge by the head-note (for the facts of the case are not given), the main proposition laid down is that if the alienee makes proper inquiry whether the debts are actually due *and has been deceived*, he is not responsible if it is subsequently ascertained that the debts do not exist.

The judgment further proceeds to lay down that he will be in no better position than the antecedent creditor if the circumstances show that he had knowledge of the nature of the debts or that he *made no inquiry* or that he acted in bad faith.

Then follows an illustration concerning a decree which *prima facie* seems to me to clash with those propositions, for it would appear that even if the subsequent alienee is aware that the decree is based on immoral debts, his alienation is unassailable and he is not bound to go behind the decree, but in his case, the judgment continues: "To avoid his alienation it would have to be specially shown that he was fully aware of the nature of the previous

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debts or had acted in collusion with the previous creditors." This appears to indicate that the onus of establishing those conditions lies on the persons challenging the alienation, whilst the next sentence of the judgment would seem to imply that the question is not one of *onus* but of the strictness or *quantum* of proof demandable of the alienee.

These two sentences of the judgment and also the preceding two, the first of which lays down that an outsider need not trouble to go behind the decree and the second of which provides in effect that the decree will not protect him if he has certain knowledge, have caused me difficulty. If the second sentence, however, be read as a proviso to the first and be read "Provided that the alienation may be avoided if it be specially shown, etc., etc.," the difficulty is removed and this is how I read those sentences. I apprehend that the principle laid down is that the initial *onus* lies on the outsider alienee to show that the debts were due and when he has discharged that *onus*, the turn then comes of the opposite party to show that the alienee made no proper inquiry or that if he made one, he must have learnt of the real nature of the debts. *Muhammad Hayat Khan v. Sandhe Khan* (2) is not a very direct authority in this connection, for in that case it was held that the alienor had unrestricted powers of alienation, so that the other findings in the appeal were really unnecessary for the disposal of the appeal. But in any case that judgment does not go farther than *Devi Ditta v. Sandagar Singh* (1), for although the judgment comprises a sentence which runs: "If the debts were really due, the alienation made to pay such debts is a necessity according to the Full Bench judgment, *Devi Ditta v. Sandagar Singh* (1), and it is binding on the plaintiff," that sentence is followed by another:—"The *onus* is on the plaintiff to prove that the debts were really incurred for immoral purposes and in reckless extravagance," so that *Muhammad Hayat Khan v. Sandhe Khan* (2) is no authority for the view that the alienation to an outsider alienee is binding on a reversioner, if the reversioner cannot show that the antecedent debts, which were liquidated by the alienation, were unjust or extravagant debts to the knowledge of the alienee. *Muhammad Islam v. Hari Lal* (3) is another

authority quoted on the subject; but its value also is much discounted by the fact that the primary finding in the appeal was that the plaintiffs had failed to prove that they had any right to contest the validity of the alienor's alienations. Later on in the judgment there is a sentence to the effect that the alienee was not bound in any way to inquire into the nature of the antecedent debt and that it was sufficient for him to satisfy himself that the debt really existed. If it was intended by this *dictum* to lay down that the alienation was unassailable merely because the antecedent debt really did exist, that goes farther than the Full Bench judgment.

From the foregoing it is clear that the two sentences in the Full Bench judgment which are hard to reconcile are that which runs:—"He can, however, be put in the same position as the other alienee if the circumstances show that he had knowledge of the true nature of the debts, or that he made no inquiry whatever or acted with bad faith," and that which runs: "The main difference between the two classes of alienees thus appears to lie in the greater strictness of proof required from the alienee who is also the antecedent creditor that the debts were actually incurred, and that they were not of the character mentioned above."

Do the words "or that he made no enquiry whatever" refer to the words in the preceding sentence "makes proper enquiry" and "has been deceived," or do they mean that he has not made any enquiry as to the mere existence of the debts without regard to their nature? If such is the meaning of the phrase "made no enquiry whatever," then the sentence is in conflict with the second sentence which suggests that the outsider alienee has to consider not only the existence of the antecedent debts but also their character. If A incurs immoral debts with B, C and D and subsequently alienates his property to E in consideration of the liquidation of those debts by E and the only duty laid upon E is to ascertain that the money is really owing to B, C and D, then the whole agnatic principle of customary law in regard to ancestral land is reduced to an absurdity. For these reasons I hold that the words "made no enquiry whatever" cannot refer merely to an enquiry as to the existence of the debts but include also an enquiry as to their nature, if the result

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of the first enquiry would raise doubts in the mind of an ordinary man as to the immorality or reasonableness of the debts.

If these principles be applied to the facts of the present case, it seems to me that the present appellant should have been placed on his guard by the mere magnitude of the debt.

He is a near neighbour of the alienors and of at least one of the antecedent debtors and he must have been aware that he was making an aleatory bargain.

For these reasons I concur with my learned colleague in dismissing the appeal and making no order as to costs.

Appeal dismissed.

ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 165 OF 1917.

September 3, 1919.

Present:—Pandit Kanhaiya Lal, A. J. C.,
and Mr. Lyle, A. J. C.

**Lala PARSHOTAM DAS—PLAINTIFF—
APPELLANT**
versus

**NAZIR HUSAIN AND OTHERS—DEFENDANTS
—RESPONDENTS.**

Guardians and Wards Act (VIII of 1890), ss. 29, 30—Guardian, powers of, restriction upon—Transfer of immoveable property without sanction of Court, validity of—Minor, liability of, extent of—Minor, whether bound to restore benefit—Document, date of execution of—Presumption.

The restrictions on the powers of a guardian appointed under the Guardians and Wards Act can be enforced only to such extent as is laid down by the provisions of that Act. [p. 848, col. 1.]

Imambandi v. Mutsaddi, 47 Ind. Cas. 513; 45 O. 878; 35 M. L. J. 422; 16 A. L. J. 800; 24 M. L. T. 330; 28 C. L. J. 409; 23 C. W. N. 50; 5 P. L. W. 276; 20 Bom. L. R. 1022; (1919) M. W. N. 91; 9 L. W. 518; 45 I. A. 73 (P. C.), distinguished from.

Therefore, although a transaction entered into by a certificated guardian on behalf of his ward in respect of the latter's immoveable property without the sanction of the District Judge cannot be enforced against the ward during his minority so as to affect directly his immoveable property, yet a simple money decree can be passed against him to the extent to which he is found to have benefited by the transaction. [p. 848, col. 1.]

No transaction can be avoided by a minor under the general principles of equity recognised by section

41 of the Specific Relief Act, except on the condition that the person benefited by the transaction restores the benefit he has received or makes such compensation as [the justice of the case requires. [p. 848, col. 1.]

There is a presumption that a document was executed on the date it bears. [p. 850, col. 1.]

Appeal from the decree of the Subordinate Judge, Bara Banki, dated the 31st July 1917.

Mr. A. P. Sen holding brief of the Hon'ble Pandit Gokaran Nath Misra and Pandit Harkaran Nath Misra, for the Appellant.

Syed Ali Mohammad, for Respondents Nos. 2 and 3.

JUDGMENT.—This appeal arises out of a suit for foreclosure. The claim is made up of three parts. The first part relates to a mortgage, purporting to have been executed by Nazir Hussain on behalf of himself and his minor nephew, Nisar Husain, in favour of the plaintiff on the 25th August 1913. The amount borrowed by virtue of this mortgage was Rs. 1,200, out of which Rs. 90 were to be credited towards an earlier debt said to have been due to the mortgagee and the balance was taken before the Sub Registrar by Nazir Husain for the purpose of discharging a prior decree for foreclosure held by Purbi Din.

Nazir Husain was the certificated guardian of the person and property of Nisar Husain; but he did not obtain the sanction of the District Judge for entering into the above transaction. Under section 30 of the Guardians and Wards Act (VIII of 1890) the mortgage was, therefore, voidable at the instance of the minor. The allegation of the plaintiff was that Rs. 1,110, paid to Nazir Husain for the discharge of the decree for foreclosure held by Purbi Din, could not be paid to Purbi Din, because he had prior to that date obtained an absolute decree for foreclosure *ex parte* against the mortgagors and he refused in consequence to receive the money. The plaintiff asserted that that money was thereafter paid by Nazir Hussain to Sarni Mal for the redemption of certain jewellery, which had been pledged with him by Nazir Hussain and Nawab Husain, the father of the minor. The defendants, however, denied that any jewellery had been pledged with Sarni Mal by Nazir Husain or Nawab Husain or that any money had

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been paid to him for the redemption of the jewellery. Nazir Husain has not been produced. The only witnesses examined on the point are Sarni Mal and the plaintiff himself; but, as the learned Subordinate Judge has pointed out, their evidence is unworthy of credit. Sarni Mal has not produced his account books. He asserts that such pledges were not entered in his account books, but he admits that he never before advanced such a large sum of money on a pledge of jewellery. A reliance is placed on the application for guardianship filed by Nazir Husain, in which it was stated that out of Rs. 1,400 due to Sarni Mal, Rs. 700 were due by the minor, Nisar Husain, on a deed of mortgage (*rehannama*); and it is asserted that the mortgage therein referred to was the pledge of jewellery, for the redemption of which Rs. 1,110 are now stated to have been paid. There is no reference, however, to any pledge in that application. In the deed of further charge, executed by Nazir Husain on behalf of himself and his nephew, Nisar Husain, in favour of the plaintiff on the 22nd September 1913, the said money is alleged to have been paid to liquidate an earlier debt of Sarni Mal and Shiam Lal with the permission of the District Judge, but no such permission has been proved. The entire story about the payment of the said money to Sarni Mal seems to be incredible and the plaintiff is not entitled to any relief in respect of this item. With regard to the item of Rs. 90 the plaintiff concedes that he is not entitled to any relief against the minor, as no proof has been offered to show that any debt of the kind referred to in the deed of mortgage was due by him or his father.

The second part of the claim refers to a deed of further charge, purporting to have been executed by Nazir Husain on behalf of himself and his nephew, Nisar Husain, for a sum of Rs. 4,500, out of which one item of Rs. 1,020-1-0 is said to have been paid to Purbi Din in respect of the decree for foreclosure above mentioned. It appears that after Purbi Din had obtained an absolute decree for foreclosure *ex parte*, an application was made by Nazir Husain and Nisar Husain to have that *ex parte* decree set aside. Prior

to the date fixed for the hearing of that application, Nazir Husain on behalf of himself and his nephew, Nisar Husain, executed the deed of further charge above mentioned. The execution of the deed took place on the 22nd September 1913 but owing to the illness of the mortgagee it could not be registered till the 13th October 1913. Out of the consideration of Rs. 4,500 secured by that deed Rs. 2,567-4-0 were paid in cash to Nazir Husain for the purpose of discharging the decrees held by Purbi Din, Ghulam Husain and Sarni Mal. This money was paid before the Sub-Registrar. The only decree held by Purbi Din was the *ex parte* decree for foreclosure, the proceedings to set aside which were then pending. On the date fixed for the hearing of the application made to set aside that decree the plaintiff sent his agent, Gokal Prasad, to see that the money was deposited in satisfaction of that decree. The evidence of Purbi Din shows that Nazir Husain paid Rs. 1,020-1-0 to him on the 18th October 1913 and that Gokal Prasad, the agent of the plaintiff, was present at the time. His statement is borne out by the receipt filed by Purbi Din, certifying the adjustment of the decree (Exhibit 9). It is not disputed that Nazir Husain had paid the money due to Purbi Din on account of that decree. The finding of the learned Subordinate Judge is that it is not shown that the said money had been paid out of the sum of Rs. 4,500 borrowed from the plaintiff. The circumstances above set forth, read with the evidence of Purbi Din and the plaintiff, are, however, in our opinion, sufficient to establish that the payment was made by Nazir Husain out of the amount borrowed by him under the deed of further charge above mentioned. The said deed mentions that the money was borrowed for that purpose. No suggestion has been made that the money paid to Purbi Din was derived from any other source. The decree for foreclosure held by Purbi Din was on account of a mortgage made by Nazir Husain and Nawab Husain, the father of the minor, jointly (Exhibit 13). The effect of the payment of that decree out of the consideration advanced by the plaintiff was that the minor, who had inherited a 14/24ths share in the property left by his father, was relieved of the burden of paying the ancestral debt and of the burden

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which the decree imposed, upon him including the risk of losing his share in case no payment was made. Nazir Husain was liable for the payment of half the amount of that decree. For the payment of the other half the minor and his mother and sister were responsible. The minor was, therefore, benefited to the extent of 14/24ths of half of the amount paid to Purbi Din for the discharge of the said decree. It is not disputed that this deed of further charge was also executed by Nazir Husain on behalf of the minor without the sanction of the District Judge. It is contended on behalf of the minor that the effect of the failure of the guardian to obtain the sanction of the District Judge was that the re-payment of the said money could not be enforced against the property of the minor, and reliance is placed in support of that contention on the decision in *Inambandi v. Mutsaddi* (1). In that case their Lordships of the Privy Council were dealing with the powers of a *de facto* guardian under the Muhammadan Law over the immoveable property of a minor whose guardianship he had assumed. The powers of a guardian appointed under the Guardians and Wards Act (VIII of 1890) are, however, not identical with those for which provision is made by the Muhammadan Law. The only restriction which the Act places in respect of the transfer, of immoveable property by a certificated guardian is that the sanction of the District Judge is requisite in cases of certain transfers, and any such transfers made without his sanction are voidable at the instance of the minor, when he attains majority. No transaction can, however, be avoided by the minor under the general principles of equity recognised by section 41 of the Specific Relief Act (1 of 1877), except on the condition that the person benefited by the transaction restores the benefit he has received or makes such compensation as the justice of the case requires. In the Court below this principle was not challenged. No decree for foreclosure can, however, be passed against the minor, for he is still incapable of ratifying the transaction, and the mortgage having

been made without the sanction of the District Judge cannot be legally enforced. The only decree to which the plaintiff is entitled is a simple money decree for the recovery of a 14/24ths share of half of Rs. 1,020-10 with interest at 6 per cent. per annum from 18th October 1913 up to the date of payment.

Another portion of the consideration of the said deed of further charge was paid to Ghulam Husain on account of two decrees held by him against Nazir Husain and the minor and his mother and sister (Exhibits 4 and 5). These decrees were obtained on foot of the mortgages made by Nazir Husain and Nawab Husain. The share of the minor in the mortgaged property was 14/24ths out of the half share belonging to his father. The amount paid to Ghulam Husain out of the consideration received from the plaintiff was Rs. 1,433-11-10. The learned Subordinate Judge considered that the judgment-debtors, heirs of Nawab Husain, were liable to contribute towards the payment of those decrees *per capita*; but the learned Counsel, who appears for the minor, concedes that he is unable to support that method of distributing the liability. The minor was benefited to the extent of 14/24ths of half of that money, inasmuch as his share in the property mortgaged would have been foreclosed, had no payment been made by Nazir Husain on his behalf out of the money borrowed from the plaintiff. It follows, therefore, that the plaintiff is entitled as regards this item to a simple money decree for 14/24ths of half of Rs. 1,433-11-10 with future interest at 6 per cent. per annum from the 23rd September 1913 up to the date of payment.

The third part of the claim relates to certain mortgagee rights, to which the plaintiff claims to have been subrogated by virtue of a payment alleged to have been made by him to *Musammât Sakina* on account of a prior mortgage. The mortgage in question was made by Nazir Husain and Nawab Husain in favour of Ghulam Husain on the 26th August 1910. Ghulam Husain obtained a preliminary decree for foreclosure on foot of that mortgage against Nazir Husain and the minor and his mother and sister and against the plaintiff, Parshotam Das, and the defendant, Muhammad Ali, who were impleaded as puisne mortgagees. The decree was subsequently transferred by Ghulam

(1) 47 Ind. Cas. 513; 45 C. 878; 35 M. L. J. 422; 16 A. L. J. 800; 24 M. L. T. 330; 28 C. L. J. 409; 23 C. W. N. 50; 5 P. L. W. 276; 20 Bom. L. R. 1024; (1919) M. W. N. 91; 9 L. W. 518; 45 I. A. 73 (P. C.).

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Husain to Sakina. On the 10th February 1915 the plaintiff in his capacity as a puisne mortgagee paid Rs. 2,154 on account of the said decree to save the mortgaged property from foreclosure. Under section 74 of the Transfer of Property Act (IV of 1882) the plaintiff is entitled by virtue of that payment to the rights held by a prior mortgagee and can claim foreclosure of the mortgage, unless the mortgage money is paid to him in full by Nazir Husain and the legal representatives of Nawab Husain, the other mortgagor. The Court below refused to allow him any relief against the minor, Nisar Husain, with respect to this item, because he had not impleaded the mother and sister of the minor, who were also interested in the mortgaged property. Under Order XXXIV, rule 1, of the Code of Civil Procedure it is necessary that all persons interested in the mortgaged property should be impleaded in order that they may have an opportunity to redeem, but no such objection was taken on behalf of the minor at the first hearing of the suit. Order I, rule 13, of the Code provides that all objections on the ground of non-joinder or misjoinder of parties shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, and any such objection not so taken shall be deemed to have been waived. Order I, rule 9, provides that no suit shall be defeated by reason of non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. In either view of the case we see no reason why the plaintiff should not be allowed a decree to enforce the rights which he has acquired by virtue of the above payment so far as the parties to the present suit are concerned.

It only remains to notice the ground of defence set up by Muhammad Ali, one of the defendants. He claims priority over the mortgagee rights which the plaintiff seeks to enforce, on the ground that he had helped the judgment-debtor, Nazir Husain, to pay up a prior mortgage effected by Nazir Husain and Nawab Husain in favour of Sarni Mal on the 11th July 1904, in respect of which Sarni Mal had obtained a preliminary decree for foreclosure on the 14th September 1910 (Exhibit C2). It appears that Nazir Husain borrowed Rs. 2,000 from the

Allahabad Bank, Limited, on the 4th December 1911 to pay up that decree with the assistance of Muhammad Ali, who joined him as surety, by executing a promissory note in favour of the said Bank (Exhibit C11). Muhammad Ali admits that Nazir Husain took him to the Allahabad Bank to get the loan for him and that he joined in executing the promissory note, as the Bank required that it should be executed by two persons. Banke Lal, the accountant of the Bank, states that Muhammad Ali told him that the loan should be given to Nazir Husain and that he, Muhammad Ali, would sign the note to help him to get it. Instead of paying the money borrowed from the Allahabad Bank, Limited, to Sarni Mal, Muhammad Ali got Sarni Mal to sell the decree to him (Exhibit C4) and subsequently applied for the substitution of his name in the place of the decree-holder (Exhibit C5). As the money was actually paid by Nazir Husain, the decree was thus practically discharged. On the 4th June 1912, Muhammad Ali accordingly filed an application in the Court which passed the decree, stating that he had relinquished the entire decretal money in favour of the judgment-debtors, one of whom was Nazir Husain, and had no claim left in regard thereto (Exhibit C6). Subsequently he obtained a deed of mortgage from Nazir Husain on behalf of himself and as guardian of his minor nephew, Nisar Husain, for Rs. 2,000. It is in respect of this deed, which was executed on the 30th September 1913, that he claims priority. He, therefore, paid the money due to the Allahabad Bank, Limited; but that payment should not be confounded with the payment, which had been made by Nazir Husain on account of the decree held by Sarni Mal, from the money borrowed from the Bank, for the payment of which Muhammad Ali stood security. We feel satisfied that the money was in reality borrowed by Nazir Husain from the Bank and paid in satisfaction of the decree, and the mere fact that Muhammad Ali stood surety for him does not entitle him to claim priority in respect of the mortgage which he subsequently obtained from Nazir Husain in consideration of the same.

It is also urged that the deed of further charge, which the plaintiff seeks to enforce

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was antedated in order to defeat the claim of Muhammad Ali to priority. The learned Subordinate Judge was of opinion that there were circumstances, which justified the suspicion that the said deed had been antedated; but we are unable to support the conclusion at which he has arrived. There is direct evidence to show that the deed of further charge was executed on the date which it purports to bear. The registration of the deed was delayed, because Nazir Husain had promised to attend the registration office on the day following the execution of the said deed but did not do so and the mortgagee thereafter fell ill. As pointed out by their Lordships of the Privy Council in *Mina Kumari Bibi v. Bijoy Singh Dudhuria* (2), there is a presumption that the document was executed on the date it bears. That presumption has not been rebutted by the delay in the registration of the deed, which has sufficiently been explained.

We allow the appeal accordingly and modify the decree of the Court below in so far that instead of the personal decree against the minor defendant No. 2 we allow the plaintiff a simple money decree for the recovery of a 14/24ths share of half of Rs. 1,020-1-0 and a similar share of half of Rs. 1,433-11-10 with interest thereon at 6 per cent. per annum from the 18th October 1913 and the 23rd September 1913, respectively, up to the date of payment against the property of Nisar Husain and further direct that the mortgagee rights held by the plaintiff by virtue of his having paid the decree for foreclosure, held by Ghulam Husain and transferred to *Musammam Sakina*, shall be enforceable against the entire property mortgaged with Ghulam Husain, including the interest held by the minor. That portion of the decree which recognises the claim of Muhammad Ali to priority will be set aside. The plaintiff appellant will in the circumstances get his costs in proportion from the defendants-respondents, who will bear their own costs of this appeal.

Appeal allowed.

(2) 40 Ind. Cas. 242; 21 C.W. N. 585; 1 P. L.W. 425; 5 L. W. 711; 32 M. L. J. 425; 21 M. L. T. 344; 15 A. L. J. 382; 25 C. L. J. 504; 19 Bom. L. R. 424; (1917, M. W. N. 473; 44 C. 662; 44 I. A. 172 (P. C.).

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 43
AND 103 OF 1918.

June 13, 1919.

Present:—Mr. Justice Chatterjea and
Mr. Justice Duval.

IN No. 46 OF 1918

JOGESH CHANDRA ROY—PLAINTIFF
—APPELLANT

versus

MOKBUL ALI CHOWDHURY AND OTHERS
—DEFENDANTS—RESPONDENTS.

IN No. 103 OF 1918

MOKBUL ALI CHOWDHURY AND OTHERS
—DEFENDANTS—APPELLANTS

versus

JOGESH CHANDRA ROY—PLAINTIFF—
RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 99—Enhancement of rent of two etmams, suit for—Misjoinder of causes of action—Misjoinder not affecting merits—Bengal Tenancy Act (VIII B C. of 1885), ss. 7, 9, 30, 37, 191, 192—Temporary settlement holder, right of, to enhance rent—Etmam tenancy, nature of—Rent, customary rate of—Enhancement, method of.

A suit for enhancement of rent of two *etmams*, where the plaintiff and defendants are the landlord and tenants of both and have the same interest in each, is not bad for misjoinder of causes of action; the misjoinder, if any, is merely technical and does not affect the merits of the case within the meaning of section 99, Civil Procedure Code. [p. 851, col. 2.]

Neither section 9 nor section 37 of the Bengal Tenancy Act is a bar to the enhancement of rent by a temporary settlement holder, as such holder is, by virtue of the terms of sections 191 and 192 of the Act, not precluded from exercising the ordinary powers of a landlord under sections 7 and 30 of the Act. [p. 852, col. 1.]

An *etmam* tenancy is a tenure not held at a fixed rate of rent and the rent thereof is liable to be enhanced under the ordinary procedure under section 7 of the Bengal Tenancy Act. [p. 852, col. 2.]

A rate of rent fixed fifty years ago and which is not the rate on which the tenancy is held since the last Settlement, cannot, in a suit for enhancement, be regarded as the customary rate. [p. 852, col. 2.]

Where in a lease a progressive rent is not fixed at its inception, and the lease is not a reclamation lease, the full rent is liable to enhancement. [p. 853, col. 1.]

In a suit for the enhancement of rent of a tenure where a customary rate of rent is not proved, the method of dividing equally the net profits of the tenure between the landlord and the tenure-holder is correct. [p. 853, col. 2.]

Appeal against the decrees of the District Judge, Chittagong, dated the 21st of September 1917, affirming that of the Subordinate Judge, 2nd Court at that place, dated the 27th November 1916.

JOGESH CHANDRA V. MORBUL ALI.

Babus Jogesh Chandra Roy and Tarakeswar Nath Mitter, for the Appellant in No. 46 and Babu Chandra Sekhar Sen for the Appellants in No. 103.

Babus Ram Chandra Majumdar and D. L. Kastgir, for the Respondents in No. 46 and Babu Tarakeswar Nath Mitter, for the Respondent in No. 103.

JUDGMENT.

No. 103 of 1918.

The plaintiff as landlord sued the defendants as his tenants in respect of two Etmams, claiming that the rents of the same are enhanceable, and that the existing rent of Rs. 252.12.0 be raised to Rs. 2,151 per annum.

The defendants' main contentions were that the suit was not maintainable in the form in which it was brought, as enhancement of rent of two Etmams could not be claimed in a single suit, that the rent had been settled by the Settlement Officer and was not liable to enhancement during the period of the settlement, that the rents of Etmams are permanent and not enhanceable and that the amount of increase claimed was unjustifiable. They further claimed that the Etmams in question were held by them in occupancy right.

The learned Subordinate Judge held that the Etmams were tenures and that the rent was enhanceable. As to the rate of enhancement he found that there was no customary rate; he found on the admissions of the defendants themselves that the collection of rents made by the defendants from their tenants was Rs. 598 a year and the net profits from the *khas* lands Rs. 405 and after deducting certain charges for collection and upkeep of the embankments he found the net profit to be Rs. 214, which he considered should be divided equally between the landlord and the tenure-holders. He, therefore, gave the landlord plaintiff a decree for an enhanced rent up to Rs. 107 with cesses and allowed him $\frac{1}{4}$ of the costs of the suit.

The learned District Judge in appeal affirmed the Subordinate Judge's decree. In Appeal No. 103 of 1918 the tenants defendants appeal, claiming that there should be no enhancement at all, that the suit cannot stand owing to misjoinder and raising other points as will appear below. In Appeal No. 46 of 1918 the plaintiff also appeals,

claiming that the tenure-holders are not entitled to retain half of the net rentals and should not be allowed as their profit more than 15 per cent. of the rent *plus* their charges for collection. The facts about the tenancies in question which are not disputed in this Court are as follows:—

The lands are in a temporarily settled estate, of which when the lands were originally settled Hara Chandra Roy was the proprietor under Government in respect of two-thirds share and Tarani Charan, Sadak Ali and others held the one-third share. The area settled is 33 *drones* i.e., over 500 *bighas*. Both the shares in the lands in suit were let out by the then proprietors under Government to the predecessors of the defendants, the one third share by an oral lease and the two-thirds share by a written lease in or about 1864. The rents then fixed were Rs. 73 in respect of the one-third share and Rs. 137.10 in respect of the two-thirds share. Subsequently the proprietary interest in each share fell into the possession of the plaintiff.

In 1895 there was a settlement proceeding and in that proceeding the Settlement Officer settled fair rent for the one-third share at Rs. 113 and in the two-thirds share at Rs. 139.12. He also recorded the two tenancies in separate entries in the *Khatians* as those of settled *raiya*s.

The points raised before us in appeal by the defendants are five in number. It is first contended that the suit is not maintainable, as the two Etmams, one by written lease in the two-thirds share and one by oral lease in the one-third share, are distinct and so there should have been two suits, one in respect of each Etmam. In this case, however, the plaintiff and defendants are the landlord and tenants of both the Etmams and have the same interest in each. The misjoinder, therefore, if any, is merely technical, as the claims to rent can be split up in the proportion of two-thirds and one third. The misjoinder does not, therefore, affect the merits of the case and so under section 59, Civil Procedure Code, there is no ground for dismissing the suits in appeal or remanding the case on this ground.

The next contention is that the rent having been settled by the Settlement Officer under Chapter X of the Bengal Tenancy Act in a temporarily settled estate, the

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Court cannot during the pendency of the settlement made by Government with the proprietors enhance the rent either under section 7 or section 30 of the Act. In a temporarily settled estate, it is argued, rent can only be enhanced or varied at the time of the re-settlement under the provisions of section 191 and section 192.

In support of this contention the learned Pleader for the appellants referred to the case of *Ambica Charan Chakravarti v. Joy Chandra Ghosh* (1) and the case of *Baikuntha Nath Ghose v. Sodananda Mohapatra* (2). These two cases, however, only lay down the rule that it is an unrebuttable presumption that the rent settled under Chapter X in a temporarily settled estate is the proper rent at the time it is settled and that the entries in the rent-roll of such rent are conclusive evidence of the amount.

For the respondent we are referred to a passage in the judgment of Banerjee, J., in the case of *Zamir Mandal v. Gopi Sundri Dasi* (3): "It is open to the Civil Court to go behind the Collector's Jamabandi and ascertain the true rate of rent payable. It has been held that a tenant is not bound by the rent recorded in the Collector's Jamabandi: If the tenant is not bound by the record, there is no reason why the landlord should be held to be bound by it". In the present case it has not been even pleaded that the settlement-holders under Government, when accepting the settlement, entered into any engagement not to raise the rents, nor do we find any authority for the proposition that a temporary settlement-holder is, by virtue of the terms of section 191 and section 192, precluded from exercising the ordinary powers of a landlord under section 7 and section 30. The present rent was settled in 1895 under section 104 of the Bengal Tenancy Act and this suit was instituted in September 1915, 20 years after the last proceedings for increasing the rent. Enhancement, therefore, is not barred either under section 9 or section 37 of the Act.

The third point taken is that as in the settlement Record of Rights the defendants were recorded as settled *raiya*s, their rent can only be enhanced on the basis of an

occupancy *raiya*t. The Court has wrongly held them to be tenure-holders and proceeded to fix the rent under section 7 of the Act. Further, even if section 7 applies, there is a customary rate set out in the written lease and so the rent can only be fixed under section 7 (2) on this customary rate. The Etmams, however, appear clearly to be tenures and not mere occupancy holdings, nor in the written statement of the defendants is it definitely contended that they are only *raiya*t holdings.

In both shares they are over 100 *bighas* in area, and the written statement shows the defendants have since a long period been establishing tenants thereon for cultivation and though part is *khas*, for the majority of the land they only receive rent from *bona fide* cultivators who have their residences in the land. The tenancies have all along been described as Etmams and Etmams are usually tenures. We hold, therefore, that section 7 of the Bengal Tenancy Act applies as to enhancement, finding the Etmams to be tenures.

As to the contention that the enhancement should only be at a customary rate, the lower Court finds that the plaintiff failed to prove any customary rate. The appellants urge that the rate set out in the written lease of 1272 is the customary rate. We do not agree with this contention. That was the rate 50 years ago. It is not the rate even on which the tenure is now held since the last settlement and cannot be the customary rate at the present time. The findings dispose of the appeal as to the one-third share held under the oral agreement.

The other two points relate to the two-thirds share only held under the written lease. It is urged that subject to section 191 and section 192, Bengal Tenancy Act, the written lease in this share created a tenure at fixed rates in perpetuity, and that the rate at which the rent should be calculated should be according to the rate fixed in that lease. As to the claim that the lease created a tenure held at fixed rates we are referred to the cases of *Soora Soonderee Dabea v. Golam Ali* (4), *Huro Prasad Roy Chowdhry v. Ohundee Ohurn Boyragee* (5), *Robert Watson & Co. v. Radha Nath Singh* (6)

(1) 4 Ind. Cas. 470; 13 C. W. N. 210.

(2) 46 Ind. Cas. 287; 23 C. W. N. 516.

(3) 32 C. 463 at p. 467 Note.

(4) 19 W. R. 141.

(5) 9 C. 505; 12 C. L. R. 25.

(6) 1 C. L. J. 572.

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and *Ram Dayal Giri v. Midnapur Zemindary Co.* (7). These cases, however, only lay down that reclamation leases held for a long period without changes of rate of rent, or in which there is a progressive rent for a few years and then full rent, are not liable to enhancement. In the case of the present lease, there was no progressive rent fixed at its inception, nor is it a reclamation lease; for the lease itself shows that at the time of its inception the major portion of the land was already culturable. The principle, therefore, of these cases does not apply in the present case.

It is urged next that the statement in the lease that for default in the payment of rent the tenure can be put to sale under Regulation VIII of 1819 and the fact that the only clause as to increase of rent is one which says that the Khila lands will be let out as they become culturable at the rate of the cultivated lands show that the tenure is one at fixed rates. But as was pointed out in the case of *Upendralal Gupta v. Jogesh Chandra Roy* (8), the rent of a tenure is always liable to enhancement unless the landlord has precluded himself by contract or is estopped by law and the mere fact that the parties have agreed that resort may be had to the Patni Regulation to recover arrears of rent cannot mean that the rent is permanently fixed. Our finding, therefore, is that the two Etmams are tenures not held at a fixed rate of rent, and rent is liable to be enhanced under the ordinary procedure under section 7. As no customary rate has been proved, we hold that the method adopted by the lower Court in fixing the rental is correct.

This appeal will, therefore, be dismissed with costs, except that in drawing up the decree the rent for each tenure will be separately shown in the one-third and two-thirds shares.

No. 46 of 1918.

The only question in this appeal is whether the proportion of the gross rental allowed to the appellant landlord in respect of the tenures is sufficient. The lower Courts, considering the geographical position of the tenure which is near to the Bay of Bengal and needs considerable sums

to be spent on it for the maintenance of embankments to keep out salt water, have allowed the tenure-holders to retain after certain deductions for collections and repairs half the net rent. The landlord claims that the tenure-holders should only retain 15 per cent. of the rent after deducting cost of collection. We have fully considered the arguments addressed us and the findings of the lower Courts and hold that in the circumstances of the tenures the lower Courts, in view of the finding of facts, have exercised their discretion rightly in making the allowances to the tenure-holders that they have made.

We, therefore, dismiss the appeal with costs.

Appeals dismissed.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 622 OF 1916.

December 11, 1919.

Present: - Mr. Justice Shadi Lal and
Mr. Justice Broadway.

NASIR ALI SHAH, MINOR SON AND REPRESENTATIVE OF HUSSAIN ALI SHAH,
DECEASED THROUGH SARDAR ALI
SHAH, AND OTHERS—DEFENDANTS—
APPELLANTS

versus

Musammat SUGHRA BIBI—PLAINTIFF
AND Musammat UMAT-UL-BATUL—
DEFENDANT—RESPONDENT.

Muhammadian Law—Will—Assent of heirs, effect of—Testator, whether can make gift over after absolute estate.

A testator cannot, under the Muhammadan Law, make a gift over after a vested bequest of an absolute estate [p. 855, cols. 1 & 2.]

Where a Will made by a Muhammadan is assented to by his heirs after his death, the assent merely validates the document, which must, however, be construed according to the ordinary rules of Muhammadan Law governing Wills. [p. 854, col. 1; p. 855, col. 2.]

First appeal from the decree of the Senior Subordinate Judge, Lahore, dated the 20th December 1915, decreeing the claim in part with proportionate costs.

Bakhshi Tek Chand and Malik Muhammad Hussain, for the Appellants,

(7) 7 Ind. Cas. 785; 15 C. W. N. 263.

(8) 34 Ind. Cas. 56; 22 C. W. N. 275.

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Chaudhri Shahab-ud-Din, for the Respondents.

table will assist in a comprehension of the case:—

JUDGMENT.—The following pedigree—

MADAD ALI SHAH

Ahmad Ali Shah=*Musammāt Sughra Bibi*
Plaintiff.

Musammāt Umat-ul-Batul,
defendant No. 2
=*Hussain Ali Shah*
Defendant No. 1

Walait Ali Shah aged 7, died on
10th April 1910.

On the 18th of December 1907 Madad Ali Shah executed a Will (printed on page 3 of the paper-book) which was duly registered on the 20th of December. Ten days later, i.e., on the 30th of December 1907, Madad Ali Shah died (page 9 of the printed book). By his Will he devised all his real and personal estate to his son, Walait Ali Shah, then a child of tender years, and appointed his daughter *Musammāt Umat-ul-Batul* the guardian of Walait Ali Shah's person and property. He also directed that in the event of her death during Walait Ali Shah's minority her husband Hussain Ali Shah, who was also the testator's nephew, should succeed as guardian of the boy. Finally, he declared that in the event of the death of Walait Ali Shah, Hussain Ali Shah was to succeed to the entire estate. The Will was invalid under Muhammadan Law in spite of the fact that both *Musammāt Sughra Bibi* and *Musammāt Umat-ul-Batul* had attested it in token of their assent to its terms. As they, however, expressed their assent to the said Will subsequent to the death of Madad Ali Shah, it became a valid Will and Walait Ali Shah took a vested and absolute interest in the estate devised to him by his father. On the 10th of April 1910 Walait Ali Shah also died (*vide* Exhibit P. 10 on page 10 of the printed book). On the 14th of May 1912 *Musammāt Sughra Bibi* instituted the suit which has given rise to this appeal. The defendants were Hussain Ali Shah and *Musammāt Umat-ul-Batul*, and *Musammāt Sughra Bibi* claimed half of the property left by Walait Ali Shah. Various allegations were made in the plaint as to the manner in which *Musammāt Sughra Bibi* had been induced to give her assent to the Will,

but it was claimed that in any event as the parties were governed by Shia Law, the plaintiff was entitled to half of the property which she claimed. The defendants filed a written statement (page 55 of the printed book) in which they traversed the various allegations made in the plaint, and averred that the parties belonged to the Sunni school of Muhammadans, that the Will having been assented to was valid in its entirety and that under it Hussain Ali Shah took the entire property on the death of Walait Ali Shah. The learned Senior Subordinate Judge held that the Will had been duly executed and that the plaintiff and *Musammāt Umat-ul-Batul* having assented to it after the demise of the testator, it was a valid Will under Muhammadan Law. He also held that the parties were Sunnis and that the property devolved according to the Sunni school of law. A claim advanced by Hussain Ali Shah for compensation was rejected and the plaintiff was granted a decree for one-third of the property which had been left to Walait Ali Shah by his father Madad Ali Shah.

Against this decree appeals have been preferred by Hussain Ali Shah and *Musammāt Sughra Bibi*. The former attacks the findings of the learned Senior Subordinate Judge and claims that the suit should be dismissed, while the latter claims that the parties followed the Shia school of law and that she was entitled to a decree for half of the property claimed by her in the suit. Hussain Ali Shah died during the pendency of these appeals and while in the appeal filed by him, No. 622 of 1916, his legal representatives have been correctly brought on to the record, in the appeal filed by

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Musammât Sughra Bibi, No. 944 of 1916, his minor son Nasir Ali alone has been impleaded. Chaudhri Shahab ud Din on her behalf has, however, withdrawn her appeal and we are no longer concerned with it. It will be dismissed.

In Appeal No. 622 of 1916 Bakhshi Tek Chand for the appellants contended that the Will made by Madad Ali Shah, having been rendered valid by the consent of *Musammât Sughra Bibi* and *Musammât Umat-ul Batul*, was a good Will and that all its provisions must, therefore, be enforced including those contained in the 7th clause. By this clause the property was devised to Hussain Ali Shah on the death of Walait Ali Shah. Bakhshi Tek Chand also contended that the Will was consented to as a family arrangement which could not, therefore, be ignored and which the respondent was estopped from seeking to avoid. He further contended that Hussain Ali Shah should be reimbursed for the expenses incurred in improving the property and in connection with the last illness of Walait Ali Shah.

With regard to the question of compensation, there is no evidence that any improvements were really made subsequent to the death of Walait Ali Shah in 1910, and the expenses for the boy's last illness must necessarily have come out of his estate. We have no hesitation in agreeing with the Senior Subordinate Judge in holding that the appellants are not entitled to anything in this respect.

With regard to the question of the enforcement of the Will in its entirety we are unable to hold that the consent of *Musammât Sughra Bibi* and her sister was given as a family arrangement, and we are not pressed by the authorities cited by the learned Vakil, viz., *Musammât Nurai Bibi v. Ghulam Hassan Shah* (1) and *Muhammad Umar Ali v. Aman Ali* (2), as we consider that they afford no assistance in the present case.

Now Walait Ali Shah succeeded to an absolute estate on the death of his father, and under no system of law can a testator make a gift over after a vested bequest

of an absolute estate. The clause in question is repugnant to Muhammadan Law and cannot, we consider, be given effect to. In this connection *Abdul Karim Khan v. Abdul Qayum Khan* (3) is a case in point. There a Muhammadan executed a Will leaving his estate to his three sons and giving to each of them certain specific property, with a proviso that none of them could alienate the property devised to them which on the death of any of them without issue must go to the surviving brother or brothers or his or their heirs. One son having died, his full brother took possession of the property which had been devised to him. The half brother thereupon sued for half of the property claiming to be entitled thereto under the Will which had been validated by the consent of the heirs after the death of the testator. It was held that while the assent of the heirs rendered the document valid, it must be construed according to the ordinary rules by which a deed or will should be construed according to the law governing the parties, viz., Muhammadan Law, and that the provisions restraining alienation and the condition as to the devolution of the property on the death of any of the sons were void. With this view we are in complete accord, and hold that Walait Ali Shah took an absolute estate and that the provisions and condition as to the devolution of the property after his death were void. It is clear, therefore, that on the death of Walait Ali Shah the property devolved under the rules laid down by Muhammadan Law and as the appellant himself alleged that the parties followed the Sunni school, this appeal fails. We accordingly dismiss both the appeals, but in the circumstances, leave the parties to bear their own costs.

Appeals dismissed.

(3) 28 A. 342; 3 A. L.J. 131; A. W. N. (1906) 25.

(1) 20 P. L. R. 1901.

(2) 12 Ind. Cas. 140; 251 P. L. R. 1911; 170 P. W. R. 1911.

MAKUND SINGH v. KALKA SINGH.

ODDH JUDICIAL COMMISSIONER'S
COURT.

FIRST CIVIL APPEALS NOS. 55 AND 67
OF 1918.

November 12, 1919.

Present :—Pandit Kanhaiya Lal, A. J. C.,
and Mr. Lyle, A. J. C.

MAKUND SINGH AND OTHERS—DEFENDANTS
—APPELLANTS

versus

KALKA SINGH AND OTHERS—PLAINTIFFS—
RESPONDENTS.

*Custom, proof of—Local custom—Family custom—
Burden of proof—Presumption—Trespasser planting
groves, whether grove-holder.*

Where in a case a local custom pertaining not only to the persons belonging to the sub-caste of the parties to the case but also to the persons belonging to the other sub-castes of the same caste is alleged to exist, it is sufficient to prove the custom so far as the particular sub-caste under consideration is concerned and it is not necessary for the purposes of that case to prove the custom so far as the other sub-castes are concerned. [p. 857, col. 2; p. 858, col. 1]

Where a local tribal custom is pleaded and it is proved that it exists in the tribe of the locality, there is a very strong presumption that any particular family of the tribe in that locality is bound by that custom, although evidence may not have been adduced to prove that the custom pertains to that particular family. In such a case the burden of proving that the custom does not obtain in that particular family lies on the person who says so. [p. 859, col. 1.]

Musammatt Parbati Kuar v. Rani Chandrapal Kuar, 8 O. C. 94, explained.

Thakurdin Singh v. Musammatt Bhagwant Kuar, 22 Ind. Cas 734; 2 O. L. J. 629, distinguished from

A person who plants groves on property to which he has no title cannot, on being ousted from possession, be given the status of a grove-holder in respect of the groves, possession of the groves going with the land on which they stand. [p. 860, col. 1.]

Appeals from the decree of the Additional Subordinate Judge, Hardoi, dated 5th April 1918.

Babu Bisheshwar Nath Srivastava, for the Appellant.

The Hon'ble Pandit Gokaran Nath Misra and Babu Ram Frasad, for the Respondents.

JUDGMENT.—The property which is the subject of dispute in the present case belonged to one Bhawani Singh, a Panwar Thakur of the Hardoi district. Plaintiff No. 1, Kalka Singh, is the son of Bhawani Singh's first cousin, Chhedi Singh, and plaintiffs Nos. 2 and 3, Deo Singh and Sheo

Singh, are the grandsons of Chhedi Singh. The defendant No. 1, Musammatt Bal Kunwar, is the daughter of Bhawani Singh. Defendants Nos. 2, 3 and 4, Makund Singh, Jawahir Singh and Sardar Singh, are the sons of Musammatt Maharani, another daughter (deceased) of Bhawani Singh, and defendant No. 5, Jai Chand Singh, is the father of defendants Nos. 2 to 4.

Bhawani Singh to whom the property belonged died long ago and was succeeded by his widow Musammatt Gulab Kunwar.

In 1879 Musammatt Gulab Kunwar transferred the property by deeds of gifts to her daughter Musammatt Bal Kunwar and her grandson Jawahir Singh, defendants Nos. 1 and 3. In 1888 the plaintiff Kalka Singh, representing himself to be the next reversioner of Bhawani Singh, brought two declaratory suits against Musammatt Gulab Kunwar and her transferees and obtained decrees by which it was declared that the deeds of gift executed by Musammatt Gulab Kunwar should have no effect against the reversioner after her death. In 1910 the defendants along with Musammatt Gulab Kunwar, without joining the plaintiffs as parties, submitted the question of succession to the estate left by Bhawani Singh to arbitration and the arbitrators decided that Makund Singh should succeed to the whole estate, with the exception of certain *guzaras* which were allowed to the other defendants. Gulab Kunwar died in January 1912, and the plaintiffs brought the present suit for possession of the estate left by Bhagwani Singh, alleging that among Panwar Thakurs daughters and daughters' sons were excluded from inheritance and that they were the nearest reversioners. They also claimed mortgagee possession of a 1-anna share in the village of Matkari, on the ground that the mortgage had been acquired by Musammatt Gulab Kunwar out of the profits of her husband's estate and the name of Jai Chand Singh defendant No. 5, who was the son-in-law of Musammatt Gulab Kunwar, had been fictitiously entered in the mortgage deed as mortgagee. The plaintiffs also claimed mesne profits for the period during which they had been kept out of possession by the defendants.

The defendants did not admit the relationship claimed by the plaintiffs with

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Bhawani Singh. They denied the custom set up by the plaintiffs and pleaded that the defendants Nos. 1 to 4 as daughter and daughter's sons of Bhawani Singh were entitled to inherit this estate. They further pleaded that by an oral Will Bhawani Singh had bequeathed all his property to Makund Singh defendant No. 2, that under the arbitration award of 1910 which had been acted upon, the other defendants were in possession of certain portions of the property for their maintenance, that the house in which Bhawani Singh lived had been entirely rebuilt by Makund Singh at his own cost, and that certain groves had been planted by Makund Singh and Jai Chand Singh and the plaintiffs could have no right either to the house or these groves. With regard to the 1 anna share in village Matkari the defendant No. 5 pleaded that *Musammât Gulab Kunwar* had nothing to do with the mortgage and that he was the real mortgagee.

The learned Subordinate Judge found that the custom set up by the plaintiffs was established, under which daughters and daughters' sons in the tribe of Panwar Thakurs to which Bhawani Singh belonged were excluded from inheritance, that the plaintiffs were the nearest reversioners to Bhawani Singh, that Bhawani Singh had not made any oral Will in favour of Makund Singh, that it was not proved that Bhawani Singh's house had been rebuilt by the defendant No. 2 and that the groves had been planted by *Musammât Gulab Kunwar* and the defendants were not entitled to retain possession of them. With regard to the share in the village of Matkari he held that the mortgage had been taken not by *Musammât Gulab Kunwar* out of the profits of her husband's property but by Jai Chand Singh defendant No. 5 himself. With regard to mesne profits he found that the plaintiffs were entitled to more than Rs. 1,500 which they claimed. On these findings he gave the plaintiffs a decree for possession of all the property in suit with the exception of the 1 anna share in Manza Matkari and for Rs. 1,500 as damages with proportionate costs against all the defendants.

Against this decree two appeals have been filed: one No. 55 of 1918 by Makund Singh and the other No. 67 of 1918 by Jai Chand Singh, and this judgment will

cover both these appeals. In the petition of appeal filed by Makund Singh practically all the findings of the lower Court adverse to him have been attacked, but the learned Advocate who has argued the appeal has confined his argument to two points only. He urges, first, that the custom set up by the plaintiffs has not been established and second, that in any case Makund Singh is entitled to retain possession of the groves as a grove-holder. After hearing the arguments we have not thought it necessary to call on the learned Advocate for the plaintiffs-respondents, as we are of opinion that the custom set up by the plaintiffs-respondents has been proved beyond any possibility of doubt and that the lower Court was right in its finding with regard to the groves.

In paragraph 7 of their plaint the plaintiffs alleged that there was a custom generally obtaining in all Thakur clans, and specially among Panwars, by which daughters and their sons are excluded from inheritance. This alleged custom was denied by the defendants and an issue was fixed: whether the custom of exclusion of daughters and daughters' sons prevails in the tribe to which the deceased Bhawani Singh belonged. After issues were fixed, the statement of the plaintiffs' Pleader was recorded in which he said that the custom set up by the plaintiffs relates to all the tribes of Thakurs of the Hardoi district and he further added, "Among the Panwars, we claim that this custom also prevails in the manner aforesaid." On these statements the issue was modified as follows:—

"Does the custom of exclusion of daughters prevail among Panwars and all the other tribes of the Thakurs of the Hardoi district?"

The learned Advocate for the appellants would argue that in view of the statements made by the plaintiffs' Pleader the custom set up by the plaintiffs was not a tribal custom pertaining to the whole tribe of Panwar Thakurs but a local custom pertaining only to the Panwars and all other Thakurs of the Hardoi district. Even if we were to accept this view of the pleadings, we are of opinion that it has been amply proved that the custom exists among all the Panwar Thakurs of the Hardoi district and

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it is not necessary for the purposes of the present case to prove that all the other tribes of Thakurs in the Hardoi district are bound by the same custom.

The *wajib-ul-araez* of no less than 19 villages have been produced in which the existence of the alleged custom among Panwar Thakurs is recorded and those *wajib-ul-araez* have been verified by hundreds of members of the tribe of Panwar Thakurs. It is urged by the learned Counsel for the appellants that these *wajib-ul-araez* relate mostly to villages in Pargana Pachoha, whereas Bhawani Singh lived and his property was situate in Pargana Mallawan. It is also urged that among Panwars there are many sub divisions with different origins, that most of the *wajib-ul-araez* produced record a custom pertaining among Dharanagri Panwars and that it cannot be assumed that the same custom exists among other sub-divisions of the tribe of Panwars, and there is nothing to show to which sub-division of the tribe Bhawani Singh belonged. We are clearly of opinion that there is no force in these arguments. It is true that certain witnesses have been produced on behalf of the defendants who are Panwar Thakurs, who state that they were told by their fathers that they did not belong to the same family of Panwars as the Panwars of Bhikhapur, the village in which Bhawani Singh resided, but we are of opinion that these statements cannot be accepted as evidence. The villages in which these witnesses reside are some considerable distance from the village of Bhikhapur, and there is nothing whatsoever to show that the persons who are alleged to have made the statements had any special means of knowledge with regard to the Panwars of Bhikhapur or indeed that their means of knowledge was any greater than that of the witnesses themselves. The defendants in their written statements did not attempt to allege that there were different sub-divisions of the Panwar Thakurs with different origins and different customs, nor do we find that a single question was asked from any one of the forty witnesses produced on behalf of the plaintiffs to suggest the existence of any such sub-divisions, and it was not until the defendants began to produce their defence witnesses that such a suggestion was

made. It is pointed out that while in the greater number of the *wajib-ul-araez* and specially in those of Pargana Pachoha it is stated that the ancestors of the Panwars of those villages came from Dharanagri, the *wajib-ul-araez* of Pargana Mallawan which have been produced do not mention Dharanagri as the original house of the ancestors of the Panwar residents in the Mallawan villages. In our opinion this is no good ground for presuming that the Panwars of Mallawan have a different origin from those resident in Pargana Pachoha. It simply shows that while the former or the persons recording the history of this tribe were satisfied to go back a few hundred years, the latter preferred to give the history of the tribe for a period of five thousand years (*vide* the *wajib-ul-araez* of Anagpur printed at page 5) of the respondents' book).

Next it is urged that while the Hardoi settlement report shows that there are 66 villages in the Hardoi district owned or partly owned by Panwars, the *wajib-ul-araez* of only 19 villages have been produced and the plaintiffs' evidence of instances in which the alleged custom has been followed relates to an even smaller number of villages. In our opinion it was quite unnecessary for the plaintiffs to produce the *wajib-ul-araez* of all the villages in the Hardoi district in which Panwars own property, or to give evidence of instances in which the custom has been followed relating to all those villages. The defendants have not produced a single *wajib-ul-araez* in which the alleged custom of exclusion of daughters and daughters' sons is not mentioned; and it may be taken as certain that had any such *wajib-ul-araez* of any village in which property is owned by Panwars been in existence, it would have been produced. Furthermore although the defendants have attempted in the lower Court to produce evidence of instances in which the alleged custom had not been followed, the learned Advocate for the appellants has placed no reliance on that evidence and has not even referred to it in his argument. Nor has he attempted to dispute the finding of the lower Court that the instances cited by the plaintiffs are good instances in which the alleged custom has been follow-

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ed. The learned Counsel for the appellant, however, points out that in the *wajib-ul arz* of Bhikhapur in which Bhawani Singh resided there is no mention of the alleged custom and that no instance has been proved in which the alleged custom was followed in the family of Bhawani Singh. He would argue that even though it be proved that the tribal custom of exclusion of daughters and daughters' sons has been established, yet in order that the plaintiffs may succeed it is necessary to prove further that that custom is applicable to the family of Bhawani Singh, and for this proposition he would rely on the rulings of this Court. *Musammât Parbatî Kuar v. Rani Chandrapal Kuar* (1) and *Thakurdin Singh v. Musammât Bhagwant Kuar* (2).

We find ourselves altogether unable to accede to his argument and are of opinion that neither of the rulings cited by him lends any support to it. In the former case the sentence in the judgment on which he relies runs as follows:—

"There is no objection to a party pleading that a custom obtains both in the family and in the tribe to which that family belongs, but he must of course prove that the custom is binding on the family, whether he confines his evidence and plea to the family or not."

There is a distinction here made between what may be pleaded and what must be proved, but this sentence is no authority for the proposition that if it is proved that the custom is binding on the tribe to which the family belongs, further evidence must be given to prove that it is also binding on the family. In the second case on which reliance is placed there was evidence which showed that different Kanpuria families had different customs with regard to the exclusion of daughters, and it was held that in these circumstances the fact that the custom of the exclusion of daughters was proved to exist in certain Kanpuria families in a district was not sufficient ground for holding that that custom pertained to another family of Kanpurias. In this case no invariable tribal custom had been proved and it was held, therefore, that in order to succeed the plaintiff was bound to prove that the custom on which he

relied existed in his family. The custom set up by the plaintiffs is a local tribal custom pertaining to the Panwars of the Hardoi district and when the existence of that custom has been proved, there is a very strong presumption that a particular family of Panwars in the Hardoi district is bound by that custom, although evidence may not have been adduced to prove that the custom pertains to that particular family. The burden would certainly be on the person denying the existence of the custom in a particular family to show that it was not applicable to that family. In the present case there is good reason why there is no mention of the custom in the *wajib-ul-arz* of Bikhapur, as there were no Panwars among the proprietors of the village of Bhikhapur at the time of the settlement and Bhawani Singh was only an under-proprietor in the village. And no instance in which the custom has been followed in the family of Bhawani Singh has been proved, for the simple reason that there is no record in that family of any case in which the custom could have been followed as none of Bhawani Singh's ancestors died leaving a daughter only.

Besides the evidence of the *wajib-ul-arz* of instances in which the custom was followed and of opinions as to the existence of the custom, evidence has also been adduced to show that the Courts have found that the custom exists among Panwars in the Hardoi district. These decisions have been examined in detail by the learned Subordinate Judge and the learned Counsel for the appellants has not referred to them in his argument. It is specially to be noted that in the suits brought by Kalka Singh one of the present plaintiffs in 1888, to obtain a declaration that the transfers made by *Musammât Gulab Kunwar* in favour of her daughter *Musammât Bal Kunwar* defendant No. 1 and *Jawahir Singh* defendant No. 3 were ineffectual after the death of *Gulab Kunwar*, it was admitted that *Kalka Singh* was the reversioner and no attempt was made by the defendants in those suits to support the transfers on the ground that the transfers merely accelerated the succession or to resist *Kalka Singh's* claim on the ground that he was not the nearest reversioner. Had the alleged custom not existed in the family of Bhawani Singh, it may be taken as certain that such pleas would have been raised.

(1) 8 O. C. 94.

(2) 32 Ind. Cas. 734; 2 O. L. J. 629.

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With regard to the groves it is urged that two of them were planted by Makund Singh and Jai Chand Singh and that they are at least entitled to retain possession of them as grove-holders.

We see no reason to differ from the finding of the learned Subordinate Judge that the groves were planted for Musammatt Gulab Kunwar. Jai Chand Singh does not dispute that finding. The appellant Makand Singh was the grandson of Musammatt Gulab Kunwar and lived with her and was maintained by her. There is admittedly no evidence that he obtained any permission from Musammatt Gulab Kunwar to plant the groves. The appellant Makand Singh does not allege that he was a tenant of Musammatt Gulab Kunwar and as such planted the groves. He alleges that he planted the groves while he was in possession as owner of the property. As he had no title to the property, he cannot, on being ousted from possession, be given the status of a grove holder and possession of the groves must go with the land on which they stand.

The appeal of Makund Singh, therefore, fails and is dismissed with costs.

The appeal of Jai Chand Singh (First Civil Appeal No. 67 of 1918) relates only to the question of mesne profits and costs. It is not shown that he was in possession after the death of Musammatt Gulab Kunwar of any of the property left by Bhawani Singh and it follows, therefore, that he should not have been held liable for mesne profits. The lower Court also found that he was rightly in possession as mortgagee of the 1-anna share in Manza Matkari and dismissed the plaintiffs' claim with regard to this property. In our opinion Jai Chand Singh should have been allowed proportionate costs on this portion of the claim. We allow his appeal to the extent that he will be exempted from the decree for mesne profits and costs and he will be allowed proportionate costs against the plaintiffs-respondents with reference to the 1-anna share in village Matkari.

Appeal No. 55 dismissed.

Appeal No. 67 partly allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 291 of 1919.

November 11, 1919.

Present:—Mr. Kotwal A. J. C.

KANHAI SINGH—PLAINTIFF

—APPELLANT

versus

KARU—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXV, rr. 2, 3—Mortgage—Preliminary decree in foreclosure suit—Application to extend time for payment—Application made after time fixed—Sufficient cause is question of fact.

An application to extend the time fixed by a preliminary decree for foreclosure made after the expiry of that time is entertainable [p. 861, col. 1.]

The question of the sufficiency of cause for granting an extension is a question of fact to be decided according to the circumstances of each particular case and the discretion of the Court in dealing with the same. [p. 861, col. 1.]

Appeal against the decree, in Civil Appeal No. 8 of 1919, in the Court of the Additional District Judge, Balaghat, decided on the 22nd of March 1919, arising out of the decision in Civil Suit No. 83 of 1916, in the Court of the Munsif, Balaghat, dated the 20th December 1918.

Mr. D. P. Tiwari, for the Appellant.

JUDGMENT.—The sole question in this case is whether the lower Appellate Court was right in extending the time for payment of the decretal debt under a preliminary decree for foreclosure. The time fixed by the decree for payment was the 29th July 1917. In appeal by the judgment-debtor the amount of the debt was somewhat reduced. The decree of the Appellate Court was passed on the 31st October 1917. The time fixed by the 1st Court's decree was not altered by the Appellate Court. The judgment debtor paid into Court the amount of the decree and costs in three separate sums on or before the 24th June 1918 and applied on that date to have satisfaction entered. On service of notice of this application the decree holder applied for a final decree, whereupon the judgment-debtor made a formal application for extension of time and consideration of delay. The first Court rejected the judgment-debtor's application and passed a final decree for foreclosure. In appeal the Additional District Judge set aside the 1st Court's order and decree and

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extended the time and remanded the case to determine what terms should be imposed upon the judgment-debtor before entering satisfaction. A decree has now been passed by the 1st Court declaring that the debt has been satisfied and passing the usual consequential order.

The decree-holder appeals to this Court against the Additional District Judge's order and decree.

It is first urged that as the judgment-debtor made no application for extension of time for payment before the date fixed by the 1st Court expired, his application should not have been entertained. This contention has no force in view of *Nand Lal v. Ram Ratan* (1). It is next urged that good cause has not been shown for granting an extension. The sufficiency of the cause is a question of fact to be decided according to the circumstances of each particular case and the discretion of the Court in dealing with the same. *Balkishan v. Atmaram* (2). The Additional District Judge has considered very fully the circumstances in paragraphs 5 to 8 of his judgment, and I am not prepared to hold that upon these circumstances it was not possible for him to exercise a judicial discretion in favour of the judgment-debtor. The decree-holder has got the money that he is entitled to with sufficient compensation for any delay which the mortgagor could not reasonably avoid and has suffered no hardship.

The appeal is dismissed without notice to the respondent. I note that I refuse to consider a plea tried to be urged in argument that the appeal to the Additional District Judge was barred by time, on the grounds that it was not urged in the Court below and nothing has been pointed out on the record in support of it.

Appeal dismissed.

(1) 2 N. L. R. 137.

(2) 26 Ind. Cas. 701; 10 N. L. R. 150.

COURT OF THE FINANCIAL COMMISSIONERS, PUNJAB.

REVENUE REVISION No. 93 OF 1918-19.

May 7, 1919.

Present:—Mr. Maynard, Financial Commissioner.

HAIDAR—PETITOR

versus

EMPEROR THROUGH GHULAM

MOHAMMAD—RESPONDENT.

Lambardar, dismissal of, for failure to assist in recruiting—Family, claims of, whether can be ignored in appointing successor.

There are certain offences which exclude all members of the family of an offender from the office of headman. But the failure of a particular individual to assist in recruiting (unless he is a member of a tribe or family, which for specific reasons, *e.g.*, the lack of connection with the classes from whom recruits are likely to be obtainable, is permanently unlikely to be successful in this respect) is not a matter which should exclude the claims of the family.

Revision from the order of the Commissioner, Lahore, dated the 6th January 1919.

JUDGMENT.—Ghulam Mohammad has appeared, and I have heard what he has to say. The hereditary claimant to this headmanship is Haidar. His father was dismissed from the post of Lambardar for failure to assist in recruiting; and this has been treated as a ground for excluding the family from the succession. There are certain offences, which exclude, and properly exclude, all members of the family of the offender from the office of headman. But the failure of a particular individual to assist in recruiting (unless he is a member of a tribe or family, which for specific reasons, *e.g.*, the lack of connection with the classes from whom recruits are likely to be obtainable, is permanently unlikely to be successful in this respect) is not a matter which should exclude the claims of the family. It depends mainly upon personal character and energy, and in a case such as the present it is not fair to assume that the son will lack the required qualities.

I set aside the order appointing Ghulam Mohammad to be Lambardar and I appoint Haidar to be headman, on the understanding that his father will transfer to him a sufficient area of land. The

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choice of a *sarbrah* during Haidar's minority is left to the Deputy Commissioner.

Revision accepted.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 47 OF 1918.

March 28, 1919.

Present :—Mr. Justice Chatterjea and
Mr. Justice Newbould.

MESSRS. BEGG DUNLOP AND COMPANY
AND ANOTHER—DEFENDANTS—APPELLANTS

versus

SATIS CHANDRA CHATTERJEE—
PLAINTIFF—RESPONDENT.

*Civil Procedure Code Act V of 1908, O. XXXIX,
r. 1—Injunction, temporary, when to be granted—Inter-
locutory injunction, when should be granted—Balance
of convenience—Irreparable injury, what is—Status
quo, preservation of.*

In granting a temporary injunction to a plaintiff all that is necessary to see is whether the plaintiff has shown a *prima facie* case in support of the title asserted by him. [p. 866, col. 2.]

An interlocutory injunction should only be granted in cases where property, which it is essential should be kept in its existing condition during the pendency of the suit, is "in danger of being wasted, damaged or alienated" [p. 866, cols. 1 & 2.]

In granting an *interim* injunction it is the duty of the Court to see on which side is the balance of inconvenience if the injunction do not issue, and to bear in mind the important principle of retaining immovable property *in statu quo*. [p. 872, col. 1.]

By the term 'irreparable injury' it is not meant that there must be no physical possibility of repairing the injury, all that is meant is that the injury would be a material one and one not adequately reparable by damages. [p. 868, col. 2.]

Appeal against the order of the Subordinate Judge, 4th Court, 24 Parganahs, dated the 5th February 1918.

Sir Rash Behari Ghose and Babu Hiralal Sanyal, for the Appellants.

Babus D. N. Chackerbutty, Baraprasad Chatterjee and Kurunamoy Ghose, for the Respondent.

JUDGMENT.—This is an appeal against an order granting a temporary injunction restraining the defendants-appellants from further building on or changing the character of the land of which the plaintiff is seeking to

reserver possession from them. The land in dispute consists of two plots, the first plot being about a *bigha* in area according to the plaintiff and about 16 *cottahs* according to the defendants. The second plot is about a *bigha* in area and there is a tank on a portion of it.

The plaintiff alleges that these 2 plots of lands are included within the Estate No. 2402 of the 24-Parganahs Collectorate which was purchased by him at a sale for arrears of revenue on the 8th January 1915. In August 1915, the plaintiff issued a general notice on the property to the effect that the interests of tenants under lessees (except those protected) were thereby annulled.

It appears that on the 8th and 9th August 1911, the two plots of land in dispute, which belonged to a family known as the Haldars, were purchased at sales held for arrears of rent by one Katyani Debi. On the 19th November 1915, Maharaja Sir Prodyot Kumar Tagore purchased 9 *cottahs*, said to form part of the land mentioned in the first plot, from one Gadadhar Ghose and another, who it is alleged by the defendants were sub-tenants under the Haldars in respect of the 9 *cottahs*. The purchase admittedly was made on behalf of the defendants, Messrs. Begg Dunlop & Co. It is also alleged that the Maharaja arranged for purchasing the two plots from Katyani Debi and took possession thereof pending execution of a formal conveyance.

It appears that a large quantity of land, about 140 *bighas*, was acquired by Messrs. Begg Dunlop & Co. through the Maharaja in the locality for a Jute Mill. In February 1916 the Maharaja made over possession of all the lands which he had acquired on behalf of the defendants including the lands in suit to Messrs. Begg Dunlop & Co. It is alleged on behalf of the defendants that there was some building on plot No. 1 which was pulled down in March 1916, and in April 1916 the whole of the 40 *bighas* were surveyed and plans were prepared by the builders Mackintosh Birt & Co. In July 1916 the builders took possession of the lands for the purpose of erecting the necessary buildings and the main buildings were commenced in November 1916. On the 26th January 1917 the plaintiff's Solicitors wrote to the defendants that the plaintiff had annulled all encumbrances, and that if the

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defendants built or proceeded to build any erection on the land in question they would do so at their own risk. On the 29th June 1917 a formal conveyance was executed by Katyani Debi in respect of the disputed lands of which possession had been taken before. On the 3rd July 1917 the building of the staff quarters on the plot No. 1 and adjoining lands was commenced. It appears from a letter of the plaintiff's Pleader Kishori Mohon Sen, dated the 28th August 1917, that he had an interview with Mr. Tosh of Messrs. Begg Dunlop & Co. A list of the tenants of the estate (including the name of Katyani Debi) whose lands had been taken possession of by the defendants was annexed to the letter, and it was stated in the letter that the plaintiff was surprised to learn that the defendants had already commenced to build upon the land without any right thereto. The defendants were reminded of the printed general notice prohibiting the general public from acquiring the tenants' interests, as also the special notice given by Messrs. Morgan and Company on behalf of the plaintiff, and it was further stated that if the defendants proceeded with the construction works on the plaintiff's land in spite of repeated protests, they would do so at their own risk.

A reminder appears to have been sent by the plaintiff's Pleader to the defendants on the 2nd September, and the defendants wrote in reply on the 3rd October 1917 that the disputed lands did not appertain to the Touzi No. 2402.

Three days afterwards, i. e., on the 6th October 1917, the present suit was instituted by the plaintiffs.

On the 8th October 1917 they applied for a temporary injunction on the ground that the defendants had purchased the disputed lands comprising the "non-transferable Ticca temporary tenancy-at-will of a certain tenant, named Katyani Debi" which had been annulled, that in spite of prohibition by the plaintiffs the defendants had continued building operations on the land and were attempting to finish the same in a hurry, and "at the present moment have raised the building up to the arch level of the first story and are making excavations on the land and are obliterating the boundary marks" The plaintiff prayed that a temporary injunction might be issued restraining the defendants from "altering the form of the land and

from continuing building operations any further" The application was supported by the affidavit of one Nalinakshya Mookerji, and on the 9th October a Rule was served upon the defendants with a copy of the said affidavit. The Courts were closed from the 13th October to the 18th November 1917 for the Puja vacation. On the 3rd December 1917 the defendants showed cause and the affidavit of Mr. Tosh, the senior partner of the defendant firm, Mr. Long, a photographer, and Sarat Chandra Gossain (in whose name some of the assignments in favour of the defendants had been taken) were filed. The defendants in showing cause asserted that the tenancies comprising the disputed lands were in existence from before the permanent settlement of the estate, that they were permanent and transferable, that there were buildings on a portion of plot No. 1 and a garden on the rest of it, and there was a tank and garden on plot No. 2, that assuming but not admitting that the lands formed part of Touzi No. 202 as alleged by the plaintiffs, they were protected interests under Act XI of 1859, that "the building for their staff quarters extends over plot No. 1 of the schedule to the plaint as also over the land lying to the east and west thereof, and covers only those holdings over which either pucca buildings and structures had been standing," that the staff quarters with the lands in suit are integral parts of the Mill and were absolutely required for its working and that the starting and working of the Mill will be considerably delayed, and the defendants firm would be put to irreparable loss in consequence, if the injunction prayed for be granted. The defendants denied that they had been "only lately defacing boundary marks and otherwise changing the character of the lands in suit", and stated that "the contractors took possession of 140 *bighas* of land including the lands in suit towards the middle of 1916, when the entire area was levelled and otherwise made fit for building purposes, and the public roads on the south of the lands in suit are still existing and are sufficient to identify the situation thereof."

The Court below by its judgment, dated the 5th February 1918, ordered that "the building already raised upon the lands in

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suit do remain intact, but that the defendants are enjoined not to further build upon the lands, that they are directed not to efface or do away with the existing landmarks on the boundaries of the disputed lands so as to prevent the identification of the lands at a later stage of the suit."

This appeal was preferred on the 9th February 1918, and the hearing of the appeal commenced on the 22nd January 1919 and was finished on the 30th January.

The main contentions raised on behalf of the appellants are, *first*, that no *prima facie* title has been made out by the plaintiff, *secondly*, that there was delay in making the application for injunction, and *thirdly*, assuming that the plaintiff has shown a *prima facie* title, the plaintiff, being out of possession, cannot obtain a temporary injunction unless irreparable injury is shown, and that in this case no irreparable injury has been shown.

As regards the first contention, it appears that although the defendants in their letter, dated the 3rd October 1917, denied that the lands in dispute appertained to Touzi No. 2402, it was admitted that Katyani Debi purchased the lands in dispute at sales for arrears of rent under the sale certificates annexed to the affidavit of Sarat Chandra Gossain. These sales took place on the 8th and 9th August 1911 in rent suits Nos. 349 and 351 of 1908 brought by the heirs and successors of Raja Barada Kanta Roy, the former proprietors of the estate, and the lands are expressly stated in the plaints in the said suits to be included within the estate No. 2402 (purchased by the plaintiff). The land of plot No. 1 was described in the plaint as *ticca gar kaimi* (non-permanent), and plot No. 2 as a *sarasari jama* (tenancy-at-will). The rent of plot No. 2 (the tank) is stated in the plaint as being Rs. 2 and the rent of plot No. 1 as Rs. 4.4.9. Katyani Debi sold the lands to the defendants by a conveyance, dated the 29th June 1917, in the *benami* of Sarat Chandra Gossain, and in the conveyance also the lands are described as being held under the *Zamindars*, the heirs and successors of Raja Barada Kant Roy, at a rent of Rs. 6.4.9. The plaintiff, as already stated, purchased the

estate No. 2402 at a sale for arrears of revenue on the 8th January 1915 and obtained possession thereof through the Collector. The former proprietors appealed to the Commissioner for setting aside the sales, but the appeal was dismissed and the sale was confirmed. They then brought a suit on the 26th August 1915 for setting aside the sale, but the suit was dismissed on the 7th April 1917, and an appeal has been preferred to the High Court against the decree of dismissal, and that appeal is still pending.

The *prima facie* title of the plaintiff to the estate No. 2402 is, therefore, established and also that the lands in dispute are included within that estate. The plaintiff gave notice of annulment of encumbrances except those which are protected under section 37 of Act XI of 1859.

Both the plots of land in dispute were held by the Haldars under the proprietors of the estate, and the interests of the Haldars passed to Katyani Debi at the sales held in execution of a rent decree obtained by the proprietors and were eventually purchased by the defendants. The defendants' case is that about 32 years ago the Haldars sub-let the eastern portion of plot No. 1, measuring 9 *cottas* to one Bhuthnath Rajak at a rent of Rs. 2.4.0. The latter built a *pucca* dwelling house on it, and on his death his widow sold the land to one Nafar Chandra Ghose and Hari Dasi. Their heirs, Gadadhar Ghose and Dwijendra Ghose, sold the eastern portion (9 *cottas*) to Maharaja Prodyot Kumar on the 15th November, the Maharaja acquiring it on behalf of the defendants. It is alleged that the western portion (7 *cottas*) was in the *khas* possession of the Haldars who laid out a garden on it, and that on the second plot the Haldars excavated a tank (about 7 or 8 *cottas*) and a garden was made on the remaining portion of the plot.

The Court below, however, has held that the 9 *cottas* of land held by Gadadhar Ghose under the Haldars was not a part of the plot No. 1 and that the sub-tenancy of Gadadhar was under some other *jama* under the Haldars.

In the *Kabala*, dated the 19th November 1915, executed by Gadadhar Ghose and Dwijendra Nath Ghose in favour of Maharaja Bahadur Sir Prodyot Kumar Tagore, it is stated that the 9 *cottas* of land

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was held at a rental of Rs. 240 under the Haldars by the late Nafar Chandra Ghose and "he died in possession and enjoyment thereof by raising *pucca* masonry building and the like thereon, by residing thereon, etc., etc." In the deed of sale, dated the 29th June 1917, executed by Katyani in respect of the 2 *bighas* in favour of Sarat Chandra Gossain, however, the land is described as, "Basat homestead land" "with tanks, trees and like fixtures." There is no mention of any *pucca* building on any portion of the land, although the Kabala was executed within a year and eight months of the Kabala executed by Gadadhar Ghose and Dwijendra Ghose referred to above. The vendor is described as being in possession of land and the vendee was at liberty to take the property in his "*khas* possession." There is no reference to any sub-tenancy of the Ghoses or of any other person in any portion of the lands sold by Katyani. Then again in the Kabala by the Ghoses the 9 *cottas* is described as being held under the Haldars, although the interest of the Haldars had been purchased by Katyani in 1911, i.e., four years before. On these grounds the learned Subordinate Judge held that the 9 *cottas* sold by the Ghoses was not a part of the disputed plot No. 1 and had nothing to do with it. It is contended before us (as it was contended before the Court below) that the boundaries of the 9 *cottas* conveyed by the Ghoses tally with those contained in Katyani's Kabala. The learned Subordinate Judge held that they did not tally on all the four sides. It is pointed out on behalf of the appellants that only the western boundary does not agree, but that is because only the eastern portion of the plot (No. 1) was purchased and not the entire plot. That is a possible explanation; at the same time there is some force in the observations made by the Court below, viz., that the land in the Ghoses' conveyance is described as being held under the Haldars and as containing *pucca* masonry structures, whereas in the conveyance by Katyani the land is described as being "Basat" "with tank, trees and like fixtures," there being no mention of any *pucca*

structures, or of any sub-tenancy in any portion of the land. The defendants produced a photograph taken by Mr. Long (a photographer) to show that there were *pucca* structures on a portion of plot No. 1. But the question need not be further discussed, as it is not of any importance so far as the present appeal is concerned. The 9 *cottas* of land appears to have been covered by the staff quarters building already erected by the defendants, and that building has been allowed by the Court below to "remain intact until the final disposal of the suit," and there is no cross-appeal by the plaintiff on the point. So far as the western portion of plot No. 1 (7 *cottas*) is concerned, there was admittedly no structure on the land.

It appears that the estate No. 2402 was permanently settled in the year 1842 and it is contended that the tenures of the Haldars were in existence from before the time of the permanent settlement, at any rate from before the year 1842, when the particular estate was permanently settled, and that, therefore, the defendants were not liable to be ejected even if their interest were not protected under the 4th proviso to section 37. The only evidence with regard to the existence of the tenures from before 1842 is the statement made by Mr. Tosh in the 11th paragraph of his affidavit based upon information given by Sarat Chandra Gossain. Sarat Chandra Gossain in his affidavit states that he confirms and relies upon the statements and submissions made in paragraphs 10 to 25 of the affidavit of Mr. Tosh, and that his knowledge of the facts stated in the said paragraphs is "based upon inspection of Zemindari papers and other documents." On the other hand Haripada Haldar (aged about 49 or 50 years), the son of Dwarka Nath Haldar and one of the defendants in the rent suits which resulted in the sales at which Katyani purchased, in his affidavit states that he and his co sharers were in possession and enjoyment of the lands and tank in dispute up to about 5 or 7 years before this suit as tenants, that his father had obtained a settlement of the tank while it was a tank from the Zemindars, and that about 25 or 30 years ago they obtained a settlement of the land from the Zemindars, that the land of the first

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plot so long as it was in their possession and all along afterwards was vacant land, that there was no building nor any garden or the like thereon, that it remained vacant land fenced all round by bamboo saplings, that in some years according to the requirements of the family it was used by causing vegetables to be grown thereon by Thika tenants, but then mostly it used to remain in a *patit* condition. The affidavit of Haripada Halder, however, was objected to on behalf of the defendants in the Court below, as a copy of it had been served upon them only the day previous to the day on which the hearing of the Rule commenced. The order-sheet stated that proper orders would be passed in the judgment. Though no separate order was passed with respect to it, the learned Subordinate Judge evidently admitted it, as he relies upon it in his judgment. It does not appear that the defendants wanted any opportunity of filing further affidavits to meet the statements made in Haripada's affidavit.

Neither party produced any papers in support of the above statements respectively made in the affidavits. The Court below has accepted the statements of Haripada Halder, and upon the materials at present on the record and in the absence of any documentary evidence, we do not see sufficient reasons for differing from the view taken by the learned Subordinate Judge, *viz.*, that there is no reliable evidence to show that the tenancy of the Haldars has been existing since before 1842.

The learned Subordinate Judge observes:— "So it comes to this, that the Halder tenants did not raise any buildings upon the first plot, nor did they dig any tank in the second plot. The defendant who purchased the lands from the auction-purchaser Katayani Debi cannot under the circumstances claim any protection under clauses 1 to 4 of section 37 of Act XI of 1859." For the purposes of the present appeal it is unnecessary to consider the finding of the Court below on the question whether there were buildings on the eastern portion of plot No. 1, as the building erected by the defendants on that portion has been allowed to stand. As already stated, there were admittedly no structures on the western portion, and the evidence on

the record is not sufficient to show that there was a garden on it, so as to bring it under the 4th clause of section 37.

In granting a temporary injunction all that is necessary to see is whether the plaintiff has shown a *prima facie* case in support of the title asserted by him. We do not see sufficient reason for differing from the view taken by the Court below, *viz.*, that the plaintiff has made out a *prima facie* title.

The second question for consideration is whether there was unreasonable delay in making the application for injunction.

As stated above, the plaintiff purchased the estate No. 2402 at a sale for arrears of revenue on the 8th January 1915. The former proprietors appealed to the Commissioner, but the sale was confirmed by the latter on the 1st June 1915. Possession was delivered to the plaintiff by the Collector on the 30th July 1915. In August 1915 a general notice was issued on the property by the plaintiff to the effect that any one dealing with the property or with the interest of the tenants thereof, except those which are protected under the provisions of section 37 of Act XI of 1859, will do so at his own risk, and all tenants of the estate were informed that leases, except those which were protected under the provisions of section 37 of Act XI of 1859, were annulled. A notice was also served on Mr. Tosh, senior partner of the defendants' firm, in August 1915.

The defendants commenced some buildings on other parts of the 140 *bighas* in November 1915. On the 26th January 1917, the plaintiff wrote to the defendants through his Solicitors Messrs. Morgan & Co. as follows:— "Our client understands that recently you have acquired an interest in several plots of lands in Mouzah Antpur within Touzi No. 2402 for the purpose of erecting a Mill. Our client contends that he is entitled, under section 37 of Act XI of 1859, to annul the tenure-holder's interest acquired by you, and to eject you from the lands, and he will take proceedings for that purpose immediately after the disposal of the suit instituted by Rai Satish Kant Roy Bahadur. Please note that if you build or proceed to build any erection on the land in question, you will do so at

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your risk." Mr. Tosh admits receipt of the letter.

Maharaja Bahadur Sir Prodyot Kumar purchased the 9 cottas on behalf of the defendants on the 9th November 1915, but that was after the notice given to Mr. Tosh. The suit brought by the former proprietors for setting aside the sale was dismissed on the 2nd April 1917. The defendants purchased the two plots of land in dispute from Katyani Dabi on the 29th June 1917. The defendants commenced building on a portion of the plot No. 1 in July 1917, and the affidavit of Nalinakhya Mookerjee states that plaintiff, coming to know of the same on the 21st August 1917, caused a letter to be written by his Pleader Babu Kissori Mohon Sen on the 23rd August 1917, forbidding them to raise the building. No reply was given to the said letter by the defendants and a reminder appears to have been sent to them by the plaintiff's Pleader Kissori Babu on the 21st September, and it was not until the 3rd October 1917 that the defendants gave a reply in which they regretted the delay in reply occasioned by the necessity to thoroughly investigate the matter put forward, and stated that they were advised that the plot on which they were building did not appertain to Touzi No. 2402 and further that as regards the said plot they were assured that it was a protected one, although under the circumstances of its being outside the plaintiff's Touzi the matter was of no importance. Three days afterwards, i. e., on the 6th October 1917, the suit was instituted. It appears, therefore, that the plaintiff after the purchase of the estate gave general notice and then a special notice to Mr. Tosh, in August 1915, not to deal with the interests of tenants. There was an interview between the plaintiff's Pleader and Mr. Tosh in August 1917, when the building on the disputed land was commenced then a letter protesting against the erection of the building on the 28th August 1917, followed by the reminder on the 21st September 1917, to which a reply was given only on the 3rd October 1917 and in which the defendants denied that the disputed land appertained to the estate No. 2402 purchased by the plaintiff. The suit was instituted on the 6th October, i. e., only

three days afterwards and the application for temporary injunction was made on the 8th October. So far as the rest of plot No. 1 and the plot No. 2 are concerned, and they are the portions in respect of which the injunction has been granted, nothing had been done by the defendants. In these circumstances there was no unreasonable delay in coming to Court.

The third question is whether under these circumstances the Court below was right in granting the temporary injunction.

It is contended on behalf of the appellants that where a plaintiff who is out of possession claims possession the Court will not grant injunction against a defendant in possession under a claim of right unless the threatened injury would be irreparable, and we are referred to *Lowndes v. Bettle* (1), *Kesho Prasad Singh v. Srinivas Prasad Singh* (2), Woodroffe on Injunctions, 4th Edition, 302, and Halsbury's Laws of England, Volume XVII, paragraph 483.

In *Lowndes v. Bettle* (1) Kindersley, V. C., reviewed the various authorities relating to injunctions in cases of trespass and classified the cases under two heads, the one where the party against whom the application for the injunction is made is in possession, and the other, where the plaintiff is in possession and is asking the Court to protect his estate. The result of the cases was that when the plaintiff was out of possession, the Court would refuse to interfere by granting an injunction unless there was fraud or collusion or unless the acts perpetrated or threatened were so injurious as to tend to the destruction of the estate. Where the plaintiff was in possession and the defendant was a mere trespasser not claiming under colour of right, the tendency of the Court was not to grant an injunction in the absence of special circumstances but to leave the plaintiff to his remedy at law, although an injunction would be granted if the acts complained of tended to the destruction of the estate. But where the plaintiff was in possession and the defendant claimed under an adverse title, the tendency was to grant the injunction.

Since the Judicature Act, these distinctions between cases where the defendant committing the acts of trespass is or is not

(1) (1864) 33 L. J. Ch. 451; 4 N. R. 609; 12 W. R. 399; 10 Jur. (N. S.) 326; 10 L. T. 55.

(2) 10 Ind. Cas. 256; 38 C. 791; 13 C. L. J. 394.

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in possession and claims under colour of title or is a mere stranger, are not of the same importance. See Kerr on Injunction, 5th Edition, page 102. Section 25, sub-section 8 of the Judicature Act, 1873, lays down:—"If an injunction is asked either before or at or after the hearing of any cause or matter to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the Court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise or (if out of possession) does or does not claim the right to do the act sought to be restrained under any colour of title, and whether the estates claimed by both or either of the parties are legal or equitable."

In *Kesho Prasad Singh v. Srinivas Prasad Singh* (2) the learned Judges (Mookerjee and Caspersz, JJ.) held that where the plaintiff is out of possession and claims possession, the Court will refuse to interfere by grant of injunction against the defendant in possession under a claim of right, but where the threatened injury will be irreparable, an injunction will lie at the instance of a complainant out of possession. In that case the plaintiff had established his title to the estate (which was in the possession of the defendant) in the Court of first instance, and while an appeal by the defendant was pending, asked for an injunction restraining the defendant from spending any sums whatever, at any rate any sums in excess of the revenue and rents and the expenses for the management of the estate. The learned Judges pointed out that there was no suggestion that the defendants were about to commit an act in the nature of waste, that the plaintiff had another adequate remedy, as he could execute the decree he had obtained (he had obtained a decree for mesne profits also) and thereby obtain full and ample relief, that the injunction if granted would be vague and indefinite, and lastly that the plaintiff could apply for the appointment of a Receiver of the estate.

The statement of the law in *Kesho Prasad's case* (2), viz., that where a plaintiff who is out of possession claims possession, the Court will not grant an injunction against a defendant in possession under a claim of right, but if a threatened injury would be irreparable, a com-

plainant out of possession may have an injunction, is quoted in Woodroffe on Injunctions, 4th Edition, page 302. In an earlier passage in the same page the learned author states: "In cases where the relief sought is ejectment, Courts in India may clearly, by means of injunction secure the property from damage during litigation. At the same time care must be taken lest by interfering with the ordinary rights of ownership the mere institution of a suit should operate as a vexatious interruption to the enjoyment of property. The English Courts for special reasons formerly hesitated as to these cases and refused to interfere by injunction where the plaintiff was out of possession, unless there was fraud or collusion or unless the acts perpetrated or threatened were so injurious as to tend to the destruction of the estate." These observations made by the learned author must be taken as subject to the qualification that the plaintiff must show that the interference of the Court is necessary to protect him from irreparable or at least a serious injury before the legal right can be established at the trial. (See Woodroffe on Injunctions, page 89.) In Halsbury's Laws of England, Volume XVII, section 483, it is stated: "By the term 'irreparable injury' is meant substantial injury which can never be adequately remedied or atoned for by damages." By the term "irreparable injury," however, it is not meant that there must be no physical possibility of repairing the injury, all that is meant is that the injury would be a material one, and one not adequately reparable by damages (see Kerr on Injunction, 5th Edition, 19). We were referred to the case of *Mogul Steamship Co. v. M'Gregor* (3), where Lord Coleridge, C. J., observed:—"it may be that they will suffer some damages; it may be that they will for a time have a difficulty in carrying on their China trade or may have to carry it on at a loss. But injury of that sort differs altogether from the injury which is called 'irreparable' to prevent which injunctions have heretofore been granted in the Court of Chancery, and are now allowed to issue from this Court. For instance if a fine old ornamental tree in a nobleman's park be cut down, the injury is practically irreparable and cannot be compensated in damages. It is in

(3) (1885) 15 Q. B. D. 476; 54 L. J. Q. B. 547; 53 L. T. 268; 15 Cox. C. C. 740; 5 Asp. M. C. 467; 43 J. P. 646.

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cases of that nature that the *interim* injunction issues. The injury here if it be made out obviously is not of that character." But although indicating the nature of "irreparable injury," it does not profess to be an exhaustive definition of "irreparable injury," and the case was one where the loss which the plaintiff would have suffered in carrying on the trade could be easily compensated by damages. In one sense it may be said that every injury to property may be compensated by damages, but in that sense no injunction can be granted in cases even between co-sharers or between a landlord and tenant because the plaintiff may be compensated by damages. But money compensation may not be an appropriate and adequate remedy in every case of injury relating to immoveable property, and we think that the question of "irreparable injury" must depend upon the circumstances of each case.

We were referred to the case of *Hilton v. Earl of Gramville* (4) to show how reluctant the Court is to grant *interim* injunctions. In that case an injunction to restrain the working of valuable mines was refused, although there was reason to apprehend that if the working was continued the plaintiff's houses upon the surface would be totally destroyed or irreparably damaged before the legal right could be decided. But in that case no action had been brought to have the legal rights determined and there was delay in applying for the injunction; the injunction was refused on a consideration of the balance of inconvenience to the parties, and on condition of the defendants making certain admissions for the purpose of enabling the plaintiff to bring an action. Of course an interlocutory injunction should not be lightly granted, because it would be a very serious thing if the person in possession were restrained from making use of the property, merely because a suit has been instituted with respect to the property. As pointed out by Pigot, J., in the case of *Pudlam v. Dhunput Singh Bahadur* (5), "the power of granting an injunction is one which has been perhaps a little lavishly bestowed upon the Courts in this country. It is a tremendous power,

and one which the superior Courts most carefully guard themselves from exercising hastily or without solid grounds." It is only in cases where property which it is essential should be kept in its existing condition during the pendency of the suit is "in danger of being wasted, damaged or alienated" that the Court ought to interfere so as to restrain persons who may turn out in the final event of the litigation to be the actual owners of the property from enjoyment and possession of it.

The learned Subordinate Judge referred to the principle laid down in the case of *Kesho Prasad Singh v. Srinivas Prasad Singh* (2), but held that it was inapplicable to the present case on the ground that the claim of right must be *bona fide*, which in its opinion was not in the present case. But a 'claim of right', we think, means 'under colour of some title' and as distinguished from the claim of a person who is in possession merely as a trespasser not claiming under any sort of title.

On behalf of the respondents reliance is placed on the observations of Jessel, M. R., in the case of *Krehl v. Burrell* (6), which are as follows:—If with notice of the right belonging to the plaintiff and in defiance of that notice, without any reasonable ground and after action brought, the rich defendant is to be entitled to build up a house of enormous proportions, at an enormous expense, and then to say in effect to the Court, 'you will injure me a great deal more by pulling it down than you will benefit the poor man by restoring his right,' of course that simply means that the Court in every case, at the instance of a rich man, is to compel the poor man to sell him his property at a valuation. That would be the real result of such a decision. It appears to me that it never could have been intended by the Legislature to bring such a result about. It never could have been meant to invest the Court of Chancery with a new statutory power somewhat similar to that with which railway companies have been invested for the public benefit under the Lands Clauses Act, to compel people to sell their property without their consent at a valuation. I am

(4) (1841) Cr. & Ph. 233; 4 Beav. 130; 10 L. J. Ch. 98; 41 E. R. 498; 54 R. R. 297.

(5) 1 O. W. N. 429.

(6) (1877) 7 Ch. D. 551; 47 L. J. Ch. 353; 38 L. T. 407.

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quite satisfied nothing of the kind was ever intended, and that, if I assented to this view, instead of exercising the discretion which was intended to be reposed in me, I should be exercising a new legislative authority which was never intended to be conferred by the words of the Statute, and I should add one more to the number of instances which we have from the days in which the Bible was written until the present moment, in which the man of large possessions has endeavoured to deprive his neighbour, the man with small possession, of his property, with or without adequate compensation." That was an action for an injunction to restrain the erection of a building on a passage over which the plaintiff claimed a right of way, where he had, on being informed of the defendants' intention, forthwith given him notice of his right and commenced the action, and the defendant had notwithstanding continued and completed the erection of the building complained of. The plaintiff's right having been established at the trial, the Master of the Rolls held that it was a case for a mandatory injunction and not for damages under Lord Cairn's Act, and made the observations quoted above. It is to be observed that it was not a case of a temporary injunction. The Court found that the plaintiff had established his right and gave a verdict accordingly, and in the circumstances of the case the Court held that a mandatory injunction and not damages was the proper remedy.

We were also referred to the case of *Hemanta Kumar Roy v Baranagar Jute Factory Company* (7). In that case the plaintiffs were some of the superior landlords of the disputed property, which consisted of two plots of land, and claimed to have been in direct possession of about one-third of the property. The defendants, who were in occupation of the remainder, obtained a permanent lease from some of the co-sharers of the plaintiffs and commenced to dig the foundation for an extension of their factory house. The plaintiffs sued for partition and applied for a temporary injunction. The defendants, notwithstanding notice of the application for injunction, expedited the execution of the building.

(7) 24 Ind. Cas. 313; 19 C. W. N. 442; 20 C. L. J. 441.

It appeared that on partition the plaintiffs could not conveniently be allowed any share of one of the plots, but must be limited to an allotment out of the other plot. It was held in these circumstances that the plot, a share of which only could be allotted to the plaintiffs on partition, should be retained *in statu quo*, so that the Court might be free to grant such relief as it might think proper, and an injunction should be granted restraining the defendants from building on this plot for a period of one month during which the partition suit was to be tried out. In that case one of the parties would have been placed in a very disadvantageous position unless an injunction was granted. The case of *Israil v. Samset Rahman* (8) also was a case between co-sharers. The principle upon which injunction is granted in this class of cases, viz., cases between co-sharers is that the co-sharer if not restrained from building, may be placed in an unfairly advantageous position compared with the plaintiff, but that principle does not apply to a case where the defendant is a trespasser in possession under a claim of right. In such a case the defendant must walk out of the land if the question of title is decided against him, and the considerations which may weigh with the Court in cases between co-sharers or in light and air cases, in deciding at the final hearing whether mandatory injunction should issue or the plaintiff should be given damages, do not apply to a case where the defendant is found to be in possession of land belonging to the plaintiff, without any title whatsoever.

The learned Pleader for the respondent contends that a temporary injunction may be granted in a case like the present under Order XXXIX, rule 2, which speaks of 'injury of any kind.' But Order XXXIX, rule 1 is the rule applicable to the present case, and not rule 2 which is applicable to a case where the plaintiff seeks to restrain a breach of contract, on the commission of a wrong or tort.

It is next contended on behalf of the respondent that even if the defendants have protected interests in the lands in dispute, they have as tenants no right to build

(8) 21 Ind. Cas. 861; 41 C. 436; 18 C. W. N. 176; 19 C. L. J. 47.

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on the western portion of plot No. 1 or to fill up the tank on plot No. 2, thus changing the character of the land altogether against the wishes of the landlord, and that a landlord is entitled to an injunction against the tenant in such a case. It is contended, on the other hand, on behalf of the appellants that the suit was brought against them as trespassers and not as tenants, and that the temporary injunction was applied for in connection with the case made in the plaint, *viz.*, that the defendant was a trespasser, and that under the circumstances the plaintiff cannot now turn round and ask for injunction against the defendants on the ground that they are tenants, at any rate without an amendment of the plaint and asking for injunction on the footing that the defendants are tenants. It is urged that if the defendants are sued as tenants, questions may be raised whether the acts complained of would not come within what is called "meliorating waste." We are of opinion that having sued the defendants as trespassers and having applied for injunction on that ground, the plaintiff should not be allowed to claim an injunction on the footing that the defendants are tenants, at any rate without remanding the case and giving the defendants an opportunity of showing cause against injunction being granted on such a footing, and that will take a long time.

The last question for consideration is whether in all the circumstances of the case, the injunction granted by the Court below should be discharged. We have already found that the plaintiff has made out a *prima facie* title, and there has been no unreasonable delay in coming to Court. The building (the staff quarters) which has been erected by the defendants on the eastern portion of plot No. 1 has been allowed to stand by the Court below. No injunction has been granted with respect to the same and there is no appeal on behalf of the plaintiff against the order. It is only with respect to the western portion of plot No. 1 and the plot No. 2, that the injunction has been granted. It is stated before us on behalf of the appellants in this Court that they want to build servants' quarters on the rest of plot No. 1 and to fill up the tank on plot

No. 2 which is said to be in an insanitary condition. It is contended, on the other hand, on behalf of the respondents that this was not suggested in the Court below, that the defendants having got all that they wanted in the Court below are raising new matters in appeal, and that they have a large quantity of their other lands adjoining the lands in dispute on which they can build their servants' quarters. There is no doubt that the appellants opposed the application for injunction *in toto* in the Court below, but so far as the records go, that there was no proposal of erecting servants' quarters on the rest of plot No. 1 or of filling up the tank in plot No. 2. Mr. Tosh in his affidavit stated that the "staff quarters with the lands in suit are integral parts of the Mill and are absolutely required for its working, and the starting and working of the Mill will be considerably delayed and my firm will be put to irreparable loss in consequence if the injunction prayed for be granted." He further stated that his firm had spent 5 lacs of rupees for the acquisition of the lands and construction of main buildings thereon, and about Rs. 85,000 for the construction of the staff quarters and had entered into a contract with Messrs. Mackintosh Burn & Co. to "complete the last mentioned building within 1917 and my firm will be seriously prejudiced and will suffer irreparable injury if the injunction be allowed." There is no trace of any suggestion in any of the affidavits as to the tank in plot No. 2 being in an insanitary condition, which it was necessary to be filled up, or that it was necessary for the defendants to build servants' quarters on the rest of plot No. 1.

The learned Subordinate Judge seems to have thought that it would satisfy both parties if the building erected for the staff quarters was allowed to stand, and an injunction was granted restraining the defendants from further building on or changing the character of the land. He observes: "The plaintiff alleged that there will be irreparable injury if the landmarks still existing on the boundaries of the disputed lands are effaced and done away with, and all possible opportunities and facilities for him to obtain possession

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thereof, if there be a decree in his favour, be permanently lost to him. On the eastern boundary, there is still the foundation of Swarnomoyi's house existing. On the south and west there are public roads. The defendants should not be allowed to interfere with and efface or demolish these permanent boundary marks. They should not also be allowed to further build upon the lands but must be ordered by an injunction to stop all further structures upon the lands until the final disposal of the suit. These are reasonable prayers and, in my opinion, they should be granted to meet the case of both parties. In that case the plaintiff would no longer have any cause for complaint that he apprehends an irreparable injury. The defendant Company also cannot complain that their Mill work will be stopped for want of erection of their staff quarters, and there will then be a phenomenal loss of income." Now if the landmarks still existing on the boundaries of the disputed lands are "effaced and done away with" by the erection of further buildings, there is danger of the enforcement of the right of the plaintiff being prevented, and this may be said to constitute irreparable injury. Then the filling up of the tank on plot No. 2 and erection of buildings (servant's quarters) on the rest of plot No. 1 on which admittedly there were no buildings at any time, would change the character of the land, and in the event of the suit being decreed, the buildings will have to be pulled down and the tank re-exacavated, and it may be difficult to restore the lands to their former condition. It is to be borne in mind that in granting an *interim* injunction the Court should see on which side, in the event of obtaining a successful result to the suit, will be the balance of inconvenience, if the injunction do not issue, bearing in mind the important principle of retaining immoveable property *in statu quo*.

It is suggested by the learned Pleader for the appellants that the boundaries can be fixed by deputing a surveyor to measure the lands and prepare a map. But that would take some time, because there may be objections to the surveyor's report by one party or the other, as there appears to be a difference between the parties

about the exact area of the first plot of land, and they will have to be decided. On the other hand the suit itself which is pending in the Court below may be tried out within two months or even earlier, if an order for expediting the hearing is made by us. This would not be sufficient ground for maintaining the injunction, if we were satisfied that the defendants would be seriously inconvenienced by the order restraining them from erecting the buildings even for this period. But the order for injunction was passed by the Court below on the 5th February 1918, and the suit was tied up for nearly one year by this appeal preferred by the defendants. Were it not for this appeal, the suit could have been disposed of long ago. The appeal itself could have been heard long ago if the appellants had moved the Court for an early hearing.

In all the circumstances of the case, we think the proper course would be to direct the trial of the suit by the lower Court at once, so that the suit may be disposed of within a period of two months. If the suit is not disposed of within two months from the date of arrival of this order in the Court below owing to any default on the part of the plaintiff, it will be open to the defendants to apply to the Court below for the discharge of the injunction. If in the meantime the defendants find it necessary to construct servants quarters on the rest of plot No. 1, they may erect temporary structures for that purpose, but not so as to efface the boundary marks, and if any difficulty arises in the erection of the temporary structures for the servants quarters on plot No. 1 it will be open to the parties to apply to the Court below, and that Court will give proper directions in the matter.

The order for injunction will be varied accordingly. We make no order as to costs. The record with a copy of this order will be sent down to the Court below within the course of the next week.

Order varied.

MUHAMMED UMAR KHAN v. RAZI KHAN.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 379 OF 1919.

May 1st, 1919.

Present:—Mr. Justice Bevan Petman.

MUHAMMED UMAR KHAN AND ANOTHER

—DEFENDANTS—APPELLANTS

versus

RAZI KHAN AND OTHERS—PLAINTFFS—

RESPONDENTS.

Appeal, second—Finding of fact, interference with—Abandonment of occupancy tenancy and adverse possession, whether questions of fact—Punjab Tenancy Act XVI of 1887, s. 38—Abandonment of occupancy tenancy, what constitutes—Adverse possession by landlord.

A finding of fact based on no evidence or against express *prima facie* reliable evidence is liable to be set aside on second appeal. [p. 874, col. 1.]

Neither the question of abandonment by an occupancy tenant nor the question of adverse possession of the holding by the landlord is necessarily a question of fact. [p. 873, col. 1.]

Where it was found that an occupancy tenant had not for a large number of years either cultivated the land by himself or by others, that there was no sufficient cause for his not having done so, and that he did not arrange for payment of the rent:

Held, that the tenancy must be taken to have been abandoned within the meaning of section 38 of the Punjab Tenancy Act [p. 875, cols. 1 & 2.]

Where a holding abandoned by an occupancy tenant is given by the landlords to their tenants-at-will, this is sufficient to constitute adverse possession as against the occupancy tenant. [p. 875, cols. 1 & 2.]

Second appeal from the decree of the District Judge, Attock at Campbellpur, dated the 29th November 1918.

Mr. Harcharan Das Bhalla, for the Appellants.

Mr. Mukand Lal Puri, for the Respondents.

JUDGMENT.—A preliminary objection is taken that no second appeal lies because the questions of abandonment and adverse possession are questions of fact. In my opinion, neither the question of abandonment, and more particularly abandonment by an occupancy tenant, nor of adverse possession are necessarily questions of fact. A great deal must depend on the circumstances of the case.

In the present case the question of adverse possession is dependent on that of abandonment. With regard to abandonment the respondents rely on a decision of the Chief Court of the Punjab No. 253 of 1908, reported in the unauthorised Punjab Law Reporter as No 102 of 1909

[*Atra v. Ram Kishen* (1)]. This judgment, however, lays down no such wide proposition, but relying on the decisions in *Fatal Din v. Shah Mahomed* (2) and *Gangu v. Jawahar Singh* (3) it was held that in the case before the Court, the question of abandonment was one of fact. This might well have been the case. The judgment is very brief and the facts are not stated. In the two decisions referred to it was no doubt remarked that the question of abandonment was one of fact to be decided on the circumstances of each case, but the question whether, under every conceivable circumstance, a finding with regard to abandonment was purely a question of fact was not before the Courts. Since these decisions of 1883 and 1884 the Punjab Tenancy Act has been passed and to some extent the subject of abandonment by an occupancy tenant is dealt with in section 38 of that Act. Under these circumstances I doubt whether those decisions are now applicable in respect of this matter.

No authority has been quoted for the proposition that a finding as to abandonment by an occupancy tenant is final even though the finding is based on no evidence, or on a misreading or misconstruction of evidence or of documents or is against express *prima facie* reliable evidence which by law is to be presumed to be correct in the absence of all evidence to the contrary, or which is based on a misconstruction of the provisions of the Punjab Tenancy Act. In *Jowala Singh v. Lakha Singh* (4) it was held that misreading of evidence may afford sufficient reason for interference on second appeal. In *Gauri Shankar v. Madho Charan* (5), which is a ruling of a Division Bench of the Chief Court of the Punjab, it was held that a finding of fact, to be conclusive and binding on a Court of second appeal, must be a finding based on evidence legally sufficient to support it and where there is no sufficient evidence to justify such a finding, the finding cannot operate as a finding of fact. In *Lachmeswar Singh v.*

(1) 4 Ind. Cas. 965; 102 P. L. R. 1909; 154 P. W. R. 1909.

(2) 141 P. R. 1883.

(3) 121 P. R. 1884.

(4) 35 Ind. Cas. 892; 81 P. R. 1916; 126 P. W. R. 1916; 39 P. L. R. 1917.

(5) 16 Ind. Cas. 887.

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Manowar Hossein (6) their Lordships of the Privy Council held that the decision that the defendant's possession had been adverse having been an inference from fact in the Courts below, the correctness of this as a legal conclusion to be drawn or not, was a question open to second appeal. It appears that the same argument would apply to the legal conception of abandonment, especially where certain acts have by Statute been declared to constitute abandonment by an occupancy tenant. In *Harendra Lal Roy Chowdhuri v. Hari Dasi Debi* (7) it was strongly contended that their Lordships of the Privy Council should not depart from their usual practice of not interfering with two concurrent findings of fact, but their Lordships pointed out that it was a case of no evidence. There are also a number of unpublished judgments of the Chief Court of the Punjab which decide that a finding of fact based on no evidence or against express *prima facie* reliable evidence is liable to be set aside on second appeal. An instance is Civil Appeal No. 1831 of 1914 [*Khubi v. Chottu* (8)].

In the present case the lower Appellate Court has not considered the oral evidence, which it has set aside on the ground that it is not of much value, without giving any reasons, and has decided the appeal on what, in my opinion, is a misconstruction of entries in the revenue papers. It would have been more satisfactory to have judged and discussed the oral evidence in the light of a proper construction of these entries. The lower Appellate Court itself describes these entries as vital. It finds that it is manifest from the revenue records that the plaintiffs, the occupancy tenants, have not received any rent for a considerable period and that their allegations to the contrary are false. It finds, further, that the Record of Rights prepared in 1902-03 shows in the proprietor's column that the representatives of defendants were proprietors and in the tenant's column the plaintiffs are shown as

occupancy tenants out of possession, that a man named Chaman was cultivating the land as tenant at will on behalf of the proprietors and that in the column of rent it is noted that nothing is due to the occupancy tenants. The Court also finds that in the Jamabandi of 1911-12 there are similar entries.

It appears to me that the only construction to be placed on these entries is that the proprietors had arranged for the cultivation and that the tenancy of the actual cultivator was one under them and not under the occupancy tenants. I think this construction would, in view of the entries being of 1892, at once raise a presumption both of abandonment and adverse possession. The lower Appellate Court, however, has proceeded to dispose of the appeal on the basis of a judgment, *Lakha v. Thakar Dial* (9). This judgment dealt with section 38 of the Punjab Tenancy Act, 1887, and the learned Financial Commissioner held that "to constitute abandonment carrying with it extinction of the right of occupancy under section 38, three things are necessary, and all these must exist in combination with each other; these are (1) that the tenant fails for more than one year to cultivate his tenancy either by himself or some other person; (2) that he so fails without sufficient cause; and (3) that he fails to arrange for the payment of the rent of the tenancy as it falls due. If a tenant has sufficient cause for his failure to cultivate, there is no abandonment; so also if he fails to cultivate but arranges for the payment of the rent as it falls due, abandonment does not occur." It was also pointed out that with regard to the intention of the section the essential point for consideration is whether the landlord has sustained any injury from the tenant which would justify the penalty of extinction of the right and that if the landlord has sustained no injury whatever, the Courts should require extremely strict proof as to all the three points above noted. In that particular case it was held that as the occupancy tenant was a minor, he had sufficient cause for not cultivating and that his uncle had as a

(6) 19 C. 253; 19 I. A. 48 (P. C.); 6 Sar. P. C. J. 133.

(7) 23 Ind. Cas. 637; 41 O. 972; 27 M. L. J. 80; 12 A. L. J. 774; 16 M. L. T. 6; (1914) M. W. N. 462; 1 L. W. 1050; 18 C. W. N. 817; 19 C. L. J. 484; 16 Bom. L. R. 400 41 I. A. 110 (P. C.).

(8) 28 Ind. Cas. 555; 41 P. W. R. 1915; 108 P. L. R. 1915.

(9) 2 P. R. 1901 Rev.; 56 P. L. R. 1901.

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matter of fact arranged for the cultivation with the proprietors. The lower Appellate Court in dealing with the above judgment has, I think, misread the first condition which is not that there must be a failure to cultivate for one year but that the occupancy tenant must fail to cultivate the tenancy either by himself or some other person, whilst the third condition relates to a failure on the part of the occupancy tenant to make the necessary arrangements. The lower Appellate Court holds that the conditions have been sufficiently met by the fact that the lands have not been out of cultivation and payment has been made direct to the proprietors who have not suffered. It regards the matter of loss as the essential point but, as pointed out by the Financial Commissioner, where there has been no loss, the result is not that it must be held there had been no abandonment, but that strict proof of the conditions should be required. If the conditions are proved, the fact of there being no loss is immaterial.

The first condition has been further dealt with by the lower Appellate Court under the discussion of adverse possession, and it has held that the occupancy tenants "have arranged for the cultivation of the land, or, at least, the land has been cultivated all this time and their names have been borne out in the revenue papers." No evidence is referred to in support of the finding that the occupancy tenants had arranged for the cultivation. Apparently seeing the weakness of this finding the Court added "or, at least, the land has been cultivated." This last finding is not sufficient. The burden of proof is, no doubt, on the proprietors but in the absence of evidence to the contrary, and none has been referred to, either by the lower Court or in this Court, the presumption raised by the entries in the revenue papers is sufficient. I hold that the appellants did not for a large number of years either cultivate the land by themselves or by others, that there is no sufficient cause for not having done so and, finally, that they did not arrange for payment of rent when due.

It is urged that no overt act on the part of the proprietors has been proved from which adverse possession can be

presumed, but the giving of the land by the proprietors to their own tenants at-will is sufficient for the purpose. I hold that the suit is time-barred. For the above reasons I accept the appeal with costs throughout.

Appeal accepted.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 1127 OF 1918.
December 20, 1919.

Present :—Mr. Justice Tadbhall and
Mr. Justice Rafique.

Thakur ATRAJ SINGH—PLAINTIFF
—APPELLANT

versus

MOOLOO SINGH AND OTHERS—DEFENDANTS
—RESPONDENTS.

Custom—Pre-emption—Proof of custom—Wajib-ul-arz, entries in, value of—Previous sales to co-sharers, effect of.

The mention of the existence of the custom of pre-emption in two *wajib-ul-arzes* drawn up at a considerable interval of time between each, the fact that the co-sharers in the village admit the existence of the custom, with the added fact that previous sales have been in favour of co-sharers, are sufficient to establish the existence of the custom. [p. 876, col. 1.]

Second appeal against the decree of the District Judge, Barielly, dated the 11th May 1918.

Dr. K. N. Katju, for the Appellant.

Messrs. P. N. Banerji and S. N. Sen, for the Respondents.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for pre-emption. The Courts below dismissed the plaintiff's suit on the ground that the evidence produced was insufficient to prove the custom alleged. The evidence consisted of the production of two *wajib ul-arzes* and certain oral evidence on both sides, and the fact that there had been at least ten sales in favour of the plaintiff in the same Mahal. The lower Appellate Court in respect of the oral evidence has in clear language said that it is worthless and that no reliance can be placed upon it. This refers to the oral evidence on both sides. It decided the

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point simply on its interpretation of the documentary evidence and the inference to be drawn from the fact that all the sales in this Mahal had been made in favour of the plaintiff. It held that the sales in favour of the plaintiff proved nothing at all and that the two *wajib-ul-arzes* were insufficient to establish the custom. The first *wajib ul-arz* is that of the settlement of 1868 or 1869. In section 8 of that document there is a distinct mention of the existence of a custom of pre-emption. The words used are "*wa riwaj haqq shufa*;" the document relates that at that time no co sharer's property was under a mortgage and that in future every one had a right to transfer his property with certain conditions. The next *wajib-ul-arz* is that of 1895 drawn up when a partition was carried out in the village. That document distinctly in section 8 refers to the customs set out in the settlement *wajib-ul-arz* and reiterates the fact that they prevail and are binding on the co-sharers. In the two *wajib-ul arzes* drawn up at a considerable distance of time apart the custom of pre-emption has been clearly and distinctly mentioned and all the co-sharers agree that it is in force and binding on them. Read in the light of the above, the fact that all the sales in this Mahal have been in favour of a co-sharer, namely, the plaintiff, is a fact which has considerable significance in favour of the contention that the custom of pre-emption itself existed. If these sales had all been to strangers, an inference of the opposite sort would naturally have been drawn. In our opinion the only inference that can properly be drawn from the above evidence is that the rule of pre-emption itself existed as a custom and that the plaintiff under that right, being a co-sharer entitled under the custom to pre-empt, had a right to pre-empt the property in suit against the defendant vendee who is not a co-sharer in the Mahal. It is true that the vendor, the vendee and the pre emptor are all descended from a common ancestor, but the vendee is not a co-sharer in the Mahal, the pre emptor is, and the custom gives a right to the relation who is a co-sharer. The Court below has found on the question of consideration that the true sale price was Rs. 1,000 and that point is not contested before us. The

result, therefore, is that we allow the appeal. The plaintiff's suit will stand decreed with costs in all Courts conditional on his paying into Court the sum of Rs. 1,000 within a period of three months from to-day's date. If he fails to pay the Rs. 1,000 into Court as directed above, then his suit will stand dismissed with costs in all Court. Costs in this Court will include fees on the higher scale.

Appeal allowed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 3289 of 1915.

May 14, 1919.

Present :—Mr. Justice Broadway and
Mr. Justice Abdul Raoof.

HARNAM SINGH—PLAINTIFF—APPELLANT
versus

NARAINA—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), ss. 11, 17—Evidence Act I of 1872), s. 115—Minor, mortgage by, validity of—Fraudulent misrepresentation as to age, effect of—Estoppel

A mortgage made by a minor is wholly void. [p. 877, col. 2.]

A false representation made to a person who knows it to be false is not such a fraud as to take away the privilege of infancy. [p. 877, col. 2.]

There can be no estoppel where the truth of the matter is known to both the parties. [p. 877, col. 2.]

Second appeal from the decree of the District Judge, Ludhiana, dated the 30th August 1915.

Mr. N. O. Mehra, for the Appellant.

Mr. Ghulam Rasul, for the Respondent.

JUDGMENT.—The facts of this case are few and the point which arises for decision is short and simple. Naraina, the defendant to the suit, while a minor represented himself to be a major and executed a mortgage in favour of Harnam Singh, the plaintiff, on the 6th of June 1908. Thereupon one Ram Ditta instituted a suit for setting aside the mortgage deed and succeeded in getting a decree. One of the points raised in that suit was that the mortgagor Naraina being a minor at the date of the mortgage, the transaction was wholly void. The suit was, however, decreed on the ground of want of con-

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sideration and legal necessity. The question of the mortgagor's age was considered immaterial and was not decided. The present suit was instituted by Harnam Singh, the mortgagee, against Naraina for the possession of the mortgaged lands and was contested by the defendant on the ground of his infancy at the time of the mortgage. The Court of first instance, holding that the defendant had been found to be an adult at the time of the mortgage in the reversioner's suit, came to the conclusion that the plaintiff was entitled to a decree.

An appeal was preferred by the defendant to the lower Appellate Court, which has reversed the decree of the Court of first instance and has dismissed the suit. The plaintiff has thereupon come up in second appeal to this Court. It has been contended on his behalf that the defendant, having fraudulently represented himself to be a major at the date of the mortgage, was estopped from pleading his infancy in this suit. It was also contended that he had been held to be of age at the date of the mortgage in the previous suit and the plea was barred by the rule of *res judicata*. We have perused the appellate judgment of Mr. Ross in the reversioner's suit, and we entirely agree with the learned Judge of the Court below that the question of the defendant's age was left open and was not finally decided in that case. In this case after considering the evidence on the record the Court has found as a fact that the defendant was a minor at the date of the mortgage. It is not open to the appellant to contest this finding in second appeal. It is, however, argued by his learned Counsel that even if the defendant was a minor, he having fraudulently represented himself to be a major, a decree on the mortgage ought to have been passed against him. In support of his contention he has relied upon a decision of the Calcutta High Court in the case of *Sreemutty Mohun Bibi v. Saral Ohund Mitter* (1), but the view taken in this case is opposed to the rule laid down by their Lordships of the Privy Council in the case of *Mohori Bibee v. Dharmodas Ghose* (2). It was held by their Lord-

ships that a mortgage made by a minor was wholly void and that the mortgagee was not entitled to enforce his security created under the mortgage. On the question of estoppel raised in that case their Lordships held that there could be no estoppel, where the truth of the matter was known to both the parties. A false representation made to a person who knows it to be false is not such a fraud as to take away the privilege of infancy.

In this case on the facts disclosed there can be no doubt that the mortgagee, who belonged to the same brotherhood to which the defendant belonged and lived in the same place where he lived, must have been aware that he was a minor. According to the finding of the learned Judge, Naraina was only just over sixteen years at the time of the mortgage and it is not possible to believe that the plaintiff did not know that he was a minor.

In our opinion this case is fully governed by the ruling of the Privy Council. We accordingly dismiss the appeal with costs.

Appeal dismissed.

ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 102 OF 1918.

November 19, 1919.

Present: —Pandit Kanhaiya Lal, A. J. C.,
and Mr. Lyle, A. J. C.

NAZIR BIBI AND OTHERS—DEFENDANTS
APPELLANTS

versus

Lala RAM RATAN—PLAINTIFF

—RESPONDENT.

Execution of document—Delay in executing document after it is written out, effect of—Pleadings—Plaint giving wrong date of execution of document, effect of.

The mere fact that a document is signed and attested a few days after it is written out does not render its execution invalid, or in any way alter the nature of the case set up on its basis, though the date of actual execution, as established by the evi-

(1) 2 C. W. N. 18.

(2) 30 C. 539; 7 C. W. N. 411; 5 Bom. L. R. 431; 30 J. A. 114; 8 Sar. P. C. J. 374 (P. C.).

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dence, is found to be slightly at variance with the date entered in the plaint. [p. 879, cols. 1 & 2.]

Appeal from the decree of the Subordinate Judge, Fyzabad, dated the 20th June 1918.

Mr. *Mumtaz Husain*, for the Appellants.

Mr. A. P. Sen and Babu *Basudeo Lal*, for the Respondent.

JUDGMENT.—The suit which has given rise to this appeal was brought by the plaintiff-respondent for the recovery of money due on a deed of mortgage purporting to have been executed by Muhammad Ayub Khan, his wife *Musammât Sardar-un-nisa* and his mother-in-law *Musammât Nazir Bibi*, on the 15th February 1910. The property mortgaged originally belonged to Asaf Ali Khan, who had obtained it under a grant from the British Government. He died in 1898, leaving him surviving a widow *Musammât Nazir Bibi*, a daughter by her named *Musammât Sardar-un-nisa*, and another named *Musammât Masjidi Maryam* by a predeceased wife.

On the death of Asaf Ali Khan mutation of names was effected in respect of his property in favour of *Musammât Nazir Bibi* alone. *Musammât Masjidi Maryam* claimed the entire property on the basis of a Will, purporting to have been made by Asaf Ali Khan. In order to enforce her alleged right to the said property and to meet the expenses of litigation she sold a 7-annas share in that property to Ram Ratan in 1906. Ram Ratan apparently took some steps to collect evidence in support of her title and also took legal advice in connection with the matter; but before any suit was filed, a compromise was arrived at between *Musammât Masjidi Maryam* and Ram Ratan on the one hand and *Musammât Nazir Bibi* and *Musammât Sardar-un-nisa* on the other, whereby *Musammât Masjidi Maryam* was allowed a 3-annas share in the said property and in return for the expenses, which Ram Ratan had incurred in connection with the proposed litigation, *Musammât Nazir Bibi* and *Musammât Sardar-un-nisa* agreed to reimburse him to the extent of Rs. 2,016-4-6, being the amount due on a previous promissory note which *Musammât Masjidi Maryam* had executed in favour of Ram Ratan for the expenses

aforesaid. In pursuance of this compromise a deed of partition was written on the 4th February 1910 by the parties to the compromise (Exhibit 2) and the deed of mortgage, now sought to be enforced, was executed by the defendants-appellants.

The defendants, *Musammât Nazir Bibi* and *Musammât Sardar-un-nisa*, deny that they executed the said deed of mortgage or received any consideration in connection therewith. They further state that if any such deed was executed, it could not be enforced, because it was not properly attested in the manner required by section 59 of the Transfer of Property Act and that the covenant as to the payment of interest entered in the said deed was hard and unconscionable. Muhammad Ayub Khan pleads that his signature was obtained by undue influence, that the consideration of Rs. 2,100 entered in the deed was fictitious and that no portion of it had been received by him. He took the same plea with regard to interest as the other defendants.

The learned Subordinate Judge found that the mortgage in suit, though written on the 15th February 1910, was actually executed by the defendants-appellants on the 20th February 1910. He accordingly disallowed the interest claimed from the 15th February to the 20th February 1910 and finding on the other points against the defendants-appellants decreed the rest of the claim.

We have examined the evidence adduced in the case and agree with the learned Subordinate Judge in finding that the mortgage-deed in suit was executed by the defendants-appellants, including the two ladies, *Musammât Nazir Bibi* and *Musammât Sardar-un-nisa*, after they had examined the account of the expenditure which the plaintiff-respondent had incurred, and undertaken to reimburse him to the extent entered in the mortgage-deed. Muhammad Ayub Khan states that he had examined the account of the sums due to the plaintiff respondent and found Rs. 2,100 payable to him. The mortgage-deed says that the account had been explained to the ladies by Muhammad Ayub Khan, who negotiated the compromise on behalf of the ladies and managed their entire

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business. There is evidence to show that at the time of the execution of the mortgage-deed in suit the terms of the deed were explained to the ladies, who were sitting behind a door before they made their marks. Mustafa Ali, the general agent of the plaintiff-respondent, states that Muhammad Ayub Khan took the mortgage-deed to them to explain it and brought it back. Ashfaq Husain, who was then the general agent of Musammat Masjidi Maryam and is also her son-in-law, says that the terms of the said mortgage had been explained to the ladies. Musammat Sardar-un-nisa admits that she made her mark on the deed. Musammat Nazir Bibi pretends that she and her daughter put down their marks on the deed, believing that it was a security bond or power-of-attorney, but that statement is obviously false. The endorsement of the Sub-Registrar shows that the ladies acknowledged the execution of the deed and the receipt of the consideration after having heard the contents thereof and having been informed of the conditions noted therein. The deed of partition was registered on the same date.

It is urged on behalf of the defendants-appellants that while the plaint asserted that the document was executed on the 15th February 1910, the evidence suggested that it was not signed and attested till the 20th February 1910 and that the evidence adduced should not, therefore, be believed. But it does not appear that the plaintiff-respondent could have had any object in asserting that the document in question was executed and attested on a date different from that it bore, had the facts been otherwise, or in producing false evidence in support of such assertion. In fact in the previous suit which was filed by Musammat Masjidi Maryam to enforce her rights under the deed of partition, to which Musammat Nazir Bibi, Musammat Sardar-un-nisa and Ram Ratan were parties, the mortgage-deed in suit was produced and the evidence then given by Ram Ratan was to the effect that the said document had been executed and attested on the 20th February 1910, as is now stated, and that evidence was accepted by the Court which decided that suit. The mere fact that the document was signed and attested 5 days

after it was written out does not render its execution invalid, or in any way alter the nature of the case as set up in the plaint, though the date of actual execution, as established by the evidence, has been found to be slightly at variance from the date entered in the plaint.

By virtue of the deed of partition the plaintiff-respondent gave up his rights under the sale-deed executed by Musammat Masjidi Maryam and contented himself with an undertaking given by Musammat Nazir Bibi and Musammat Sardar-un-nisa for the payment of Rs. 2,016-4-6 on account of the expenses incurred by him after his purchase. It is not open to the two ladies to go behind that settlement or resile from the agreement into which they had then entered.

It is also urged that the Court below has erred in allowing interest at the stipulated rate; but as we are satisfied that the defendants-appellants thoroughly understood the liability which they had undertaken, when they executed the mortgage deed, and accepted the terms entered therein, which in all the circumstances were neither hard nor unconscionable, we are not disposed to interfere with the decree passed by the Court below. The interest allowed is not penal and there is no proof that any undue influence was exercised.

The appeal fails and is dismissed with costs.

Appeal dismissed.

LAHORE HIGH COURT.
SECOND CIVIL APPEAL No. 3166 of 1915.
May 16, 1919.

Present:—Mr. Justice Scott-Smith and
Mr. Justice Martineau.

ALI MUHAMMAD AND OTHERS—
DEFENDANTS—APPELLANTS

versus

NATHU AND OTHERS—PLAINTIFFS—
RESPONDENTS.

Limitation Act (IX of 1908), s. 12—Appeal—Time

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requisite for obtaining copies, what is—Appellant, whether bound to apply at one time for copies of judgment and decree—Separate periods, whether can be allowed for copies of judgment and decree.

There is nothing in law which obliges an appellant to make one and the same application for obtaining copies of the judgment and decree to be appealed against.

Where an appellant applied for and obtained a copy of the judgment to be appealed against and subsequently, but before the expiry of the period for filing the appeal, applied for and obtained a copy of the decree:

Held, that the time spent in obtaining a copy of the judgment and the time spent in obtaining a copy of the decree must both be excluded in computing the period of limitation under section 12 of the Limitation Act.

Second appeal from the decree of the District Judge, Lahore, dated the 5th August 1915.

Messrs. Obedulla and Umar Baksh, for the Appellants.

Mr. Niaz Muhammad, for the Respondents.

JUDGMENT.—This is a second appeal from the order of the District Judge of Lahore, dismissing an appeal on the ground that it is barred by limitation. The suit was decided by the first Court on the 15th of January 1915, and on the same date an application was put in for a copy of the judgment. On the 26th of January 1915 the copy was ready for delivery and was delivered on the 28th of January. On the 23rd of February an application was made for a copy of the decree, and this copy was ready on the 25th and was delivered on the 26th of February. An appeal was filed on the 3rd of March. The appellant is entitled under section 12 (2) of the Limitation Act to deduct the time requisite for obtaining a copy of the decree appealed from and under sub-section (3) of the same section he is entitled to deduct the time requisite for obtaining a copy of the judgment on which the decree is founded. In the present case, he is, therefore, entitled to a deduction of 11 days under section 12 (2) and to a further 3 days under section 12 (3), i. e., to 14 days in all. Thirty days is the statutory period in which an appeal can be filed in the Court of the District Judge. The appeal could, therefore, in the present case have been filed on the 44th day after the suit was decided, in

other words, it could have been filed on the 28th of February. Now, the latter was a Sunday and the 1st and 2nd of March were also holidays, and therefore, as the appeal was filed on the 3rd of March, it was within time.

The only point urged by Sheikh Niaz Muhammad, the respondents' Vakil, is that the appellant should have made one and the same application for obtaining copies of the judgment and of the decree. But there is nothing in the law that obliges him to do this. It appears probable that the original application of the 15th of January was for copies both of the judgment and of the decree, but this was subsequently amended and a copy of the judgment was alone asked for. Even if it be supposed that the original application was for both the copies, still only one was supplied and it was, therefore, necessary for the appellant to make a second application which he did on the 23rd of February. We note that the period for appealing had not yet expired at the time when the application for a copy of the decree was put in on the 23rd of February. The District Judge's office erred in its calculation because it was under the impression that this application was put in after the period of limitation for filing the appeal had already expired.

We accept the appeal and, setting aside the order of the District Judge, remand the appeal to him for decision in accordance with law. Stamp in this Court will be refunded and other costs will be costs in the case.

*Appeal accepted;
Case remanded.*

RUSNA TELI v. EMPEROR.

PATNA HIGH COURT.

CRIMINAL REFERENCE NO. 5 OF 1919 AND
CRIMINAL APPEAL NO. 229 OF 1919.

December 2, 1919.

Present:—Mr. Justice Coutts
and Mr. Justice Adami.

RUSNA TELI AND OTHERS

—APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

*Evidence Act (I of 1872), s. 24—Confession, retracted,
value of—Corroboration, whether necessary.*

A confession by an accused person made after he has been for a considerable time in Police custody, and subsequently retracted, ought not to be accepted without corroboration. [p. 883, col. 1.]

Criminal reference under section 374 of the Code of Criminal Procedure, dated the 10th November 1919, from the Judicial Commissioner, Chota Nagpur, sentencing the accused to death.

FACTS.—The confession of accused Har Lal Kurmi was recorded by the Magistrate on the 17th August 1919 as follows:—

"Q. I am a Magistrate, your statement before me will be taken in evidence against you. Do not fear anything. Make a free statement.

A. Rusna Teli, Tekwa Teli and I together killed Rasmania Teli in the Lerna Jungle, seized his money and gold and threw away his body."

The confession of accused Rusna Teli was recorded by the Magistrate on the 17th August 1919 as follows:—

"Q. I warn you that your statement before me will be taken in evidence against you. You must, therefore, make your statement before me of your own free will and not mind the intimidation or threats of the Police or of anybody else.

A. Tekwa Teli, Har Lal Kurmi and I met Rasmania Teli in the Lerna Jungle. Tekwa and I knew that Rasmania was carrying money. We three persons together snatched the money and gold from him and killed him and threw away the body in the jungle."

The confession of accused Tekwa Teli was recorded by the Magistrate on the 17th August as follows:—

"Q. I am a Magistrate, your statement before me will be taken in evidence against you.

You should make your statement before me of your own free will and not mind the intimidation or threats of anybody.

A Rusna Teli, Har Lal Kurmi and I killed Rasmania Teli in the Lerna Jungle, seized his money and gold and threw away his body."

Rai Tribhuvan Nath Sahay, for the Appellants.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—The appellants in this case Rusna Teli, Tekwa Teli and Har Lal Kurmi have all been convicted of murder by the Judicial Commissioner of Chota Nagpur and have been sentenced to death. The facts of the case, as stated by the prosecution, are shortly as follows:—

On the 10th August last Gujar Teli went off with a cart to Hazaribagh Road Railway Station to purchase rice having previously arranged with his son-in-law Rasmania, who lived in his house, to go to Hazaribagh Road Station the next day taking with him money in order to pay for the rice which he would purchase. In accordance with this arrangement Rasmania next morning started off at about 9 A.M. with Rs. 117 in cash. He was to go by train from Chaudhuribandh Railway Station, which is about two miles from the village Kulgo where they lived. He did not turn up as expected by Gujar at the Hazaribagh Road Station. Gujar waited until the 12th and then started for home again. He arrived at about 9 P.M. at night and learnt from his wife Rudia that Rasmania had started. It was too late to do anything that night, so the next morning Gujar, his wife and a boy named Rewa started off for Chaudhuribandh Railway Station to make enquiries. At Chaudhuribandh they got no information and they came back searching in the jungle along the road. In a jungle known as Asanbani Jungle the boy Rewa found a *lathi*, which Gujar and his wife identified as belonging to Rasmania, and presently on further search they found the dead body of Rasmania in a ditch. His hands were tied behind his back with his *dhoti* and one side of his face and head were buried in mud. Gujar remained with the body and sent his wife Rudia to the Thana to lay a first information. The place where the

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body was found is within the jurisdiction of the Bagodar Thana, but as Dumri Thana was nearer and apparently in the direction in which Kulgo lay, she went to Dumri Thana and at 2 p. m. on the 13th laid a first information there.

The Sub-Inspector of Dumri Thana went at once to Kulgo village where Gujar, his wife and the accused also lived and began to make enquiries. At the village Rudia said that she suspected Rusna and Tekwa and as one of the witnesses Murat Mian told the Sub-Inspector that he had seen Tekwa drunk and asking that a goat should be killed for him the evening before, he suspected Tekwa apparently on the ground that he had more money than he should have. He accordingly searched the houses of Tekwa and Rusna who are uncle and nephew. He found nothing there and proceeded to the Asanbani Jungle. There he was shown the dead body and held an inquest. He found several injuries on the head and face, which appeared to him to have been caused by an axe. The body was sent to Kulgo and subsequently to Hazaribagh. On the 14th having got certain information, the Sub Inspector sent for the accused Har Lal and questioned him for about 3 hours from 8 a. m. to 11 a. m. About 11 a. m. the Sub Inspector from Bagodar arrived, and about noon Har Lal took the Police to a Makai field, where either with a *lathi* or with his hands he dug up an earthen pot from the ground near a jack fruit tree. The pot contained Rs. 28 7.3. The Dumri Sub-Inspector then went off to Asanbani Jungle to try and find out something and to make a map. He found out nothing, but he prepared a map which is on the record. Meanwhile the Dumri Sub-Inspector remained at Kulgo investigating. He sent for Tekwa and Rusna, told them that they were suspected and that Har Lal had produced certain property. Tekwa then led the Sub Inspector and others to his Bari and from a dung heap brought out a cloth which contained Rs. 24. Subsequently at about 2 30 p. m. Rusna led them to a Bari which belonged to him, dug with his hands in the ground and produced a small tin case which contained Rs. 28 and more money in small coins. He also produced a Chankidari receipt in his own name. The Sub-Inspector

then questioned him about the earring which was said to be missing from the body of the deceased, and Rusna then took him to another Bari of his and after digging there with his hands he produced a cloth which contained a Kanosi. The Sub-Inspector then demanded the Kanosi which had been found on the dead body from Gujar with whom it was, and on comparison the Kanosis were found to be of the same pattern. All the accused were then arrested. On the 15th Tangis were recovered from the accused's houses, and in the afternoon of the same day they were sent to Hazaribagh. We do not know when they arrived there, but on the 17th which was a Sunday the accused were taken to the house of Maulvi Raza Karim, Deputy Magistrate, in the afternoon and he recorded their statements. In the statements they confessed that they killed Rasmania in a certain jungle called Lerna Jungle. These confessions were subsequently retracted before the Committing Magistrate and at the trial the accused stated that they had been induced to make these confessions by ill treatment from the Police. The result of the *post mortem* examination showed that there was a fracture of the right parietal bone of the skull, which was in the opinion of the Doctor sufficient to cause death if it was *ante mortem*, but the body was so decomposed that it was impossible for him to state what the cause of death was.

It will be necessary to deal with the evidence against each of the accused separately, and first of all I shall deal with the evidence in the case of Har Lal. The first piece of evidence against this accused is the evidence of witnesses Nos. 6 and 7, to the effect that he was seen by them, on the morning of the day on which Rasmania started for Chandhuribandh, going with the other two accused in the direction of Asanbani Jungle with Tangis in their hands, and the evidence of prosecution witness No. 8 that she saw these three men both going towards the Asanbani Jungle and returning from the same direction. This would be valuable evidence if it were possible to accept it, but in our opinion it is impossible to do so. The prosecution witness No. 6 is a boy of 14 and there are very great discrepancies between the state-

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ments which he made before the Police, before the Committing Magistrate and in the Court of the Judicial Commissioner. It is impossible to reconcile these statements. The learned Judicial Commissioner has said that he believes the discrepancies to be due to want of memory, but if this is so, it would be unsafe to rely on his memory with regard to what occurred on the day the deceased went to Chaudhuribandh. Prosecution witness No. 7 is a boy of 11, on whose evidence alone it is impossible to place much reliance. Prosecution witness No. 8 is a woman labourer who says that she saw the men both going and returning. As, however, she says in the beginning of her deposition that this was on the day before the Daroga came to the village, it is impossible to place much reliance on her evidence and with it the whole evidence that the accused were seen going on the morning of the day of occurrence towards Asanbani and returning from the same direction also goes.

The next piece of evidence is the production of the pot full of money by the accused from his Bari. Money is unidentifiable and as it is a common practice to bury money, this does not carry the case any further.

Lastly there is the confession. This, however, has been retracted and as it was made after the accused had been for some considerable time in Police custody, it would without corroboration be unsafe to accept it.

The evidence against Tekwa is practically the same as the evidence against Har Lal and for the same reasons as it has been found insufficient in the case of Har Lal, it is in our opinion insufficient in the case of Tekwa also.

So far as seeing the accused Rusna going towards and coming from Asanbani and the confession is concerned, the evidence against accused Rusna is the same as the evidence against the other two accused. But in addition to the production by him of money which is unidentifiable, there is evidence of the production of the Kanosi. Considerable importance has been attached to this by the learned Judicial Commissioner and by the learned Deputy Government Advocate who has argued the case for the Crown before us. The facts in regard to the

Kanosi as alleged by the prosecution are that when the body was examined by the Sub-Inspector a Kanosi was found in the left ear. This Kanosi was taken out and Gujar was told to keep it. He did so, and on the next day after the Kanosi had been produced by the accused Rusna, Gujar also produced the Kanosi which is said to have been on the body of the deceased. They were compared and found to be of the same pattern. If it were a fact that the Kanosi produced by the accused was the Kanosi worn by the deceased, this would be very strong evidence, but we are not satisfied that this has been sufficiently established. The only witness who identifies them both is the woman Rudia, and in view of the fact that they are of a very ordinary pattern it would be unsafe to accept her uncorroborated testimony. Moreover, there are other considerations which make the acceptance of this evidence still more unsafe. In the first information she has stated that both the Kanosis were missing from the ears of the deceased, and in the inquest report there is no mention of any Kanosi. An attempt has been made to explain the statement in the first information by evidence that the left ear in which the Kanosi was subsequently found was buried in the mud, but we cannot assume that the woman in fact made no investigation into this matter, and it is true that the inquest report is chiefly concerned with the wounds on the body, but still there is the fact that there was no mention of the Kanosis there. Then again the single Kanosi said to have been found on the body was not produced until after the production of the single Kanosi by the accused and being of a very ordinary pattern, it would have been by no means difficult to match it. Under these circumstances the fact of the production of the Kanosi by the accused Rusna is not, in our opinion, sufficient evidence to connect this accused with the crime.

For the above reasons, therefore, we are of opinion that the case has not been sufficiently established against any of the accused. Their conviction and sentences are, therefore, set aside and the accused are acquitted.

Conviction set aside.

DAULAT RAM v. EMPEROR.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 597 OF 1919.

July 11, 1919.

Present :—Mr. Justice Dundas.

DAULAT RAM—CONVICT—PETITIONER

versus

EMPEROR—RESPONDENT.

Opium Act (I of 1878), ss. 4, 9, r. 48—Sale of opium in contravention of conditions of license—Offence.

A sale of opium in contravention of the conditions of a license is a breach of rule 48 and is punishable under section 9 of the Opium Act.

Revision from the order of the Sessions Judge, Shahpur, Sargodha, dated the 26th March 1919.

Mr. B. R. Puri, for the Petitioner.

The Assistant Legal Remembrancer, for the Respondent.

JUDGMENT.—The applicant has been convicted, under section 9 of the Opium Act, of a breach of the rules, Notification No. 954, 16th October 1916, amended 27th March 1917, under the Opium Act, in that he sold more than two *tolas* of pure opium to one person at one time. In the application for revision it is argued that the applicant's act only amounts to a breach of the conditions of the license, which breach may expose him to penalties under rule 53 but not to conviction under section 9. The authority quoted is *Bur Singh v. Queen Empress* (1), in which it was held that the omission by a cultivator to enter the amount of his cultivation on the back of his license might be a breach of the conditions of the license but was not a breach of any rule under the Act. No doubt if rule 49 of Notification No. 954, dated the 16th October 1916, as amended on the 27th March 1917, stood alone, the argument would be sound. The case, however, can be distinguished. First of all there is a substantive rule 48, which runs as follows:—"Save as provided by rules 46 and 47, the sale of opium is permitted only in accordance with the terms and conditions of a license granted as provided in the following rules." Sale in contravention of the conditions of a license is, therefore, a breach of rule 48. Secondly by section 4 of the Act it is

(1) 10 P. R. 1893 Cr.

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provided that "no one shall sell opium except as permitted by this Act, or by rules framed under this Act." Looking to section 4 of the Act and rule 48 the applicant is clearly liable to punishment under section 9. The case is clearly distinguishable from that reported as *Bur Singh v. Queen Empress* (1) and the application for revision must be rejected.

Application rejected.

PATNA HIGH COURT.

CIVIL CRIMINAL REVISIONS Nos. 11 AND 12 OF 1918.

August 1, 1918.

Present :—Mr. Justice Imam.

GAURI SHANKAR PRASAD SAHU

AND ANOTHER—PETITIONERS

versus

BALDEO KOERI AND ANOTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 195—Sanction to prosecute—Sanction based on circumstantial evidence, validity of.

In the absence of any direct evidence, the existence of circumstantial evidence is sufficient to justify an order granting sanction to prosecute. [p. 887, col. 1.]

Civil Criminal Revision under section 195, Criminal Procedure Code, against the order of the District Judge, Muzaffarpur, dated the 31st May 1918, granting sanction to prosecute the petitioners for offences under section 209/109, Indian Penal Code.

FACTS appear from the following judgment of the District Judge:—

"These are two applications under section 195, sub-section (6), Criminal Procedure Code, to prosecute certain persons under sections 209 and 209/109, Indian Penal Code. The applications were originally rejected by the Munsif before whom they were made. But as the learned Munsif recorded no evidence, and as evidence was necessary in order to come to a conclusion, it is not necessary to consider his order. The circumstances are as follows:—Lakshmi Narain Kuar, one of the persons against whom the applications are

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made, sued the present applicants in the Motihari Munsifi for money lent. The applicants, who are residents of Saran, represented to the District Magistrate that the suits were false, and after an enquiry obtained the assistance of the Criminal Investigation Department with a view to instituting proceedings. Lakshmi Narain Kuer then filed petitions in the Mansif's Court, saying that his witnesses were kept back by the Police and asking leave to withdraw the suits. These applications were opposed, but were allowed. Nine witnesses have been examined on behalf of the applicants. The opposite party has not examined any witnesses.

The province of this Court in such matters as the present one is strictly limited to finding whether or not the statutory bar to a prosecution of this nature should be removed, and in particular to finding whether there is any reason for believing that the applications are made not in the interests of justice but for the purpose of furthering a private grudge. This being so, it is not for me to consider in any detail the precise effect of the evidence which has been adduced. To do so will be the province of the trial Court. It is, therefore, sufficient to state quite briefly the salient facts disclosed in the evidence. These are as follows: Lakshmi Narain Kuer instituted both his suits on the same day, namely, 11th January 1916. The claim against Baldeo Koeri was for Rs. 249 principal, and the claim against Raj Kumar Ojha was for Rs. 399 principal. The interest in both cases was the same, namely, Rs. 1-8. According to the plaints both these transactions took place on the same day and at the same place, namely, Motihari. The object in each case of the loan was the same, namely, the purchase of bullock carts or of bullocks for carts. The wording of the plaints is ambiguous on this point, but is the same in each case. Baldeo Koeri and Raj Kumar Ojha say in their evidence that they had never been at Motihari before the suits, that they did not know Lakshmi Narain Kuer before the suits, that they never borrowed any money from Lakshmi Narain, and that they had no occasion to do so, since neither of them has ever possessed a bullock cart,

Motihari is 30 miles from the village at which Baldeo and Raj Kumar reside. Baldeo's property consists of 2 *bighas* 14 *cottas* of land, and Raj Kumar's 6 *bighas* of land. The loans in each case are stated to have been oral loans, and there is no document of any kind. Baldeo and Raj Kumar both say that they have had frequent quarrels, of which they give details, with Gauri Shanker and Mangal Prasad, who are the Maliks in their village to whom alone they pay rents. Lakshmi Narain Kuer is admittedly the Karpardaz of these Maliks. The evidence of Baldeo and Raj Kumar on this point is supported by that of another *raiyyat* of the village, and by that of a Sub-Inspector who enquired into a criminal case brought by Mangal Prasad and Gauri Shanker, in which Raj Kumar and Baldeo are said to have given evidence against them. He also gives evidence as to an information being given on behalf of Gauri Shanker and Mangal Prasad, in which it was stated that Raj Kumar and Baldeo were likely to cause a breach of the peace. There is also the evidence of a survey Amin, who speaks to disputes having taken place in the survey proceedings between Mangal Prasad and Gauri Shanker on the one part and Baldeo and Raj Kumar on the other. Three co-proprietors of Mangal Prasad and Gauri Shanker give evidence tending to show that Lakshmi Narain Kuer has been throughout in embarrassed circumstances, and a Civil Court peon says that on one occasion he arrested him under a warrant. Another circumstance which deserves notice is that though in withdrawing his suits Lakshmi Narain Kuer took leave to institute fresh suits, no such suits have been instituted and the period of limitation has now expired.

The circumstances and the evidence which has been produced leave no doubt in my mind that a *prima facie* case has been made out against each of the accused persons, and that the statutory bar to their prosecution should be removed. The delay which took place in the institution of the proceedings has been found by the High Court to have been satisfactorily explained, and the fact that the prosecution has been conducted by Government is sufficient guarantee that it is in the public interest,

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and not in furtherance of a private grudge. I accordingly grant sanction under section 195, sub-section (6), to prosecute Lakshmi Narain Kuer under section 209, Indian Penal Code, for fraudulently and dishonestly making false claims against Baldeo Koeri and Raj Kumar Ojha before the Munsif of Motihari in Suits Nos. 34 and 35 of 1916, and to prosecute Gauri Shanker Prasad Sahu and Mangal Prasad under section 209/109, Indian Penal Code, for abetting Lakshmi Narain Kuer in so doing."

Mr. *Hasan Imam*, for the Petitioners.—Even if it be assumed that the suits instituted by Lakshmi Narain Kuer were false, there is no evidence whatsoever on the record to prove that these petitioners abetted the institution of these suits. Under the circumstances the order of sanction was a mere harassment of these respectable men and should be set aside. There is no probability of conviction.

Mr. *Sultan Ahmad* (Government Advocate), for the Crown.—The true function of the Court in such matters is laid down in the well-known case of *An Attorney, In re, (Mr. Hume v. Poresh Chunder Ghose)* (1).

[Reads out various passages from the judgments of Sir Lawrence Jenkins, C. J., Chaudhuri, J., and Stephen, J.]

The District Judge was satisfied on a consideration of the circumstantial evidence available in this case that a *prima facie* case had been made out against the petitioners and was, therefore, justified, as required by law, to remove the bar to their prosecution. A sanctioning Court is different from a trial Court.

Counsel then detailed the circumstantial evidence on which he relied. He further submitted that it was almost impossible to get direct evidence of abetment in cases of this sort and after the most elaborate inquiry by the C. I. D. no direct evidence was available to the Crown.

JUDGMENT.—The petitioners Gauri Shankar Prasad Sahu and Mangal Prasad Sahu are brothers and residents of Motihari town in the district of Champaran. They are proprietors of a village called Dighwa in the district of Saran.

It appears from the evidence that there has been bitter feeling between the Maliks

and some of their tenants at Dighwa. Two of these tenants are Baldeo Koeri and Raj Kumar Ojha. There is evidence to show that the bitterness had reached a very acute form in the closing months of 1915. Indeed some of the incidents of personal enmity between the Maliks and these men are traced to about the middle of December of 1915. On the 11th January 1916, their Gomasta and Karpardaz one Lakshmi Narain Koer instituted two money suits against Baldeo and Raj Kumar before the Munsif of Motihari, on the allegation that the defendants in those two suits had borrowed Rs. 249 and Rs. 399 from him for the purchase of bullocks at Motihari on one and the same date.

Baldeo and Raj Kumar invoked the help of the District Magistrate of Saran to protect them from harassment by the institution of these false suits. After an enquiry the District Magistrate extended his protection to them. Thereafter Lakshmi Narain Koer applied to the Munsif at Motihari for the withdrawal of the suits with permission to institute fresh suits if he so desired. This application was granted. It was followed by an application by Baldeo and Raj Kumar for sanction to prosecute Lakshmi Narain Koer and the Maliks Gauri Shankar and Mangal Prasad under section 209 read with section 109 of the Indian Penal Code. The Munsif refused the sanction.

The District Judge of Muzaffarpore was then moved against the order passed by the Munsif, but he also refused the prayer. Baldeo and Raj Kumar then moved the High Court and a Divisional Bench of this Court directed the learned District Judge of Muzaffarpore to inquire into the matter and then pass such order as he considered fit. The learned District Judge having made the enquiry sanctioned the prosecution of Gauri Shankar and Mangal Prasad under section 209 read with section 109 of the Indian Penal Code for abetting Lakshmi Narain in instituting the false suits before the Munsif of Motihari.

The petitioners Gauri Shankar and Mangal Prasad have moved this Court for revocation of the sanction granted by the learned Judge. It is contended on their behalf that even if it be conceded that Lakshmi Narain instituted those false

(1) 22 Ind. Cas. 821; 41 C. 446; 15 Cr. L. J. 49.

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suits, there is no evidence to support the order of sanction passed against the petitioners Gauri Shanker and Mangal Prasad.

The learned Government Advocate has frankly admitted that there is no direct evidence of abetment against these two men, but he has supported the order of the learned Judge on the ground that the circumstantial evidence in the case is sufficient to justify that order, which is only a sanction under section 195 of the Criminal Procedure Code. He has urged that the sanction is nothing more than the removal of the bar to prosecute these men and that the circumstances of the case are such that the removal of this bar is justifiable. The circumstantial evidence relied upon by the learned Government Advocate is as follows:—

Firstly, the bitterness of feeling between the Maliks and the tenants reaching a climax within only about three weeks prior to the institution of the two suits by their Gomasta and Karpardaz Lakshmi Narain Koer. Secondly, the impecuniosity of Lakshmi Narain Koer and the clear evidence of his incapacity to have advanced any money to the defendants in those two suits. Thirdly, no personal enmity between Lakshmi Narain Koer and the defendants in those two suits existing, and fourthly, the probability that Lakshmi Narain, an old servant of the Maliks, was instigated to institute the false suits in the interest of his masters.

I think the learned District Judge was justified in a case like this to remove the statutory bar to the prosecution of the petitioners before me. They may succeed in proving their innocence at their trial, but the circumstantial evidence against them is sufficient to justify the order of sanction passed by the learned Judge.

In the circumstances the petitions of Gauri Shankar and Mangal Prasad in the two Criminal Revisions Nos. 11 and 12 of 1918, are rejected.

[Petitions rejected.]

CALCUTTA HIGH COURT.
CRIMINAL REFERENCE No. 2 OF 1919.
CRIMINAL APPEAL No. 208 OF 1919.
May 1, 1919.

Present:—Mr. Justice Walmsley and
Justice Sir Syed Shamsul Huda, Kt.
EMPEROR—PROSECUTOR

versus

ABDUL SHEIKH—ACCUSED.

Evidence Act (I of 1872), s. 11—Statement by wounded person made shortly after attack—Different statement made subsequently—Former statement, whether admissible—Jury—Misdirection—Criminal Procedure Code (Act V of 1893), s. 297.

A woman mortally wounded and believed to be at the point of death made a statement to a Magistrate naming a particular person as her assailant; she subsequently recovered and was produced as a witness for the prosecution at the trial of the person previously named by her and stated that she did not recognise the person who had attacked her; the statement previously made was admitted in evidence and placed before the jury:

Held, that under section 11 of the Evidence Act the admission of the contents of the statement was not justified, the mere fact that the witness had made such a statement had no bearing on the main fact in issue, and that the placing of that statement before the Jury was a misdirection of a very serious nature. [p. 888, col. 1.]

Reference under section 374, Criminal Procedure Code, by the Additional Sessions Judge, Mymensingh, dated the 5th April 1919.

Babu Jotindra Mohan Choudhury, for the Accused.

Mr. Orr, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.

WALMSLEY, J.—This case comes before us under the provisions of section 374, Criminal Procedure Code, as the learned Sessions Judge, accepting the verdict of the majority of the Jury, has sentenced the accused to death under section 302, Indian Penal Code. The accused has also preferred an appeal.

The case for the prosecution briefly stated is that the accused one night committed a violent assault with a knife on his two wives Saratan Bibi and Kafunnessa Bibi, killing the former and severely injuring the latter. The charges framed against him were under section 326, Indian Penal Code, in respect of the injuries caused to both women, and under section 302, Indian Penal Code, in respect of the fatal injuries caused to Saratan.

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The Jury by a majority of three to two found the accused guilty under section 326, Indian Penal Code, and section 302, Indian Penal Code.

There is singularly little evidence against the accused. It is not proved that he was alone with Saratan Bibi on the night of occurrence. In fact the only evidence consists of statements which the unfortunate women are said to have made.

Kafunnessa, as already mentioned, survived her injuries, and she was called as a witness for the prosecution, but in Court she said that she did not recognize her assailant. The prosecution, however, produced evidence to show that, shortly after her arrival at hospital, when it was believed that she was at the point of death, she made a statement to the effect that it was her husband, the accused, who attacked her and her co-wife. This evidence was admitted by the learned Judge and the statement was placed before the Jury. It is urged on behalf of the appellant that the Judge was in error in admitting this evidence. When the objection was taken in the Court below, the learned Judge overruled it on the ground that "the fact that Kafunnessa made such a statement to a Magistrate on the day of occurrence is relevant as rendering highly probable a fact in issue, viz., that Abdul Sheikh killed the other woman and assaulted her." He added that section 11 of the Evidence Act was not confined to facts other than statements. It appears to me that the reasoning is unsound, and I think the fallacy lies in confusing the fact that the woman made a statement with the contents of the statement. The mere fact that the woman made a statement has no bearing on the main fact in issue, and section 11 of the Evidence Act does not justify the admission of the contents of the statement. Mr. Orr on behalf of the Crown has conceded that he cannot uphold the Judge's decision that the contents of the statement are admissible. It follows that there was a misdirection to the Jury in this respect, and in the circumstances of the case a misdirection of a very serious nature.

There remains the alleged statement of Saratan Bibi. This was not reduced to writing, and the evidence to show that she made any statement at all consists of

the testimony given by the Dafadar and the Choukidar. Their evidence has been discussed before us at some length and I think the criticisms passed upon it are well deserved. They contradict one another on several points and although the woman was lying with her intestines protruding and succumbed after a few minutes, the Dafadar says, she spoke in an ordinary way. I cannot think it would be right to believe these witnesses, and this was the view placed before the Jury by the learned Judge.

The result, therefore, is that there is really no evidence to prove that it was the accused who attacked the women. It may be extremely probable that he is the guilty man, and that those who are in a position to give evidence against him are shielding him, but a conviction cannot be based on such probability.

So far as the charge under section 302, Indian Penal Code, is concerned, I think we should set aside the conviction and sentence, and acquit the accused. In regard to the conviction under section 326, Indian Penal Code, our position is different. There was a misdirection to the Jury in placing before them the so-called dying statement made by Kafunnessa Bibi, and it was of a character to vitiate the trial. We must, therefore, set aside the conviction and sentence. Inasmuch as Kafunnessa Bibi's statement must be excluded, and the evidence as to any statement being made by Saratan Bibi rejected as unreliable, there appears to be no evidence to warrant a re-trial. I think the accused must be acquitted on this charge also.

SHAMSUL HUDA, J.—I agree.

Accused acquitted.

PATNA HIGH COURT.
CRIMINAL REVISION No. 416 OF 1919.
December 17, 1919.
Present: —Mr. Justice Adami.
NATHU THAKUR AND OTHERS—PETITIONERS
versus
EMPEROR OPPOSITE PARTY.
Criminal Procedure Code (Act V of 1898), s. 249—

NATHU THAKUR v. EMPEROR.

Penal Code (Act XLV of 1860), s. 182—Prosecution under s. 182—Magistrate, power of, to cancel summons.

Where upon receipt of a Police report that one J. had given false information to the Police against certain persons a Magistrate ordered the prosecution of J under section 182 of the Penal Code, but subsequently upon receipt of another report in another case that the information given by J. was true, he ordered the summons issued for the attendance of J. to be cancelled:

Held, that the Magistrate had full power to cancel the summons under section 249 of the Criminal Procedure Code. [p. 889, col. 2; p. 790, col. 1.]

Application to set aside proceedings before the Sub Divisional Officer, Sitamarhi, District Darbhanga.

Mr. G. O. Pal, for the Petitioner.

Mr. Muhammad Hasan Jan, for the Opposite Party.

JUDGMENT.—This is an application to set aside the proceedings taken against the petitioners under section 147, section 448 and section 354, Indian Penal Code, by the Sub-Divisional Magistrate of Sitamarhi on the 1st of July 1919.

One Jhumak applied to the Police to take proceedings against the petitioners on the ground that the petitioner and his family, suspecting intimacy between the daughter of the petitioner and one Mahabir Mallah, wanted to molest Mahabir: that the petitioner's daughter Gujia had fled to the house of Mahabir and that Mahabir had married her: that on the 1st of July the petitioners had come in a mob and ransacked Mahabir's house and assaulted his sister and mother. That same day, it seems, the Police held an investigation, and after examining witnesses, reported the case to be a false one, and recommended the prosecution of Jhumak. On this report the Sub-Divisional Magistrate ordered that Jhumak should be prosecuted under section 182. Thereupon Mahabir, the cousin of Jhumak, put in a petition to the Magistrate impugning the Police investigation and alleging that his life was in danger from the petitioner and his party, and asked that proceedings might be taken under section 107 of the Criminal Procedure Code against them. The Sub-Divisional Officer thereupon sent the case for enquiry to Mr. Everett, who is the manager of certain estates in the neighbourhood. Mr. Everett reported that the petitioners should be bound down

under section 107, Criminal Procedure Code, as otherwise Mahabir would be unable to stay in the village. He reported further that he found that the complainant's story was true in every detail, and also that the woman Gujia had been spirited away into Nepal territory, where her husband's people lived. He suggested that the father of Gujia should be made to produce her, as there was strong apprehension of foul play, and besides there were good motives for making away with her. On receiving this report from Mr. Everett, the Sub-Divisional Magistrate passed an order in the proceedings, which had been taken against Jhumak under section 182, to the following effect on the 29th July: "Mr. Everett reports that the original complaint is true. Cancel the summons under section 182, and put up, on disposal of the section 365 case." The Sub-Divisional Magistrate had, on receipt of the report, taken proceedings against the petitioners under section 365, apparently on the basis of the report that the woman had been kidnapped to Nepal. The petitioners then applied to this Court to have the proceedings under section 365 set aside, and they were set aside by Das, J., on the ground that Mahabir had not been examined after filing his petition of complaint, and that if the Magistrate took cognizance on the report of Mr. Everett, Mr. Everett too had not been examined.

Next, on the 1st November, Mahabir filed a fresh complaint before the Sub-Divisional Magistrate, charging the petitioners with offences under sections 147, 448, and 354 of the Indian Penal Code, and on that complaint, the Magistrate ordered summons to issue against the petitioners. It is against that order that the present application has been made.

The learned Vakil for the petitioners argues that, while the proceedings under section 182 are still pending against Jhumak, a fresh complaint on the same grounds cannot be entertained against the petitioners. He further argues that the Magistrate, once having summoned Jhumak under section 182, could not afterwards cancel the summons himself.

In the first place, it seems that under section 249, Criminal Procedure Code, the

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Magistrate had full powers to stop the proceedings in the section 182 case without pronouncing any judgment either of acquittal or conviction, and may thereupon release the accused. It is evident that the Magistrate is proceeding under this section, and the case relied upon by the learned Vakil, to the effect that the summons in the section 182 case could not be cancelled and the proceedings stopped by the Magistrate himself, namely *Panchu Ghosh v. Khosdel Sarkar* (1), does not apply, since section 249 applies to cases only which have been instituted otherwise than on a complaint, while the case cited deals with a case instituted on a complaint. Further, it may be noted that the proceedings under section 182 were taken against Jhumak on his complaint while the present complaint is by Mahabir. The real point in the whole case is, whether the Sub-Divisional Magistrate, when he had received a report from the Police that the case of Jhumak was false, was justified in acting on the report of Mr. Everett which was given just afterwards. Both these reports are so short that it is impossible to judge whether the Magistrate has exercised his discretion wisely. That he had a discretion, there is no doubt; the quashing of the proceedings under section 365 does not affect this case at all. That case was instituted on allegations of an offence which was not covered by the information which Jhumak gave to the Police, or which Mahabir mentioned in his petition. Mahabir in fact only asked for proceedings to be taken under section 107, though he recounted the occurrences, which formed the basis of Jhumak's information to the Police. If Mahabir wished to impugn the Police enquiry, as he was at full liberty to do, his petition should have been taken as a complaint, and he should have been examined upon it. This was not done, with the result that the proceedings, that were taken, were set aside, and now the only course left to Mahabir was to file a fresh complaint. This he has done, as soon apparently as it was possible to do it after the case under section 365 was set aside. Whether the Magistrate should

have believed the Police report or Mr. Everett's report, remains to be found out during the course of the trial. It is impossible here to express any opinion on the merits of the case at all.

This is a case in which the truth must be found out, and I, therefore, see no reason to interfere. The case should, I think, be tried by a Magistrate other than the Sub-Divisional Magistrate of Sitamarhi, and will be tried by such other Magistrate as the District Magistrate may direct.

The application is rejected.

Rule discharged.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 819 OF 1919.
January 2, 1920.

Present :—Mr. Justice Walsh.
GANGA SAHAI—APPLICANT

versus

EMPEROR THROUGH TARIF—OPPOSITE PARTY.

Evidence Act (I of 1872), s. 132—Penal Code (Act XLV of 1860), s. 500—Defamation—Privilege—Witness, answer given by, to Court, whether privileged.

An answer given by a witness to the Court, after he has left the witness-box, cannot form the subject of proceedings under section 500, Penal Code, as such proceedings are prohibited under section 132 of the Evidence Act. [p. 892, col. 1.]

Criminal revision against the order of the Sessions Judge, Meerut, dated the 31st October 1919.

Messrs. O. Ross Alston and Ram Nama Prasad, for the Applicant.

The Assistant Government Advocate, for the Opposite Party.

JUDGMENT.—This is a case in which a man has been charged under section 500 of the Indian Penal Code and ordered to pay a fine of Rs. 250 for an answer given by him on oath in a Civil case. The fine was reduced by the Sessions Judge to Rs. 100. The applicant, being still dissatisfied, has applied to this Court to set aside the order on the ground that no offence had been committed.

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The circumstances of the case are possibly exceptional, but it is perfectly certain that at an adjourned hearing of the case the witness, who was a mortgagee and was suing his mortgagor for his money, was asked by the Munsif who was trying the case why he wanted back his money. His answer was that he did not wish to keep the land of the present complainant, the then defendant, under mortgage, because he was a *badmash* and a thief. Of course that meant that he thought him so.

It appears that this answer was given to the Munsif at an adjourned hearing after the witness had left the witness-box. So far as good faith is concerned, that is the strongest possible point in favour of the applicant because it shows that he had gone through the witness box and given his evidence without making any gratuitous or malicious attack upon the mortgagor, and it was only in answer to a question by the Munsif at the eleventh hour and to satisfy a perfectly natural but not strictly relevant curiosity of the Munsif that the answer came to be given in Court. A suggestion is made that when a witness has once been in the box and has left it, and at any late stage of the proceeding is asked some supplementary question by the Judge, he is no longer a witness, or the proceeding is something different from the ordinary legal proceeding. I regard this contention as hardly worth discussion. When a witness is once sworn and afterwards re-called, he must behave himself in the same way as if he were giving evidence in the box for the first time at the commencement of the trial. No change has taken place by adjournment, or by his leaving the box, which relieves him from any obligation to speak the truth and to treat the Court with respect. Were it not for one or two authorities which have been mentioned to me, I should hold without the slightest hesitation that a witness was compelled to answer such a question asked him by the Judge within the meaning of section 132 of the Indian Evidence Act. The two cases which raise any difficulty are the case of *Queen-Empress v. Moss* (1) and the recent decision of my brother Piggott in *Kallu v.*

Sital (2). I have not examined the circumstances under which the Chief Justice construed the section in the former case (which after all was not a decision *ex cathedra* upon this point at all, but was merely a ruling *obiter* on the admissibility of certain evidence) and I do not presume to express any opinion as to the correctness of that decision. I do think, however, that in the course of the decision and in the head-note a too narrow interpretation has been put upon the word 'compelled' in section 132. The view there suggested is that 'compelled' can only mean 'compelled' by an order of the Court expressly made upon a claim put forward by the witness to be excused from answering. The difficulty about accepting that view is that, for example, in the case of an experienced lawyer acquainted with the section and with the procedure of Courts of law, it may well be that knowing that his reason was one which was bound to be rejected he would think it waste of time and not unlikely to irritate the Court to take an objection which was bound to fail and that he might answer a question which, if he had refused to answer, the Court would have told him he must answer. In my view an experienced lawyer, answering a question which, if it were not for the section, he might refuse to answer, is just as much compelled to answer it as if he had taken an objection and was overruled. He knows that he must answer it and he knows that he has no good ground for refusing. He is, therefore, in my view compelled. I think a witness who is not trained in the procedure of the law and probably knows nothing of these fine points but who comes into the box, whether or not with a desire to tell the truth, at any rate with a very natural determination to pay respect to the Court and to answer the Judge's questions, is compelled by the situation in which he finds himself and the force of circumstances, and indeed by the Code of ordinary decency, and the respect which he owes to the Court. I now turn to the decision in *Kallu v. Sital* (2), in which my brother Piggott applied the principle laid down in the case of *Queen-Empress v. Moss* (1) to the facts of the case which he was deciding,

(2), 43 Ind. Cas. 823; 16 A. L. J. 201; 12 Cr. L. J. 281; 40 A. 271.

(1) 16 A. 88; A. W. N. (1894) 23.

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but in the following passage he, in my opinion, recognised that cases must arise in which the Courts would be compelled to hold that the witness was placed under compulsion by his appearance in the box. I accept this view, which cannot be better expressed than in the passage which I adopt from my brother Piggott's judgment: "Obviously no form of words can be prescribed in which this claim is to be made; and I conceive that cases may arise in which the Courts will be compelled to hold that the claim has been made by implication, or that the witness was placed under practical compulsion to answer certain questions by the mere fact of his appearance in the witness-box". I hold that this witness was compelled to answer the question which the Munsif put to him and that any proceedings for defamation in respect to the answer are prohibited by section 132. The whole proceeding for defamation against him is misconceived and must be quashed. I admit the revision and quash all the orders made against him. The fine, if paid, must be refunded.

Conviction quashed.

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE NO. 35 OF 1919.

June, 24 1919.

Present :—Mr Justice Walmsley and
Justice Sir Syed Shamsul Huda, Kt.

EMPEROR PROSECUTOR

versus

BIBHUDANANDA CHAKRAVARTI—

ACCUSED.

Penal Code (Act XLV of 1860), s. 477 A—Tampering with Court-fee stamps on documents—Offence.

Accused was charged under section 477A, Penal Code, with tampering with requisitions and *vakalatnamas* presented under the Public Demands Recovery Act, by removing the Court-fee stamps affixed to them and affixing in their stead stamps removed from other documents. On a reference to the High Court:

Held, that the acts alleged against the accused could not be brought within the scope of section 477A of the Penal Code [p. 893, cols. 1 & 2.]

Reference under section 307, Criminal Procedure Code, made by the Sessions Judge, Burdwan, on 19th May 1917.

Mr. Orr, Deputy Legal Remembrancer, for the Crown,

Babus *Dasarathi Sanyal*, *Atulya Oharan Bose* and *Manmatha Nath Mukerjee*, for the Accused.

JUDGMENT.

WALMSLEY, J.,—This case comes before us on a reference under section 307, Criminal Procedure Code, made by the Sessions Judge of Burdwan.

The accused Bibhudananda Chakravarty was placed on his trial on three charges under section 477A, Indian Penal Code, the Jury was unanimous in finding him not guilty, and the learned Judge has referred the case to this Court, as he thinks it necessary to do so in the ends of justice.

The allegations against the accused are as follows :—He was a clerk in the Certificate Department at Burdwan, and he was in charge of the section which dealt with requisitions under the Public Demands Recovery Act made on behalf of estates under the management of the Court of Wards. In April 1917, several requisitions were filed by a Pleader on behalf of the Manager of the Karotiya Estate. Each requisition bore a Court-fee stamp, and was accompanied by a stamped *Vakalatnamas*. In the latter part of 1918, irregularities were suspected in the office, and an enquiry was made; in the course of that enquiry it was discovered that the requisitions and *Vakalatnamas* just mentioned had been tampered with. The Court-fees upon them appeared to have been taken from other papers and attached to the requisitions and the *Vakalatnamas* in lieu of the Court-fee stamps which they originally bore. In answer to a question put by the learned Judge the Jury replied that they believed that such tampering had taken place. In fact it is obvious that the Court fee stamps on Exhibits 6, 7, 8, two *Vakalatnamas* and one requisition, are not the stamps that were attached to those papers when they were filed originally. This is not denied on behalf of the defence.

The question of fact in the lower Court was whether it was the accused who was guilty of substituting used Court-fee stamps for the new stamps. But before dealing with that question, we have to deal with the contention raised on behalf of the accused that the facts alleged do not constitute an offence under section 477A of the Penal Code. Some doubt upon the question was evidently

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present to the minds of those who framed the charges, for the offence was described as 'altering papers', the papers being the Vakalatnamas in two counts and the requisition in the third.

For the accused it is pointed out that the marginal note describes the offence as falsification of accounts, and that the explanation to the section imports the same idea, namely, that the section refers to something in the way of book-keeping or written accounts. Here it may be noted that no registers are said to have been tampered with so as to bring the entries in the registers into conformity with the papers as they were after the substitution of used stamps for new stamps. A second line of argument is based on a reference to the English Acts. The section 477A of the Penal Code is almost identical with section 1 of the Falsification of Accounts Act, 1875 (38 and 39 Vict. c. 24). All the cases cited by Russel on Crimes in the Chapter dealing with that Act are cases in which fraud was committed by falsifying some form of account, and thereby keeping some part of the money received by the servant from reaching the hands of the master. These cases show the use made of the section in England, and not one of them bears any likeness to the allegations in the present case. Further, in 1891 there was passed the Stamp Duties Management Act (54 and 55 Vict. c. 38) and in section 13 nine punishable acts are described, of which the fourth, and still more the sixth, are very similar to the acts alleged against the accused. The argument is that when the Act of 1875 has not apparently been used as suitable for dealing with acts like those now under investigation, and a second Statute does make provision for punishing such acts, the inference necessarily is that the section which the Indian Legislature has copied from the English Statute should be interpreted in the same way as the section in the English Statute, more particularly as the Statute of 1891 had been already enacted when section 477A was added to the Penal Code by the Amending Act.

I think there is considerable force in the argument. But apart from this line of reasoning, it seems clear to me that on a plain reading of section 477A the acts

alleged against the accused cannot be brought within its scope without straining the words of the section.

I think we ought to hold that even assuming the allegations to be proved, the accused cannot be held guilty under section 477A. It may be that there is some other section in the Penal Code or in some other enactment which would cover the facts of the case, but on that we express no opinion.

Taking the above view I think we should reject the reference and order that the accused be acquitted of the three charges preferred against him under section 477A of the Penal Code.

SHAMSUL HUDA, J.—I agree.

Accused acquitted.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 711 of 1919.
December 5, 1919.

Present:—Mr. Justice Tudball.
Mian NOOR alias BIJJJI KHAN—
PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 164—
Statement by prisoner in jail implicating another,
whether admissible—Suspicion, conviction based on,
legality of.*

A statement made by a prisoner undergoing a sentence of imprisonment, implicating another person in the commission of the offence for which he was convicted and subsequently retracted by him when produced as a witness, is not admissible in evidence against that other person. [p. 894, col. 1.]

A conviction based on mere suspicion is bad. [p. 894, col. 1.]

Criminal revision from an order of the Sessions Judge, Kumau, dated the 21st October 1919.

Dr. S. M. Sulaiman, for the Appellant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—The applicant was convicted for aiding and abetting an offence under section 355, Indian Penal Code, and he

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was originally sentenced to one year's rigorous imprisonment, which on appeal was reduced to six months' rigorous imprisonment. One Jakka Khan laid in wait for Hafiz Abdul Jalil, a Municipal Commissioner at Pilibhit, after the meeting of the Municipal Board at the Town Hall in that town. He threw a shoe into the carriage. He was prosecuted for an offence under section 355 of the Code and was sentenced. Throughout the course of that trial no mention whatsoever was made of Bijji Khan, the present applicant, or of his complicity in the matter. Subsequently while Jakka Khan was serving his sentence, he was placed before a Magistrate by a Police Officer and made a certain statement implicating the present applicant. Proceedings were, therefore, taken against the latter. Jakka Khan was examined as a witness and totally denied Bijji Khan's implication in the matter. His statement as recorded by the Magistrate, ostensibly under section 164, Criminal Procedure Code, (which, however, did not apply) was taken into evidence by the Magistrate at the trial of Bijji Khan. It is not clear under what provision of the law this was done. No provision of the law has been shown to me under which it could possibly have been done. There was further evidence taken which one might accept that shortly before the occurrence Bijji Khan was seen talking to Jakka Khan. There is also evidence which showed that after the occurrence Bijji Khan told the brother of Abdul Jalil what had happened. That is to say, he told him that his brother had been beaten with a shoe and had fallen to the ground. It is denied that there was any actual beating or that Abdul Jalil actually fell on the ground. On this evidence Bijji Khan has been convicted. I notice on the record that there is a good deal recorded which was quite inadmissible in evidence. No particularly strong motive has even been suggested in the course of the trial for Bijji Khan to have incited Jakka Khan to commit the offence. Therefore, though there may be some suspicion arising from the statement made by the applicant to the brother of Abdul Jalil and by the fact that shortly before the occurrence he was seen speaking to Jakka Khan, these circumstances are not in themselves sufficiently strong for a Court to hold that beyond all reasonable doubt Jakka Khan acted at

the instigation of the applicant. The evidence, in my opinion, is insufficient to support the conviction. I, therefore, allow the application, set aside the conviction and sentence and direct the applicant to be released.

Application allowed.

PATNA HIGH COURT.
CIVIL CRIMINAL REVISIONS Nos. 29 AND 30
OF 1919.

November 4, 1919.

Present:—Mr. Justice Das.

IN No. 29 OF 1919

LALJI TEWARI—PETITIONER
versus

EMPEROR—OPPOSITE PARTY.

IN No. 30 OF 1919

DIPAK SINGH—PETITIONER
versus

THE SESSIONS JUDGE, SARAN—
OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 195 (b), 476—Sanction to prosecute—Period of sanction, expiry of—Order directing prosecution under s. 476, legality of—Interpretation of Statutes.

Sanction to prosecute was granted by a Munsif. On appeal to the District Judge it transpired that more than six months had elapsed since the date of the sanction; the District Judge accordingly revoked the sanction, but directed the prosecution of the accused under section 476, Criminal Procedure Code. On revision to the High Court:

Held, that the order of the District Judge was illegal and must be set aside [p. 893, col. 2.]

Section 476 of the Criminal Procedure Code must be read consistently with section 195 of the Code. [p. 896, col. 1.]

It is a well-known rule of construction that each part of a Statute must expound every other part. [p. 893, col. 1.]

Civil Criminal Revisions against the order of the District Judge, Chapra, dated the 10th September 1919, directing the prosecution of the petitioners under section 476, Criminal Procedure Code, in an appeal by the petitioners against the order of the Munsif, Chapra, dated the 20th January,

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1919, sanctioning the prosecution of the petitioners for various offences under the Indian Penal Code.

FACTS.—In his order the District Judge observed as follows:—"It was suggested on behalf of the respondent (Public Prosecutor) that I should exercise my discretion in altering the sanction granted by the lower Court into an order for the prosecution of the appellant under section 476, Criminal Procedure Code.

As a general rule I adopt this procedure in all appeals against orders granting sanction, my object being to avoid as far as possible the danger of the sanction granted being used for the purpose of blackmail and not for legitimate prosecution.

In the present case at first it did not seem to be necessary to take this course, for there was obviously no danger of blackmail as the Public Prosecutor had obtained sanction. However, it was subsequently pointed out to me that six months had already expired since the date on which the sanction was granted (*viz.*, 20th January 1919) and hence the sanction has elapsed and cannot be renewed without the orders of the High Court under section 195 (6), Criminal Procedure Code.

It is true that the respondent is not to blame for this delay. It is due to the fact that the appeals against the sanction were first filed in the High Court and it was subsequently decided that the appeals lay to my Court. While these appeals were pending without final decision, it would obviously not have been of much use to have acted on the sanction. Nevertheless the fact remains that the sanction has lapsed.

Under these circumstances in order to avoid the necessity of a further reference to the High Court, I have come to the conclusion that it is desirable in lieu of granting sanction to pass orders under section 476, Criminal Procedure Code, and to direct the prosecution of the appellants for abetment of the offences under sections 209, 210, Indian Penal Code."

Messrs. A. T. Sen, J. N. Sen Gupta and Nirsu Narain Sinha, for the Petitioners.

JUDGMENT.—These two applications are directed against an order passed by the learned District Judge of Chapra directing, under section 476 of the Code of Criminal Procedure, the prosecution of the petitioners under sections 209 and 210 read with section 109 of the Indian Penal Code.

The facts may be shortly stated as follows:—On the 2nd October 1915, one Ramphal brought a suit in Saran on a hand-note alleged to have been executed by one Ratan Singh. That suit was decreed *ex parte* on the 6th of December 1915. The decree was subsequently transferred to Patna for execution. On the 8th of May 1917, Ratan Singh filed a suit against one Ramnandan Prasad and Ramphal to set aside the decree obtained by Ramphal against him on the ground of fraud. His allegations were that the suit was really a suit of Ramnandan who had instigated Ramphal to file the suit against him. He said that the summons had never been served on him, and that he never executed the hand-note upon which the decree had been obtained. The Court dismissed the suit as against Ramnandan but decreed it as against Ramphal. In other words, the Court set aside the decree obtained by Ramphal against Ratan Singh.

On the 8th of June 1918, the Public Prosecutor applied for sanction under section 195 to prosecute Ramnandan, Ramphal and the petitioners under various sections of the Indian Penal Code. It appears that Ramphal died during the pendency of the sanction proceedings. On the 20th January 1919, the Court refused to grant any sanction against Ramnandan but granted sanction as against the petitioners. Then various proceedings took place with which we are not concerned in these applications. Ultimately there was an appeal to the District Judge of Chapra. He held that sanction was not in force inasmuch as six months had elapsed from the date on which it was given. He, however, took proceedings against the petitioners under section 476 of the Criminal Procedure Code and has directed their prosecution.

In my opinion it is impossible to escape from the clear provisions of paragraph 6 of section 195. That paragraph runs as

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follows: "Any sanction given or refused under this section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate; and no sanction shall remain in force for more than six months from the date on which it was given: provided that the High Court may, for good cause shown, extend the time." This paragraph, in my opinion, makes it obligatory on the Court either to revoke the sanction or to refer the matter to the High Court, if six months have in fact elapsed from the date on which sanction was given.

But it was argued by the learned Assistant Government Advocate that the Court has independent power under section 476, Criminal Procedure Code, and is entitled to exercise that power under section 467. If the argument advanced by the learned Assistant Government Advocate be a good argument, then the clear intention of the Legislature is in every case liable to be defeated by the simple device of drawing up proceedings under section 476. In my opinion, section 476 must be read consistently with section 195. That is a well-known rule of construction. Each part of a Statute must expound every other part. It is not without reason that the Legislature has said definitely and positively that no sanction shall remain in force for more than six months from the date on which it was given, and it is not without reason again that the Legislature has constituted the High Court the sole judge to determine whether time should in any case be extended.

The learned Assistant Government Advocate has argued that the High Court in this case would certainly have extended the time. That may be so, or that may not be so. But, at any rate, it was for the High Court to determine that question and not for the learned District Judge of Chapra. The District Judge has in effect usurped the function of the High Court and has disobeyed the spirit, though not the letter, of paragraph (6) of section 195.

Apart from this, this is hardly a case for the prosecution of the petitioners under sections 209 and 210 read with section 109 of the Indian Penal Code. So far as

Lalji Tewari is concerned, there is clearly no sort of case against him. All that is found against him is that he was the scribe of the promissory note which is now found not to have been executed by Ratan Singh. I am at a loss to understand how on this evidence it can be said that he abetted an offence either under section 209 or 210, Indian Penal Code. The scribe may have acted upon instructions, and it is difficult to see how he should have known that a crime was contemplated by Ramphal Rai. All the facts found may be correct and yet the scribe may not have committed any crime at all. So far as Dipak Singh is concerned, his case stands on a slightly different footing. He is alleged to have signed the hand-note on behalf of Ratan Singh. But here again it is a case of oath against oath, and, in my opinion, it would materially prejudice his defence to allow a prosecution nearly four years after the offence is alleged to have been committed. I would, therefore, set aside the order complained against.

Order set aside.

RAM CHAND v. JAGIRI MAL.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1332 of 1919.

January 12, 1920.

Present:—Mr. Justice Scott-Smith.

RAM CHAND—PLAINTIFF—APPELLANT
versus

JAGIRI MAL—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), s. 74—Mortgage—Interest, enhanced rate of, on default—Penalty—Compensation, whether can be awarded.

Where a mortgage-deed provides that on default of payment of interest the rate of interest payable on the loan would be enhanced, the enhanced rate is in the nature of a penalty and cannot be awarded. But in such a case some interest must be allowed as compensation.

Second appeal from the decree of the District Judge, Jullundur, dated the 17th March 1919, varying that of the Junior Subordinate Judge, 2nd Class, Jullundur, dated the 23rd December 1918, decreeing the claim.

Bakshi Tek Chand, for the Appellant.

Lala Jagan Nath, for the Respondent.

JUDGMENT.—The question in this second appeal is whether the plaintiff is entitled to any part of the sum claimed by him by way of interest at the enhanced rate stated in the deed, the defendant not having paid the stipulated interest by the due date. The interest fixed upon the principal of Rs. 1,000 was at the rate of 8 annas per cent. per mensem, i. e., Rs. 60 annually. The agreement was that if interest was not paid annually, then it should be charged at the rate of 1 per cent. per mensem from the date of the deed, in other words, at double of the original rate. The first Court allowed interest at the enhanced rate but the lower Appellate Court, holding that the condition for enhanced interest was of the nature of a penalty, said that the plaintiff was not entitled to the full amount claimed and disallowed the whole of it.

It is not now urged that the stipulation for enhanced interest was not in the nature of a penalty, but it is urged that something at least should have been allowed to the plaintiff-appellant by way of compensation under section 74 of the Contract Act. The lower Appellate Court was correct in its view that the full amount claimed need not be allowed, but it did not consider whether any part of it should be allowed by way of compensation. Decisions reported as *Babu Hari Singh v.*

DURGA DAS v. DEVI PROSANNA ROY.

Frema Shah (1), Khunni Lal v. Kalimuddin (2) and Vadlamannati Srinivasadikshitulu v. Damera Rangayya (3) support the proposition that reasonable damages for the default can be allowed. In the first and last of these rulings the enhanced rate, which was allowed, exceeded the original rate by about 33 per cent. In my opinion some compensation for the default should be allowed and it would be fair to calculate this at the rate of 1 per cent. per mensem, on the interest which was not paid by the due dates. This comes to a little over Rs. 100. The lower Appellate Court has passed a decree for Rs. 1,197.8 and I think the ends of justice will be met by increasing this to Rs. 1,300 and I do so accordingly, accepting the appeal to this extent. Plaintiff will get his costs in the trial Court in proportion to this sum. But taking all the circumstances of the case into consideration I direct that the parties should bear their own costs in the lower Appellate Court and in this Court.

Appeal accepted.

(1) 155 P. L. R. 1901.

(2) 10 Ind. Cas. 572.

(3) 25 Ind. Cas. 702; 1 L. W. 903.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 222
OF 1917.

July 4, 1919.

Present:—Mr. Justice Walmsley and
Justice Sir Syed Shams-ul-Huda, Kt.
Srimati GUNAMANI DASSI, WIDOW OF
DURGA DAS SARKAR AND EXECUTIVE
TO THE ESTATE OF THE LATE DURGA
DAS SARKAR—DEFENDANT—APPELLANT
versus

DEVI PROSANNA ROY CHAUDHURI

AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Will—Succession Act (X of 1865), s. 11, applicability of—Separate property of woman, succession to—Step-brother, whether preferred to husband's younger brother—Adopted son, whether full brother of daughter by predeceased wife.

The applicability of section 111 of the Succession Act depends upon a natural meaning as opposed to a forced interpretation of the words used in a Will. [p. 899, col. 2; p. 898, col. 2.]

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The claim of a husband's brother to succeed in preference to the deceased woman's step-brother in respect of her separate property is recognised in text-books of Hindu Law and has also received judicial confirmation. [p. 899, col 2.]

Where a man takes a son in adoption after the death of his first wife, the adopted son becomes a step-brother of a daughter by the first wife. [p. 899, col. 1.]

Where of two wives one only joins in an adoption, the adopted son becomes the full son of the wife joining and the step son of the other [p. 899, col. 2.]

Appeal against the decree of the Subordinate Judge, 3rd Court, 24-Pargannas, dated the 25th September 1916, affirming that of the Munsif, Alipore, dated the 16th June 1915.

Babus Mohendra Nath Roy and Abinash Chandra Guha, for the Appellants.

Babus Gunada Charan Sen and Abinash Chandra Ghose, for the Respondents.

JUDGMENT.

WALMSLEY, J.—The facts which have given rise to this suit are as follows:—One Durga Das Sirkar, deceased, left a Will, and his surviving widow, Gunamani Dasi, the present appellant, as executrix named in the Will, took out Probate. Durga Das had married twice: his first wife bore him two daughters, one of whom was named Annapurna Dasi; and his second wife bore him six more daughters, and eventually bore a son, but before the son was born a boy named Rajendra was taken in adoption by the testator. It is agreed that the adoption was made after the death of the first wife, and after the second marriage.

The fourteenth clause of the Will made provision for the eight daughters in these terms: "each of the above daughters shall get Rs. 5 per mensem, i.e., 60 Rs. per annum out of the estate left by me;" and the direction continued "*ukta kanyaganer madhye kaharo mrityu haile, ukta mrita kanyar warishgan ukta mashik panch taka paibe.*"

Annapurna's husband died and she died later leaving no issue. The plaintiffs are her husband's younger brothers; they brought a suit for the annuity bequeathed by the Will, and that suit was compromised on April 17th, 1913, the suit being dismissed. They have now brought the present suit to recover the annuity in respect of a later period and they have been successful in the Courts below.

For Gunamani two contentions are put forward. The first is based on the terms of the Will and the provision of section 111 of the Succession Act. It is argued that as Annapurna survived the testator, the legacy to her heirs did not take effect, and reference is made to the first illustration given under section 111. The force of this argument, it appears to me, depends upon the meaning of the participial clause, "*ukta kanyaganer madhye kaharo mrityu haile.*" If it must mean "should the possible contingency happen, namely, the death of one of my daughters during my lifetime," then I think the argument would be sound; but the words may equally mean, "when the certain event happens, namely, the death of one of my daughters at a future date." And this seems the meaning which the father of a married daughter must have had in his mind, for his natural hope would be that she should be the mother of children, and he would wish to make a gift to his possible grand-children whether they lost their mother before or after his death. Adopting the view of the meaning of the words used by the testator, I hold that the first contention fails. A further reason for overruling it is that it was not put forward in either of the Courts below.

The second argument is that the adopted son is the heir and not the deceased husband's brothers. The learned Subordinate Judge on appeal thought that this question was settled by the decision of this Court reported as *Debi Prasanna Rai v Harendra Nath Ghosh* (1). That decision was in a case between Annapurna's sister's sons and her husband's brothers. The nephews applied for Probate of a Will said to have been executed by Annapurna, and named as her other near relations, her husband's brothers, her step-mother's son, and her step-mother's adopted son. The Judge held that the husband's brothers had no *locus standi* to object to the grant of Probate during the lifetime of the step-brothers and as the latter did not press their objection, he granted Probate of the Will. The husband's brothers then appealed to this Court, and it was held

(1) 6 Ind. Cas 534; 37 C. 863; 15 C. W. N. 383; 12 C. L. J. 385.

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that the step-brother was not entitled to preference over the younger brother of the husband, with the result that the lower Court was directed to call upon the nephews to prove the Will in solemn form in presence of the husbands' brothers. That decision obviously did not determine the present question, for the question now is whether Durga Das Sirkar's adopted son is to be regarded as Annapurna's whole brother or only as her step-brother. It may be that it was assumed on all hands in that case that the adopted son could not stand in a nearer degree than the natural son of the second wife to the daughter by the first wife, but the subject was not discussed; and so far as we can ascertain, the question has never formed the subject of any judicial decision or even received the consideration of a commentator.

The facts on which we have to reach a conclusion are scanty: we only know that Annapurna was the daughter of Durga Das by his first wife, and that Rajendra was adopted by Durga Das after his marriage with Ganamani, the second wife. Possibly further information would show that a special relationship was created between the boy and Ganamani, but I doubt whether such information would be of much value. I think the answer to the problem is to be found in the reflection that Rajendra can only be regarded as Annapurna's full brother by a fiction upon a fiction. It is only by a fiction that he is the son of Durga Das: another fiction is required to hold that he became by adoption also the full brother of a daughter born to Durga Das by a wife who had died before the adoption. This answer may be stated in another form as follows: if the adoption had been made during the lifetime of Annapurna's mother, then her mother might have become the boy's adoptive mother, and the relation of sister and brother might have been created, but when Annapurna's mother was dead, it was physically impossible that there should be born to her father a son, who could be looked upon as her full brother.

Another argument which seems to have considerable force is that there is no apparent reason why the son born to Durga Das

by Ganamani should stand in a different relation to the children of the first marriage from the relation occupied by the son adopted in Ganamani's lifetime.

These reasons may be rather unconvincing but for the appellant no cogent reasons are advanced.

I think the appeal should be dismissed with costs.

SHAMSUL HUDA, J.—I agree with my learned brother in dismissing this appeal. The first argument regarding the applicability of section 111 of the Succession Act is based on a forced interpretation of the Will opposed to the natural meaning of the words used, and I feel no hesitation in rejecting it.

As regards the second point it is conceded by the learned Vakil for the appellant that if Rajendra was adopted by Durga Das in conjunction with Ganamani, he would stand in the position of a half brother to Annapurna and would be postponed to the plaintiffs, who are younger brothers of Annapurna's husband.

This is also the view of law taken by their Lordships of the Judicial Committee in the case of *Annapurni Nachiar v. Forbes* (2), in which they approved of the decision in *Kasheeshuree Debia v. Greesh Chandra Lohiri* (3) and held that where of two wives one only joined in the adoption, the adopted son became the full son of the wife so joining and the step son of the other. Again in the case of *Gungulhar Bogla v. Hira Lal Bogla* (4) Mr. Justice Mookerjee explained away Manu's text that if among all the wives of one husband one has a son "Manu declares them all to be the mothers of male children through that son" and held that the son adopted by the husband conjointly with one of his wives is only the step-son of other wives. The claim of a husband's brother to succeed in preference to a woman's step-brother in respect of her separate property is recognised in text books of Hindu Law and has also received judicial confirmation. The law on this point is fully discussed in the decision of Mookerjee and Carnduff, JJ., in *Debi Prasanna Rai v. Harendra Nath Ghosh* (1).

(2) 23 M. L. 1; 26 I. A. 246; 3 C. W. N. 730; 9 M. L. J. 20; 1 Bom. L. R. 611; 7 Sar. P. O. J. 591.

(3) (1864) W. R. (Sup. Vol.) 71.

(4) 34 Ind. Cas. 10; 20 C. W. N. 439; 23 C. L. J. 372; 43 C. 644.

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It has, however, been argued that if Rajendra was adopted by Durga Das only, he became by the fact of such adoption the son of all his wives, dead or alive, and in this way Rajendra became the full brother of Annapurna. It is not necessary in this case to consider the effect of an adoption by a husband alone without the concurrence of any of his wives. I feel no doubt that in this case the adoption was both by Durga Das and Ganamani. At the time of the adoption Annapurna's mother was dead but Ganamani was alive and it is only natural to suppose that she did take part in the adoption. This inference is strengthened by the fact that in the Court below the case proceeded on that assumption, that Ganamani in paragraph 5 of her written statement claimed Rajendra to be her adopted son and that no specific issue was raised on the question whether the adoption was by Durga Das and Ganamani or only by Durga Das. It is too late now for the appellant to raise an issue of fact for the first time in second appeal.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 3402 OF 1915.

May 17, 1919.

Present :— Mr. Justice Scott-Smith and
Mr. Justice Martineau.

HARI CHAND AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

MATHRA DAS AND OTHERS—
DEFENDANTS—RESPONDENTS.

*Custom - Khanadamad—Hindu jats of village
Bottar, Tahsil Kharian, District Gujrat.*

There is no custom of *khanadamadi* among Hindu jats of village Bottar, Tahsil Kharian, Gujrat district. [p. 90, col. 1.]

Second appeal from the decree of the District Judge, Jhelum, dated the 29th October 1915.

Mr. Dhanrai Shah, for the Appellants.

Messrs. B. N. Kapur and Abdul Ghani, for the Respondents.

JUDGMENT.—This is a second appeal from the order of the District Judge of Jhelum upon a certificate granted by him regarding the validity of a custom, *viz.*, whether the appointment of a *khanadamad* is valid in the tribe of Jat Hindus of village Bottar, Tahsil Kharian, District Gujrat, to which the parties belong. The learned District Judge has decided in favour of the custom and has, therefore, held that the plaintiffs-collaterals have no right to contest a gift effected by Mathra Das in favour of his daughter, *Musammatt Mewa Devi*, whose husband, he has found, he had appointed as his *khanadamad*. The learned District Judge in his judgment admits that not a single precedent, either in actual practice or in a Court of law, for or against the custom is forthcoming. He finds, however, that (1) Muhammadan Jats of Gujrat have the custom of *khanadamadi*; (2) Hindu Jats follow in general the same customs as Muhammadan Jats; (3) Hindu Jats in other districts have the *khanadamadi* custom; and (4). Hindus of other Tahsils in the Gujrat District have the custom. From these facts he draws the conclusion that the appointment of a *khanadamad* by Mathra Das was in accordance with the custom of his tribe and was quite valid.

Now, in regard to the fourth point found by the District Judge, *viz.*, that Hindus of other Tahsils have the custom, there is very little evidence indeed. The first instance relied upon is printed at page 12 of the paper book. In that case it was held that agnates do not exclude daughters from inheritance unless there is some special custom to that effect. The decision was given in reliance upon what the Judges of the Chief Court had laid down. The decision is dated the 4th of February 1873 and, therefore, long before the Full Bench case reported as *Gujar v. Sham Das* (1). In that case it was found that the daughter in question had resided with her parents and that her husband had been made *khanadamad* of her father and received into his house. But preference does not appear to have been given to her on that account, but merely because the *onus* was considered to

(1) 107 P. R. 1887 (F. B.).

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be upon the collaterals to prove that they excluded the daughter. The second decision relied upon is that printed at pages 14 and 15 of the paper-book. There also the decision was in favour of the daughter, because it was held that the plaintiffs had not referred to any instance which would prove the invalidity of a gift to a daughter as against the custom entered in the *riwai-i-am*. The date of the decision is 19th of February 1280, i.e., before the Full Bench ruling *Gujar v. Sham Das* (1). In our opinion, these instances are quite insufficient to prove that there is any general custom of *khanadamadi* among Hindus in any Tahsil of the Gujarat District. The onus was certainly upon the defendants to prove that the custom of *khanadamadi* existed in the tribe of Hindu Jats and in our opinion they have not discharged it. Mr. Badri Nath Kapur referred us to certain extracts of the *riwai-i-am* of 1868 printed at pages 8 to 11 of the paper book, wherein it is stated that in the absence of male issue a land owner can adopt a daughter and transfer his property to her. This is said to apply to Khatrias, Brahmins, Bahrupias, Aroras and Bhatias. Hindu Jats are not included in these tribes and in any case the entry does not establish any custom of *khanadamadi*.

We accordingly accept the appeal and, setting aside the order of the lower Courts, give the plaintiffs a declaration to the effect that the gift of the land and houses in suit made by defendant No. 1 in favour of defendant No. 2 on the 9th of January 1914 shall not affect the plaintiffs' reversionary rights after the death of defendant No. 1, and we further direct that the defendants shall pay the plaintiffs' appellants' costs in all the Courts.

Appeal accepted.

ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 51 of 1916.

March 10, 1919.

Present:—Pandit Kanhaiya Lal, A. J. C., and Mr. Daniels, A. J. C.

Musammam JANKI KUNWAR—DEFENDANT
—APPELLANT

versus

Babu MITRA SEN SINGH AND OTHERS—
PLAINTIFFS, Babu INDER SEN SINGH AND
OTHERS—DEFENDANTS—RESPONDENTS.

Landland and tenant—Under-proprietary rights for life without power of transfer, whether can be granted—Lapse of under-proprietary title on grantee's death, condition as to—Reversion, superior proprietor becoming entitled to—Failure to enforce right of reversion, effect of—Trespasser allowed to assert under-proprietary title, effect of—Rent, acceptance of, from trespasser, effect of—Estoppel.

A tenure which is not transferable cannot be treated as under-proprietary, but a superior proprietor can confer under-proprietary title on a person for life without any power of transfer. For, it is possible to conceive that a person might split up his full rights into proprietary and under-proprietary, and then grant the under-proprietary rights to another person for a limited period, reserving the reversion for another person or for himself [p. 901, col. 1.]

An under-proprietary title for life without power of alienation was granted to a person by the superior proprietor with regard to certain property, with the condition that the under-proprietary title would lapse on the death of the grantee and the superior proprietor would then be entitled to reversion of that title. When the grantee died, the superior proprietor did not elect to claim or enforce the reversion but allowed a trespasser to assert that title and continue to pay the under-proprietary rent, so that on the faith of the trespasser being treated and recognised as an under-proprietor by the superior proprietor, the trespasser did certain acts which were to the detriment of herself and to the advantage of the superior proprietor.

Held, that the superior proprietor was estopped from denying the right of the trespasser to hold the property in question as an under-proprietor for life without any power of alienation. [p. 901, col. 1.]

Appeal from the decree of the Subordinate Judge, Fyzabad, dated the 25th April 1916.

Messrs. Mohammad Wasim and Imtiaz Ali, for the Appellant.

The Hon'ble Syed Wazir Hasan and Chaudhri Niamatullah, for Respondents Nos. 1 to 4.

JUDGMENT.—The dispute in this appeal relates to the entire villages Tarshampur, Mendhai Salimpur and a 10 *biswas* share in the village Naurahni Rampur situated in the Fyzabad district. The said village

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and another village named Maipur formed part of the Birhar estate belonging to Dhup Narain Singh.

Musammatt Rajau Kunwar, the wife of Dhup Narain Singh, claimed to be in possession of these four villages by virtue of a grant said to have been made by her husband. On the 23rd April 1877, while the first regular settlement was in progress, she claimed a declaration of her under-proprietary title in regard to the said villages, stating that her husband had given the same to her for her maintenance and that she was in proprietary possession thereof by the collection of rents and the payment of revenue (Exhibits A 1, A-4 and A-7). These claims were brought against Dhup Narain Singh. On the 22nd May 1878 Musammatt Rajau Kunwar and Dhup Narain Singh entered into a compromise, the effect of which was that the former was allowed to remain in possession by virtue of the *pukhtadari* right of the entire villages Turshampur, Mendhai Salimpur and Maipur and a 10-*biswas* share of the village Naurahni Rampur for her life without any power of transfer subject to the payment of a profit of 15 per cent. on the Government revenue, and the latter was allowed to retain possession of the *sir* lands situated therein without any power of transfer on payment of the usual rent to the former (Exhibits 1, 3 and 5). The compromise further declared that after the death of Musammatt Rajau Kunwar the "wife of her son, Kalka Bakhsh Singh," shall be entitled to possession on similar conditions. In accordance with these compromises, decrees were passed in favour of Musammatt Rajau Kunwar, declaring that she was entitled to *pukhtadari* rights with regard to the said properties without any power of alienation subject to the payment of the Government revenue and a profit of 15 per cent. thereon to the Taluqdar (Exhibits 2, 4, 6 and 10).

In pursuance of those decrees Musammatt Rajau Kunwar was recorded in the under-proprietary register as a *pukhtadar* (Exhibits A 8, A 20 and A-22), and on her death her daughter-in-law, Musammatt Sundar Kunwar, the wife of Kalka Bakhsh Singh, was recorded as holding the said villages in

the same capacity (Exhibits A-34, A-36 and A-38). On the 1st September 1888, Dhup Narain Singh mortgaged his right, title and interest in the villages in suit with the predecessors in title of the present plaintiffs (Exhibit 10) and on the same date his wife, Musammatt Rajau Kunwar, joined him in executing another deed of mortgage in respect of the under-proprietary rights held by her in the said property in favour of Musammatt Dilraj Kunwar, the mother of one of the mortgagees previously mentioned. In order to pay up the amount due on the deed first mentioned, and the deed of further charge subsequently executed by Dhup Narain Singh (Exhibit 1), Kalka Bakhsh Singh, the son and successor of Dhup Narain Singh sold his right, title and interest in the villages in suit to the Court of Wards in charge of Meopur Dhaurahra estate on the 23rd October 1902, stating in the sale deed that he was only realizing the under-proprietary rent on account of the same from the *pukhtadar* (Exhibit 8). The Court of Wards thereby stepped into the shoes of the superior proprietor and became entitled to collect the under-proprietary rent from Musammatt Sundar Kunwar, who had succeeded Musammatt Rajau Kunwar in 1901. Musammatt Sundar Kunwar died in 1905, and such rights as were conferred on her by virtue of the compromises of the 22nd May 1878 lapsed on her death. In 1906, Kalka Bakhsh Singh married Musammatt Janki Kunwar, who assumed possession of the *pukhtadari* rights enjoyed by Musammatt Sundar Kunwar without any objection having been taken by the Court of Wards in charge of the Meopur Dhaurahra estate. The Court of Wards acknowledged her as a *pukhtadar* and realized rent from her up to 1914 (Exhibits A-35 to A-106).

Meanwhile Musammatt Janki Kunwar and her husband, Kalka Bakhsh Singh, sold the *pukhtadari* rights, the former claimed to have possessed, in Maipur to the late Rai Sri Ram Bahadur (Exhibit A-49) to pay up the prior mortgage effected by Musammatt Rajau Kunwar and Dhup Narain Singh on the 1st September 1888, to which reference has already been made. Rai Sri Ram Bahadur redeemed that mortgage by paying Rs. 18,125 to the heirs of Musammatt Dilraj Kunwar (Exhibits A-197 and A-108).

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Musammāt Rajau Kunwar and *Dhup Narain Singh* had made other mortgages, too, of the *pukhtadārī* rights in some of the villages in question from time to time (Exhibits A-110, A-113 and A-114), the amount due on which was similarly discharged by *Musammāt Janki Kunwar* and *Kalka Bakhsh Singh*. *Musammāt Rajau Kunwar* and *Kalka Bakhsh Singh*, too, made certain mortgages of the *pukhtadārī* rights in some of the villages in question (Exhibits A-115 and A-116), which *Musammāt Janki Kunwar* and *Kalka Bakhsh Singh* similarly discharged.

The Court of Wards claims to have since discovered that *Musammāt Janki Kunwar* had no title whatsoever to the *pukhtadārī* rights of the said villages and has filed the present suit for her ejection with mesne profits. The Court below decreed the claim for possession. It found that *Musammāt Rajau Kunwar* was granted an under-proprietary tenure for life without any power of alienation, that *Musammāt Sundar Kunwar*, the wife of her son, was to succeed her on the same conditions, that is to say, to hold the disputed property for her life without any power of alienation, and that as *Musammāt Janki Kunwar* was not married till some time after the death of *Musammāt Sundar Kunwar*, such interest as was conferred by the compromise lapsed on the death of *Musammāt Sundar Kunwar*.

A tenure, which is not transferable, cannot be treated as under-proprietary; but as the learned Council for the defendant-appellant points out, it is possible to conceive that a person might split up his full rights into proprietary and under-proprietary, and then grant the under-proprietary rights to another person for a limited period, reserving the reversion for another person or for himself. In that view of the matter, the condition restraining alienation can only be treated as a condition emphasizing that the grant was made for only the lifetime of the grantee and that no alienation could be made which would extend the grant beyond that period. If the intention was to give the grantee *pukhtadārī* or under-proprietary rights for a limited period, an absolute restraint on alienation from the very inception of the grant would be inconsistent with the nature of the interest created. No other construction consistent with the language of the com-

promise as a whole is, therefore, reasonably possible.

The entries made in the revenue papers in pursuance of the decree and the subsequent conduct of the parties, moreover, show that that was the construction which the parties had themselves placed on the settlement decrees, for *Musammāt Rajau Kunwar* was entered as a *pukhtadar* liable to pay to the *Taluqdar* 15 per cent. in addition to the revenue. The rights of *Musammāt Rajau Kunwar*, however, came to an end on her death in 1901: those of *Musammāt Sundar Kunwar*, the wife of *Kalka Bakhsh Singh* similarly came to an end on her death in 1905. *Kalka Bakhsh Singh* is not shown to have any other wife then alive. The limited rights created by the compromise, therefore, came to an end on the expiry of the above life-estates and the property, which was the subject of those rights, subsequently reverted to the heir or successor-in-interest of the grantee, then in existence. As *Kalka Bakhsh Singh*, the son and successor of the grantor, had sold his entire right, title and interest in the property in dispute to the Court of Wards in charge of the *Meopur Dhaurahra* estate before the death of *Musammāt Sundar Kunwar*, the vested interest he held in the reversion passed by the sale to the Court of Wards, who became entitled to that reversion on her death.

The Court of Wards did not, however, for some reason or another elect to claim or enforce the reversion and allowed *Musammāt Janki Kunwar*, whom *Kalka Bakhsh Singh* married in 1906, to remain in possession as a *pukhtadar* and to pay rent as such up to 132 *Fasli*. The name of *Musammāt Janki Kunwar* was entered in the under-proprietary register as a *pukhtadar*, and though she had nothing to do with the *pukhtadārī* rights under the petition of compromise because such rights as were conferred by the compromise on *Musammāt Rajau Kunwar* and the wife or wives of *Kalka Bakhsh Singh* in succession had already lapsed on the death of *Musammāt Sundar Kunwar*, the last survivor, the failure of the Court of Wards to enforce the reversion and the subsequent acknowledgment of *Musammāt Janki Kunwar* as a *pukhtadar* and the acceptance of rent from her from time to time are tantamount to a waiver for the time being of the right of reversion and to a recognition of the right of *Musammāt Janki*

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Kunwar to succeed to the *pukhtadari* rights under the compromise, as if she had been the wife of Kalka Bakhsh Singh when *Musammât Sundar Kunwar* died. On the faith of her having been treated and recognised as a *pukhtadar*, *Musammât Janki Kunwar* and her husband, Kalka Bakhsh Singh, paid the prior encumbrances on the under-proprietary tenure (limited as it was), which *Musammât Rajau Kunwar* and *Dhup Narain Singh* and after the death of the latter *Musammât Rajau Kunwar* and Kalka Bakhsh Singh had created. In the mortgage deeds the property mortgaged was described as an under-proprietary tenure and the fact that *Dhup Narain Singh* and after him his son, Kalka Bakhsh Singh, who held the superior proprietary rights had joined the lady in executing the mortgages renders those mortgages enforceable, despite the restriction contained in the compromise and the settlement decrees passed in accordance therewith, as against themselves and their successors-in-interest. In the case of the mortgage effected by *Musammât Rajau Kunwar* in favour of *Thakurain Dilraj Kunwar* on the 1st September 1888, the redemption was effected by selling the under proprietary interest or such interest as *Musammât Janki Kunwar* held or claimed to hold in the village (Exhibit A 49). The Court of Wards accepted the position of the vendee as the purchaser of the under-proprietary interest of *Musammât Janki Kunwar* in the said village and sold the superior proprietary interest, it held therein, to vendee (Exhibit A50). It is not clear whether the payments of the other encumbrances were made by *Musammât Janki Kunwar* out of the money belonging to her or by Kalka Bakhsh Singh with his own funds; but the payment made by *Musammât Janki Kunwar* by the sale of what she described as the under proprietary interest in Maipur was clearly made to the advantage of the person holding the right of reversion, and to the detriment of herself, if she had no interest whatever in that or in the other villages in respect of which she was recorded and treated as a *pukhtadar*. The plaintiffs-respondents are, therefore, clearly estopped from denying the right of *Musammât Janki Kunwar* to hold the villages in question as a *pukhtadar* on the conditions laid down in the petition of compromise, that is, for her life without any power of

alienation; and after what the Court of Wards in charge of their estate had done up to almost the time when the present suit was instituted, they cannot be allowed to turn round and treat her as a trespasser. As pointed out in *President and Governors of Magdalen Hospital v. Alfred Knotts* (1), even where a lease is granted by a person who had no authority to grant the same, the acceptance of rent from the lessee may for the time being create the relationship of a landlord and tenant between the person accepting the rent and the lessee. In *Beni Pershad Koeri v. Dudhnath Roy* (2), where a village was granted by a Zamindar to his nephew for maintenance for his life and the grantee had during his lifetime executed a permanent lease in favour of another person and the latter had obtained possession, it was held by their Lordships of the Privy Council that the acceptance of the rent at the rate stipulated in the lease by the successor of the grantor from the lessee after the death of the original grantor purported to create at all events a tenancy at will, which along with other evidence could be treated as a sufficient recognition of the lessee as a tenant for life. In *Nabakumari Debi v. Behari Lal Sen* (3), *Chaitan Singh v. Sakhari Monim* (4) and *Jagraj Kunwar v. Ganga Din* (5) acceptance of rent was similarly treated as a recognition that the person paying the rent was not a trespasser. It is immaterial whether the Court of Wards acted negligently or in ignorance of its rights. The treatment accorded led *Musammât Janki Kunwar* to alter her position to her detriment by paying the prior encumbrances due in regard to the interest she held in her possession; and it is not open to the plaintiffs-respondents to treat her as a trespasser and sue her for possession or mesne profits. The effect of the failure of the Court of Wards to enforce the reversion, when *Musammât Sundar Kunwar* died, and of the subsequent acceptance of rent from her as a *pukhtadar* was to invest *Musammât Janki Kunwar* with

(1) (1873) 4 App. Cas. 324; 48 L. J. Ch. 579; 40 L. T. 466; 27 W. R. 602.
 (2) 27 C. 58 (P. C.); 26 I. A. 216; 4 C. W. N. 274; 7 Sar. P. C. J. 540.
 (3) 4 A. L. J. 570; 6 C. L. J. 122 (P. C.); 11 C. W. N. 865; 9 Bom. L. R. 846; 17 M. L. J. 337; 34 C. 802; 2 M. L. T. 433; 41 A. 160.
 (4) 5 C. L. J. 62.
 (5) 18 Ind. Cas. 382.

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the rights allowed to her by the compromise as if she had been the wife of Kalka Baksh Singh when Musammam Sandar Kanwar died, but not to enlarge her interest.

The appeal is, therefore, allowed and the claim of the plaintiffs-respondents dismissed with costs throughout.

Appeal allowed.

PUNJAB CHIEF COURT.

CIVIL MISCELLANEOUS CASE No. 137
OF 1919.

March 24, 1919.

Present:—Mr. Justice Scott Smith.

GURDIT SINGH—PLAINTIFF—

PETITIONER

versus

ISHAH DAS AND ANOTHER—DEFENDANTS—

RESPONDENTS.

Punjab Chief Court Rules and Orders, Vol. III, p. 81, rr. 3, 4—Injunction, suit for—Pleader's fees, scale of—Practice.

Pleader's fees should in all cases be fixed in accordance with the rules framed by the Chief Court.

In a suit for injunction the Pleader's fee should be calculated according to the valuation of the suit, or according to such a sum, not exceeding the valuation, as the Court shall think reasonable.

Review from the order of Mr. Justice Scott-Smith, dated the 11th November 1918.

Mr. Lal Chand Mehra, for the Petitioner.

Mr. Tirath Ram, for the Respondents.

JUDGMENT.—Plaintiff's suit for an injunction having been dismissed, he appealed to the District Judge who dismissed his appeal. He then filed a second appeal to this Court, which was dismissed on the 11th November 1918. On the question of costs allowed by the lower Courts he was advised to file an application for review in the lower Appellate Court. Instead of this he filed an application for amendment of the decree, which was rejected as it was found that the decree was in accordance with the judgment. He has now accordingly applied for a review of this Court's order, dated

the 11th November 1918, as to costs only, and I admitted it because it appeared clear that the lower Courts had wrongly calculated the Pleader's fee. The suit was one for an injunction and was valued for purposes of jurisdiction at Rs. 110. The trial Court, however, allowed Rs. 20 as Pleader's fee and the lower Appellate Court allowed Rs. 16. It is contended on behalf of the applicant that this was illegal and that the Pleader's fee awarded could not legally exceed Rs. 580 calculated at 5 per cent. on the value. The rules made by this Court fixing the fees of Counsel in proceedings in Subordinate Courts will be found in Volume III, Rules and Orders, at page 81 *et seq.* Rules 3 and 4 read together shew that the fee in a case of this sort should be calculated according to the valuation of the suit, or according to such a sum, not exceeding the valuation, as the Court shall think reasonable. In any case the amount of the fee is to be calculated according to rule 3. Rule 3 shews that in suits for the recovery of specific property, or a share of specific property, whether immovable or moveable, if the amount or value of the property shall not exceed Rs. 5,000, the fee is to be calculated at 5 per cent. on the amount or value thereof. In the present case the value being Rs. 110 the fee could not exceed Rs. 580. There seems to be a general impression in some of the Subordinate Courts that in suits for injunctions and in declaratory suits any fee can be fixed according to the pleasure of the Court. The fee should in all cases be fixed in accordance with the rules framed by this Court and above referred to. Lala Tirath Ram who appears for the respondents admits that the fee allowed by each of the Courts is illegal and does not oppose the present application for review.

I allow the review and in modification of the decree of the lower Courts, reduce the Pleader's fee allowed to Rs. 580 in each Court. Costs of this Court should be borne by the parties.

Review allowed.

NADIRAM CHANDRA SIL v. SRINATH CHAKRABARTI.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1200
OF 1918.

August 19, 1919.

Present:—Justice Sir Asutosh Choudhuri, Kt.,
and Mr. Justice Cuming.NADIRAM alias NABADWIP CHANDRA
SIL—DEFENDANT No. 1—APPELLANT

versus

SRINATH CHAKRABARTI—PLAINTIFF

WHO APPEARED, AND OTHERS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), ss. 20, 48, 49, 50, 85, Sch. III, Art. 3—Landlord and tenant—Tenant, dispossession of—Suit to recover possession of holding—Limitation applicable—Occupancy tenant, lease by, exceeding nine years, validity of—Kayami ryot, whether ryot at fixed rent—Under-ryot, heir of, whether entitled to gather crops—Non-occupancy ryot, interests of, whether heritable.

A suit by a tenant against his landlord for the recovery of possession of his holding, where the defendant did not dispossess the plaintiff in his capacity as landlord of the holding, is not governed by Article 3, Schedule III, of the Bengal Tenancy Act. [p. 907, col. 2.]

A document creating a lease by an occupancy ryot cannot be given in evidence if the lease is for more than 9 years and whether the document has been registered or not, the lease is void. The validity of such a lease can be questioned by the grantor or by a person claiming from him. [p. 907, col. 2.]

Chandi Charan Nath v. Somla Bibi, 44 Ind. Cas. 254; 22 C. W. N. 179; 28 C. L. J. 91, followed.

Where in a lease a lessor states that he is a *kayami ryot*, this does not necessarily imply that he is a ryot at a fixed rent. [p. 908, col. 1.]

Irrespective of custom or local usage the heir of an under-ryot under an annual holding is entitled on the death of the under-ryot to remain in possession of the land until the end of the then agricultural year for the purpose of tending and gathering in the crops standing on the land. [p. 908, col. 1.]

Arip Mandal v. Ram Ratan Mandal, 31 C. 757 (F. B.); 8 C. W. N. 479, followed.

The right of a non-occupancy ryot is not heritable. [p. 908, cols. 1 & 2.]

Appeal against the decree of the Subordinate Judge, 1st Court, Tipperah, dated the 20th April 1918, modifying that of the Munsif, 4th Court at Chandpur, dated the 5th of March 1917.

Dr. Sarat Chandra Basak and Babu Upendra Kumar Roy, for the Appellant.

Babus Dwarkanath Chakerbutty and Jatin-dra Mohan Ghose, for the Respondents.

JUDGMENT.—The plaintiff sued for *khas* possession of the land in suit upon declaration of his *ryoti* interest therein. He claims to have purchased the land

from one Ram Kumar Chakravarty, who had an occupancy right in it. The principal defendants contend that Ram Kumar had a *mokarari mourashi kayami* right and that he settled the land with their predecessor Bangsi Sil by a lease, dated the 28th Kartick 1302, (Exhibit C) under which they claim an occupancy right. The case, therefore, depends on the question as to what right Ram Kumar had and what right was acquired by Bangsi Sil under Exhibit C. The trial Court was of opinion that Ram Kumar was an occupancy ryot, that his right was heritable but not transferable, that the plaintiff after his purchase had not been recognised by the two-annas co-sharer superior landlord, hence his title to the *ryoti* was only to the extent of 14 annas share. He also held that Bangsi's *ryoti* under Ram Kumar was not heritable and, therefore, it did not pass to his heirs, the defendants Nos. 1, 2 and 3, who became trespassers upon his death. These persons, however, had taken a *howla* tenure in respect of one anna share in the said land and had thus become landlords of the plaintiff also to that extent, and that they as such landlords held adverse possession since the 10th January 1914, which is the date of the death of their father, Bangsi Sil, and inasmuch as the present suit was brought on the 29th March 1916, he found that it was barred under Article 3, Schedule III, Bengal Tenancy Act. He also held that notice of ejectment was necessary upon the defendants, but such notice had not been served and the suit was, therefore, not maintainable.

On appeal the learned Subordinate Judge held that the suit was not barred by limitation. He was not satisfied from the evidence that the defendants had dispossessed the plaintiff in their capacity as fractional landlords; that they were in possession as the heirs of Bangsi Sil under the lease which had been granted to him by Ram Kumar, and inasmuch as the suit had been instituted within 12 years of the death of Bangsi Sil, the plaintiff was within time. He next found that the plaintiff had got a *ryoti* title to 15-annas and not 14-annas only as found by the learned Munsif, that the plaintiff's purchase of Ram Kumar's interest was not recognised by the one-anna landlords, namely, the defendants Nos. 1 and

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2, who had purchased a *howla* right to one anna as aforesaid, and he held that the plaintiff had in the circumstances got a *ryoti* title to 15-annas share of the land in suit. He agreed with the Munsif that Ram Kumar was not a *ryot* of a fixed rent but that he was only a *ryot* with a right of occupancy in respect of the disputed land, that Bangsi Sil's status was that of an under *ryot* under Ram Kumar and that the defendants did not inherit his under *ryoti* right and that the defendants were trespassers.

A contention was raised that inasmuch as the *jama* of this *ryoti* had remained unchanged for more than 20 years the presumption under section 50 of the Bengal Tenancy Act should apply. He held that this was not a suit under that Act inasmuch as the defendants were not under *ryots* under the plaintiff and that, therefore, the defendants were not entitled to any notice under section 49, clause (b). The defendants contended that even if the Court held that Ram Kumar had not a *mourashi* right, yet they had acquired a right of occupancy having been on the land for much longer than the statutory period. They contended that Ram Kumar having granted the lease under which Bangsi built his homestead, made excavations and gardens and as after Bangsi's death the defendants had remained upon the land, Ram Kumar could not be heard to say that Bangsi was a trespasser, although Ram Kumar could not legally have granted such a lease as he had and that as Ram Kumar would have been estopped from raising any question as regards the validity of the lease, the plaintiff having purchased from Ram Kumar's son was equally estopped. The learned Subordinate Judge held that Ram Kumar had no right to grant such a lease which was for a term exceeding 9 years, that in the lease Ram Kumar had stated that he was a *kayami ryot*, which did not necessarily imply that he was a *ryot* at a fixed rent. He found that it did not appear that Ram Kumar had made any representation that he was a *ryot* at a fixed rent or that his right was other than that of an occupancy *ryot*, nor did it appear that Bangsi, believing in any representation of Ram Kumar, was thereby induced to take the lease. He referred

to *Ohandi Oharan Nath v. Somla Bibi* (1) and held that the grantor could question the validity of such a lease. He also found that the defendants had failed to make out that they had any occupancy right. He finally held that the plaintiff was entitled to get *imali khas* possession in respect of 15-annas share only of the lands in suit; hence this appeal.

It has been strongly contended on behalf of the defendants, first, that they cannot be considered as trespassers and they cannot be ejected without notice to quit, that the lease, Exhibit C, is operative, that Bangsi having been put in possession and built a house and garden and excavated a tank, the plaintiff is estopped from questioning the defendants' title under the lease, that even if section 50 of the Bengal Tenancy Act be not applicable, the general presumption of fixity of rent has not been considered by the Judge, that even if it be held that Bangsi had only an under-*ryoti* right, such right is heritable and, therefore, the defendants are not trespassers and that the suit was barred under Article 3, Schedule III, of the Bengal Tenancy Act. Having regard to the learned Subordinate Judge's finding that the defendants had not dispossessed the plaintiff in their capacity as fractional landlords and also having regard to the fact that the plaintiff was not recognised by defendants Nos. 1, 2 and 3 as landlords, the suit was not barred by limitation. Both the Courts have found that Ram Kumar had only an occupancy right, that he had no *mokarari mourashi* right and, therefore, he could not have granted a lease for a term exceeding nine years. Such a lease is clearly invalid and could not have been registered. See *Ohandi Oharan Nath v. Somla Bibi* (1). All the cases up to that date were reviewed by one of the learned Judges who held as the result of his review "that the document creating the lease cannot be given in evidence if the lease is for more than 9 years and whether the document has been registered or not, the lease is void." He also held that the authorities led to the conclusion that the validity of such a lease can be questioned by the grantor or by a person claiming from him. The

(1) 44 Ind. Cas. 254; 22 C. W. N. 179; 28 C. L. J. 91.

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express provision of section 85 of the Bengal Tenancy Act cannot be overlooked. Upon the findings of the learned Subordinate Judge the elements essential to attract its operation are also wanting in this case. Ram Kumar describes himself in the lease as a *kayami ryot*, which does not necessarily imply that he was a *ryot* at a fixed rent. The Subordinate Judge also held upon the evidence that it did not appear that Ram Kumar had made any representation that he was a *ryot* at a fixed rent or that his status was other than that of an occupancy *ryot* or that Bangsi, believing in any representation of Ram Kumar, was induced to take the lease. That being so, we are unable to accept the contention that the plaintiff is estopped from questioning the lease. It has also been found as a fact that Ram Kumar was not a *ryot* at a fixed rent. Section 50 of the Bengal Tenancy Act clearly does not apply in this case, as the tenancy dates from the lease. It is clear upon the findings that Bangsi was an under-*ryot*. It is contended that an under-*ryoti* right is heritable. The point was distinctly raised before the Full Bench in *Arip Mandal v. Ram Ratan Mandal* (2), in which it was held that irrespective of custom or local usage the heir of an under-*ryot* under an annual holding was entitled on the death of the under-*ryot* to remain in possession of the land until the end of the then agricultural year for the purpose, if the land has been sub-let, of realising the rent which might accrue during the year, or if not sub-let, for the purpose of tending and gathering in the crops. The learned Judges who referred the case were apparently of opinion that apart from any rights under the Tenancy Act the interest of an under-*ryot* in his tenancy could not be held to be terminated on his death but it must pass to his heirs and legal representatives. This view was not accepted by the Full Bench. In *Mohunt Lukhan Narain Das v. Jainath Panjau* (3) it was held by the majority of the Full Bench (Brett and Mitra, JJ., dissenting) that under the Bengal Tenancy Act the right of a non occupancy

ryot is not heritable. A later Full Bench held in *Midnapore Zenindari Co. v. Hrishikesh Ghosh* (4) that the holding of a non-occupancy *ryot* is (apart from possible exceptions) heritable. Having regard to the Full Bench case of *Arip Mandal v. Ram Ratan Mandal* (2) we cannot hold that the heir of an under-*ryot* has a heritable right to continue as a *ryot*. His right extends to tending and reaping the crops standing on the land, as therein laid down. Chapter VII of the Bengal Tenancy Act deals with under-*ryots*. Section 48 limits the rent recoverable from under-*ryots*. Section 49 provides that an under-*ryot* shall not be liable to be ejected by his landlord, except (a) on the expiration of the term of a written lease, or (b) when holding otherwise than under a written lease, at the end of the agricultural year next following the year in which a notice to quit is served upon him by his landlord. This suit was brought more than two years after Ram Kumar's death and we do not think that we can interfere with the judgment of the learned Subordinate Judge. The appeal is dismissed with costs.

Appeal dismissed.

(4) 25 Ind. Cas. 562; 18 C. W. N. 828; 41 C. 1108; 19 C. L. J. 505.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2503 of 1915.

May 9, 1919.

Present:—Mr. Justice Scott-Smith and
Mr. Justice Martineau.

HARNAMAN AND ANOTHER—DEFENDANTS
—APPELLANTS

versus

Musammât DEWAN—PLAINTIFF—
RESPONDENT.

Custom—Alienation by male proprietor—Widow of
predeceased son, whether can challenge alienation.

The widow of a predeceased son, who desires to challenge an alienation made by her father-in-law, is bound to prove not merely that she is heir to her father-in-law but that she has a right to contest the alienation effected by him. [p. 909, col. 2.]

Second appeal from the decree of the
District Judge, Ludhiana, dated the 25th
May 1915.

Mr. Kanwar Narain, for the Appellants,

(2) 31 C. 757; 8 C. W. N. 479.

(3) 11 C. W. N. 626; 5 C. L. J. 457; 34 C. 516; 2 M.
L. T. 219.

HARNAMAN v. DEWAN.

Mr. *Devi Dayal*, for the Respondent.

JUDGMENT.—In this case the plaintiff, who is the widow of Soudha, a Jat of the Ludhiana District, sues for possession of the land left by her husband's father, Ishar. The defendants, who are Ishar's brother's grandsons, plead that they are entitled to the property as Ishar's heirs as well as on the strength of a Will made by him in their favour. The execution of the Will has been proved and is not disputed. The first Court dismissed the suit, finding that the plaintiff had failed to prove a custom by which she could succeed to the property of her father-in-law and that she could not, therefore, contest the Will. On appeal the District Judge has held that the plaintiff is entitled to succeed to her father in law and to contest the validity of the Will, which he holds to be a form of alienation not recognised by custom. He has, therefore, given the plaintiff a decree. The defendants have appealed to this Court. They have obtained a certificate from the District Judge.

It is unnecessary for us to determine whether the plaintiff would have a right of succession to her father-in-law, as we are of opinion that, even if it be assumed that she is an heir, she has failed to show that she has a right to challenge the validity of the Will, and we cannot agree with the view of the lower Appellate Court that the existence of that right would follow from the fact of her being an heir.

In *Partapi v. Hazara Singh* (1) it was held that among Jat Sikhs of the Jullundur District the *onus* of proving that a daughter had a right to contest an alienation by her mother of land whereof the last male holder was her father lay on the daughter and that she had failed to discharge it.

The learned District Judge has himself referred to *Nur ul-nissa v. Gauhar-ul-nissa* (2), in which it was held that, whilst by custom the nearer male agnates of a proprietor had the power of controlling his dealings with the property which they would inherit, there was no presumption in favour of control by a female.

The passage quoted by the lower Appellate Court from *Premi v. Khushal Singh* (3) relates only to the question of succession.

The plaintiff is bound to prove, not merely that she is heir to her father-in-law, but that she has a right to contest the alienation effected by him and the burden lies the more heavily on her as the defendants are the alienor's agnates. Here we may observe that both the Courts below have made a mistake in thinking that the defendants are the sons of Ishar's brother's daughter, whereas they are in fact the sons of Ishar's brother's son.

Lihori v. Radho (4), on which the learned District Judge relies and which was considered in *Partapi v. Hazara Singh* (1), related to Ghirths of the Kangra District, and was a case of an alienation by a female. It is only such alienations which female heirs have in certain cases been held to be competent to contest. It has in fact been held in *Maqsood ul-nisa v. Kaniz Zohra* (5) that a female can in no case challenge an alienation by male proprietor.

The learned District Judge has referred to Gordon Walker's Settlement Report of 1882, in which it is stated that Wills are unknown in the Ludhiana District. The practice of making Wills may have grown up since that report was written, but whether or not the Will made by Ishar was valid, the plaintiff cannot succeed in her suit without proving that she is competent to dispute the Will.

It is pointed out that that in the trial Court the plaintiff applied for a local enquiry and it is urged on her behalf that the case should be remanded to enable her to produce evidence of her right to contest the Will. The enquiry which the plaintiff asked for was probably an enquiry in regard to her right of succession, and we do not think it probable that if the case were remanded, evidence would be forthcoming to prove that a female is competent to impeach an alienation by a male proprietor.

We may note that the appellant *Dhuran* (3) 1 Ind. Cas. 605; 30 P. R. 1909; 28 P. W. R. 1909; 42 P. L. R. 1909.

(4) 72 P. R. 1906; 108 P. L. R. 1907; 125 P. W. R. 1906.

(5) 135 P. R. 1908; 194 P. W. R. 1908.

(1) 31 Ind. Cas. 794; 33 P. R. 1916.

(2) 61 P. R. 1906; 110 P. W. R. 1906.

LACHMI PRASAD V. PARBATI.

Singh has expressed his willingness to provide maintenance for the plaintiff.

We hold that the plaintiff has no power to contest the Will and that, therefore, the suit must fail. We accept the appeal, reverse the decree of the lower Appellate Court and restore the decree of the first Court, dismissing the suit. Plaintiff will pay the defendants' costs throughout.

Appeal accepted.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 84 OF 1917.

January 6, 1920.

Present:—Sir Grimwood Mears, Kt., Chief Justice, and Justice Sir P. C. Banerji, Kt.

LACHMI PRASAD, MINOR, THROUGH
BHAGWAN SINGH—DEFENDANT

—APPELLANT

versus

Musammât PARBATI—PLAINTIFF AND
ANOTHER—DEFENDANT—RESPONDENTS.

Hindu Law—Adoption—Widow—Power given to two widows jointly to adopt—Junior widow, death of—Senior widow, whether competent to adopt.

A Hindu by his Will bequeathed his estate to his two widows and empowered them jointly to adopt a boy. The junior widow died, and after her death, the senior widow adopted a son:

Held, that the adoption was not valid, as the power to adopt was a joint permissive power and the surviving widow alone was incompetent to exercise the power. [p. 910, col. 1].

First appeal against the decision of the Subordinate Judge, Saharanpur, dated the 30th January 1917.

The Hon'ble Dr. T. B. Sapru and Mr. B. R. Dave, for the Appellant.

Mr. B. E. O'Connor, the Hon'ble Mr. Moti Lal Nehru and Mr. Nihal Ohand, for the Respondents.

JUDGMENT.—By Will, dated the 21st of July 1907, Din Dayal directed that after his death his two wives Musammât Sarupi and Musammât Ram Dei "will by all means be like myself the owners of, and have authority over, the properties of which I am up to this time in possession without the participation of any one else. They will have all powers of transfer, gift, etc., like myself. They may, if neces-

sary, adopt a boy of good family according to their necessity." The testator died on the 19th of August 1907. Both wives survived him. Musammât Ram Dei had a daughter Musammât Parbati, who was the plaintiff in the original action. Musammât Ram Dei died in or about the year 1911 and on January 3rd, 1916, Musammât Sarupi executed a deed whereby she purported to adopt the appellant. The question in this appeal is whether on the true construction of the Will it was competent for the senior widow to adopt to her late husband. If she were competent, then the appellant is, as he claims to be, heir to the estate of Musammât Ram Dei. We are of opinion that the power of adoption given by the Will was a joint permissive one. It created no obligation to adopt; but it did require, first, a joint agreement to adopt; next, a selection of an heir by both of the wives, and finally a formal legal adoption. Our attention has been called to the case of *Venkata Narasimha Appa Row v. Parthasarathy Appa Row* (1). That was a case very like the present one, with this exception that the testator by his Will specifically gave a one-half share to each of his two wives. We, however, are of opinion that that difference does not create any real distinction and that we ought to follow the propositions which the Privy Council laid down as regards the exercise of joint powers. We refer specially to page 225,* where their Lordships lay down in general terms the intelligible principle that where a power is given to A and B jointly, that power can be exercised only in the way directed by the donor, namely, by A and B together doing the necessary acts. If it should happen that one of the joint donees dies, the survivor is not competent to perform the act which by the very directions of the testator requires the concurrence of both. In this case the power to take in adoption ceased at the moment of the junior widow's death in 1911. As regards the disposition of the testator's property, we are of opinion that the Will gave the two ladies the whole of Din

(1) 23 Ind. Cas. 166; 37 M. 199; (1914) M. W. N. 299; 12 A. L. J. 315; 18 C. W. N. 554; 26 M. L. J. 411; 15 M. L. T. 285; 41 I. A. 51; 16 Bom. L. R. 328 (P. C.).

*Page of 37 M.—Ed.

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Dayal's property absolutely. It follows, therefore, that in our view the appellant is a complete stranger as far as regards any rights to any share in the property of the late *Musammam Ram Dei*, and, therefore, agreeing as we do with the finding of the learned Subordinate Judge, we dismiss the appeal with costs and fees on the higher scale.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2209 OF 1915.

May 9, 1915.

Present:—Mr. Justice Broadway and
Mr. Justice Abdul Raoof.

BISHEN SINGH AND ANOTHER — DEFENDANTS
— APPELLANTS

versus

JAFFAR—PLAINTIFF—UJAGAR SINGH

AND OTHERS—DEFENDANTS—RESPONDENTS.

*Punjab Tenancy Act (XVI of 1887), s. 77 (3) (d) —
Jurisdiction of Civil and Revenue Courts—Occupancy
rights, claim to establish, cognisance of.*

A claim to establish a right of occupancy by adverse possession falls within the purview of section 77 (3) (d) of the Punjab Tenancy Act and no enquiry can be made into this question by the Civil Courts. [p. 912, col. 1.]

Second appeal from the decree of the Additional District Judge, Lahore, dated the 28th April 1915.

Mr. *Devi Das*, for the Appellants.

Mr. *Brij Lal*, for the Respondents.

JUDGMENT.—The facts of this case are as follows:—The owners of village Ohhappa moved the Revenue Courts to partition the village common land. Jafar, plaintiff, objected that certain lands (now in suit) belonged to him and were not liable to partition. The Revenue Court then stayed partition proceedings and directed Jafar to establish his title. He accordingly filed a suit in the Court of the Subordinate Judge which he afterwards withdrew and took proceedings in the Revenue Courts. The case then came before Sardar Hotu Singh, who proceeded to act as Assist-

ant Collector, 1st Grade, and District Judge, under section 117 of Act VII of 1887. His order was upset on appeal by the Divisional Judge, and it was directed that the suit should proceed before the Civil Courts. The present suit then came before Mr. Garbett, I. C. S., Subordinate Judge, 1st class, and in the plaint Jafar sought to obtain a declaration to the effect that the land

(a) belonged to him as proprietor,

(b) formed part of his occupancy land, and

(c) that in any event his possession was adverse and, therefore, the land was not liable to partition.

The defendants, proprietors of village Chhappa, contested these pleas, claiming that Jafar was not proprietor of the land but was a tenant-at-will, his possession having commenced only some 8 years previously.

A preliminary objection was taken to the jurisdiction of the Civil Courts in connection with the claim regarding occupancy rights, and on the 5th February 1914 the Court passed an order practically allowing the objection and directing that the enquiry by the Court would be restricted to the points "whether the land in question is a part of plaintiff's *maliki* and hereditary tenancy."

The issues framed also dealt solely with these points, the question regarding the rights of occupancy tenancy being omitted. The learned Subordinate Judge, in his order dated the 8th January 1915, held that the plaintiff had failed to prove that he was the proprietor of the land in suit, that the land in suit was not land over which the plaintiff, had positive occupancy rights and that the plaintiff had, however, asserted occupancy rights adversely against the owners for more than 12 years over 39 *kanals* 11 *marlas* out of the land in suit. A decree was, therefore, granted to the plaintiff, declaring that he had been in possession of 39 *kanals* 11 *marlas* of land for more than 12 years claiming occupancy rights and that the defendants (owners) were now debarred from challenging those rights. Against this decision two of the defendants Bishen Singh and Kharak Singh preferred an appeal to the learned District Judge who, however, dis-

APPASAWMI MUDALIAR v. APPANDAI NYNAN.

missed the appeal on the 28th April 1915, recording a very brief and unsatisfactory judgment. Bishen Singh and Kharak Singh have, therefore, preferred this second appeal to this Court, and on their behalf we have heard Lala Devi Das, Pleader, while Mr. Brij Lal has addressed us on behalf of Jafar.

The first ground of appeal challenges the jurisdiction of the Civil Court to deal with the question of the acquisition of occupancy rights. It was urged before us that on the findings arrived at by the learned Subordinate Judge the suit should have been dismissed, inasmuch as by the order of the 5th February 1914, it had been held that no enquiry was to be made into the question of the acquisition of occupancy rights. The learned District Judge has clearly failed to realise this circumstance. Probably the order of the 5th February 1914 was not brought to his notice. He commences his judgment by saying that the plaintiff sued for a declaration that he is proprietor and if not, then occupancy tenant of certain *shamilat*, while as a matter of fact there was no question before the Court as to the claim to the occupancy tenancy. This is to our minds quite clear, not only from the order of the 5th February 1914, but from the fact that no issue on this point was settled. Under section 77 (3) (d) suits by a tenant to establish a claim to a right of occupancy are to be heard and determined by Revenue Courts. The plaintiff's claim to be owner was undoubtedly cognisable by the Civil Courts. Similarly his claim that the land in suit really formed part of his hereditary holding was within the cognisance of the Civil Courts. His claim to establish a right of occupancy, in our opinion, falls within the purview of section 77 (3) (d) of the Tenancy Act and no enquiry can be made into this question by the Civil Courts.

Under these circumstances we are constrained to accept this appeal and to dismiss the plaintiff's suit so far as it related to the question of ownership and the land being part of his hereditary tenure. The claim to a right of occupancy was one not within the cognisance of the Civil Courts and the plaintiff is, therefore, at liberty to

bring a suit to establish this claim in the proper Courts, if so advised. In the circumstances we leave the parties to bear their own costs.

Appeal accepted.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 171 of 1919.

October 27, 1919.

Present :—Mr. Justice Bakewell and
Mr. Justice Odgers.

APPASAWMI MUDALIAR—
PLAINTIFF—APPELLANT

versus

APPANDAI NYNAN—DEFENDANT—
RESPONDENT.

Arbitration—Award not signed by all arbitrators, validity of.

An award to be binding and enforceable must be signed by all the arbitrators concurring. [p. 913, col. 2.]

Where an uneven number of arbitrators are appointed, there is no presumption that the parties contract that a majority award shall be binding. [p. 913, col. 2.]

Mahomedali Adamji v. Secretary of State, 41 Ind. Cas. 264; 42 B. 668 at p. 675; 19 Bom. L.R. 618, not followed.

Second appeal against the decree of the District Court, Chingleput, in Appeal Suit No. 51 of 1918, preferred against the decree of the Court of the Additional District Munsif, Chingleput, in Original Suit No. 40 of 1917.

FACTS.—Disputes between plaintiff and defendant were referred to the arbitration of seven persons and an award was made, signed only by five of them, the other two declining to sign for interested reasons. The plaintiff brought his suit on the award and on defendant raising issues as to the legal validity of the award, he applied to amend his plaint so as to include the original cause of action also. This was refused.

The lower Appellate Court held that the award was unenforceable.

M. O. V. Ananthakrishna Aiyar, for the Appellant.—The amendment applied for was reasonable and ought to have been allowed. Compare *Sevugan Chetty v. Krishna Aiyangar* (1) and *Dhani Ram Shaha v. Bhagirath Shaha* (2).

(1) 13 Ind. Cas. 268; 36 M. 378; 22 M. L. J. 139; 10 M. L. T. 557.

(2) 22 O. 692 at p. 710.

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The award itself is valid and enforceable. The non joining of two of the arbitrators cannot vitiate the award. If the dispute is referred for the arbitration of an uneven number of individuals, the intention of the parties ought to be presumed to be that they would abide by the decision of the majority. See *Mahomedali Adamji v. Secretary of State* (3), per Beaman, J.

Further it is found that the refusal to sign was because of the partiality of the two arbitrators in favour of the defendant.

Mr. S. Duraiswami Aiyar, for the Respondent, was not called.

JUDGMENT.—In this appeal two points are argued for the appellant: (1) that he should be allowed to amend his plaint which, as it stands, asks for an enforcement of an award of arbitrators, so as to allow him to bring a suit for dissolution of the partnership which subsisted between plaintiff and defendant, (2) that the award is valid, even though it is only signed by five out of seven arbitrators appointed by the Muechilika (Exhibit 1). As to the first point, we are unable to say that such an amendment would not alter the character of the suit and there is also this consideration, namely, that plaintiff had ample opportunity to bring this suit for dissolution in the past. He presented a petition to amend his plaint to enable himself to do this to the District Munsif on the 18th June 1917. The issue as to the validity of the award was raised as long before this as 21st July 1916. The petition was rejected on 25th August 1917, and judgment was given in the suit to enforce the award on 1st November 1917. The suit for an account of the partnership dealings would not have been barred till 2th November 1917. At the hearing on 1st November 1917 plaintiff did not examine himself or any witnesses and asked for more time, which was refused. It is thus apparent that plaintiff had plenty of opportunity of bringing another suit on an account and did not avail himself of it. We are, therefore, not disposed to allow him to do so on second appeal.

As to the second point, an award must be signed by all the arbitrators (see (3) 41 Ind. Cas. 264; 42 B. 633 at pp. 674, 675; 19 Bom. L. R. 618.

Russell on Arbitration and Award, 9th Edition,* Part II, Chapter IV, section 3, Note 4 at page 168). Mr. Ananthakrishna Iyer has drawn our attention to the opinion of Beaman, J., in *Mahomedali Adamji v. Secretary of State* (3), that parties must be assumed to contract that a majority award shall bind them when an uneven number of arbitrators are appointed. But that was a case of valuers and it is not clear that it would be the same in the case of arbitrators. The learned Judge himself at page 673† quotes a ruling of Mathew, J., *United Kingdom Mutual Steamship Assurance Association v. Houston & Co.* (4), that in every case of arbitration unless all the arbitrators concurred in the award, there would be no arbitration award at all. In this state of things we cannot follow the opinion of Beaman, J., in the present case and it is clear that the award in suit is unenforceable in law.

The appeal, therefore, fails on both these points and must be dismissed with costs.

M. C. P.

Appeal dismissed.

(4) (1896) 1 Q. B. 567; 65 L. J. Q. B. 484.

*Page 270 of 10th Edition—Ed.

†Page of 42 B.—Ed.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 3067 OF 1915.
October 29, 1919.

Present:—Mr. Justice Scott-Smith and
Mr. Justice LeRossignol.

GELA RAM AND OTHERS—DEFENDANTS—
APPELLANTS

versus

GANGA RAM AND OTHERS—PLAINTIFFS AND
OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 33, O. XX
r. 6—Judgment and decree, distinction between—
Paragraph in judgment, whether decree.

In the case of an original civil suit the decree must be quite distinct from the judgment. [p. 914, cols. 1 & 2]

A paragraph in a judgment not drawn up in the form of a decree and not embodied in a separate

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form is not a decree within the terms of the Civil Procedure Code [p. 914, col. 1.]

Dulhin Golab Koer v. Radha Dulari Koer, 19 C. 463 at p. 467 (F. B.), followed.

First appeal from the decree of the Munsif, 1st Class, Jhang, dated the 29th July 1915, decreeing plaintiffs' claim.

Lala Moti Sagar, R. S., for the Appellants.

The Hon'ble Pandit Sheo Narain, R. B., for the Respondents.

JUDGMENT.—This is a first appeal from the order of a Revenue Officer who tried the suit under the procedure laid down in section 117 (2) (b) of the Punjab Land Revenue Act XVII of 1887, which lays down that the procedure of the Revenue Officer shall be that applicable to the trial of an original suit by a Civil Court, and that he shall record a judgment and decree containing the particulars required by the Code of Civil Procedure to be specified therein.

Pandit Sheo Narain on behalf of the plaintiffs-respondents raises a preliminary objection that no decree has been drawn up by the lower Court in the form and manner prescribed by the Code of Civil Procedure. On the record there is a decree sheet signed by the Court in which the amount of costs incurred by each party is specified, but otherwise the form has been left blank and does not contain the particulars specified in Order XX, rule 6, Civil Procedure Code.

Mr. Moti Sagar on behalf of the appellants urges that the concluding paragraph of the judgment is a decree and appealable as such. It is, however, quite clear from the Code of Civil Procedure that in the case of a civil suit it is contemplated that the judgment and decree should be quite distinct. Section 33 of the Code lays down that the Court, after a case has been heard, shall pronounce judgment and on such judgment the decree shall follow. Order XX, rules 1 to 5, Civil Procedure Code, deal with judgments in original civil suits and rule 6 gives the particulars which are to be entered in the decree. Specified forms are prescribed for decrees in different classes of suits by Appendix D of the First Schedule to the Code. It is, therefore, quite clear that in the case of an original civil suit the decree must be

quite distinct from the judgment. Order ALI, rule 1, of the Code lays down that a memorandum of appeal shall be accompanied by a copy of the decree appealed from and (unless the Appellate Court dispenses therewith) of the judgment on which it is founded. Again section 117 (2) (b) of the Punjab Land Revenue Act lays down that the Revenue Officer shall record a judgment and decree containing the particulars required by the Code of Civil Procedure to be specified therein. In *Dulhin Golab Koer v. Radha Dulari Koer* (1) Pigot, J., said: "I must add that had the point been raised, I should have felt a difficulty in holding that a paragraph in the judgment not drawn up in the form of a decree, and not embodied in a separate form, is, within the terms of the Code of Civil Procedure, a decree at all."

We agree with this view and have no hesitation in holding that there is no decree in the present case within the meaning of the portions of the Civil Procedure Code above referred to, and, therefore, no appeal lies.

We, therefore, dismiss the appeal, but, as we consider that the plaintiffs were to blame for not moving the Court to draw up a formal decree, we leave the parties to bear their own costs in this Court. Pandit Sheo Narain says that he will advise his clients to move the lower Court now to draw up a proper decree.

Appeal dismissed.

(1) 19 C. 463 at p. 467 (F. B.).

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2510 OF 1917.

August 11, 1919.

Present:—Mr. Justice Chatterjea and Mr. Justice Duval.

GURUDAS SEN—PLAINTIFF—APPELLANT
versus

GOBINDA CHANDRA SINHA AND

OTHERS—DEFENDANTS—RESPONDENTS.
Landlord and tenant—Rent, payment of, partly in

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kind and partly in cash—Kabuliyat, provision in, in case of default—Tenant agreeing to pay definite sum as value—Landlord, whether entitled to market value.

The question whether a landlord is entitled to realise anything more than the value of the paddy mentioned in the *kabuliyat* on default of payment of the paddy by the tenant is one of construction of the *kabuliyat* in each case. [p. 919, cols. 1 & 2; p. 920, col. 1.]

A *kabuliyat* fixed the rent of a tenant as a specified sum of money to be paid in cash and a certain quantity of the produce to be delivered by the tenant to the lessor in a particular month according to a certain measure, and provided that in case of default the landlord would be entitled to recover the cash amount and a specific sum as the value of the produce. In a suit by the landlord claiming to recover the market value of the produce:

Held, that he was entitled only to realize the sum specified in the *kabuliyat* as the value of the produce and not its market value. [p. 919, col. 2; p. 920, col. 1.]

Appeal against the decree of the Subordinate Judge, 1st Court, Chittagong dated the 18th of May 1917, affirming that of the Officiating Munsif, Additional Court at Patiya, dated the 30th of June 1916.

Babu Ohandra Sekhar Sen, for the Appellant.

Babu Khitish Ohandar Sen, for the Respondents.

JUDGMENT.

CHATTERJEA, J.—This appeal arises out of a suit for rent based upon a *Kabuliyat* providing for payment of cash rent as well as Bhag paddy, and the question is whether the plaintiff is entitled to recover the market value of the Bhag paddy or the value thereof as stated in the *Kabuliyat*.

The *Kabuliyat* provides that the tenant would pay four rupees as rent and 31 *aris* of Bhag paddy, the paddy to be delivered at the house of the lessor in the month of Pous every year according to a certain measure and the cash rent within the course of the year. The *Kabuliyat* then says: "If I fraudulently do not pay the aforesaid rent and share of paddy, you shall be competent to realize the said rent and Rs. 36 as price of the paddy together with interest and damages by bringing rent suit under the current Act or under any other Act which may come in future, to which I shall raise no objection. To this effect I execute this *Kabuliyat* for permanently enjoying the land in succession to sons and grandsons." The Court below held that the case comes within the scope of the ruling in *Afar v. Surja Kumar Ghose* (1),

and that the plaintiff was not entitled to the market value of the paddy.

The plaintiff has appealed to this Court.

It appears that a previous suit for rent was compromised and reliance is placed on the fact that the *Solenama* did not mention the value of the paddy. But the *Solenama* only dealt with the claim for rent of a particular year and, moreover, provided that the defendant "shall pay in accordance with the purport of the *Kabuliyat* of 2nd Falgun 1240 M. S. to the plaintiff the amount of rent, cesses and share of the paddy." I think that the *Solenama* did not vary the terms of the contract contained in the *Kabuliyat* as contended for on behalf of the appellant.

The question, therefore, is whether the plaintiff is entitled to recover (besides rupees four described as rent) Rs. 36 only as the value of the paddy, or the market value of the paddy. As to the intention of the parties there cannot be any doubt that a portion of the rent was to be paid in kind, viz., 31 *aris* of paddy; and this is made clear by the provision that the paddy was to be delivered according to a certain measure at the house of the plaintiff in the month of Pous every year. But the question is whether the plaintiff is entitled to realize anything more than Rs. 36, the value of the paddy mentioned in the *Kabuliyat*, on default of payment of the paddy by the tenant. Contracts for payment of rent in kind (Bhag paddy) are very common, and have come up for consideration to this Court in many cases. The decisions, however, are not uniform. The question is no doubt one of construction of the *Kabuliyat* in each case, but the *Kabuliyats* in some of the cases are similar in nature though differently worded and as we have been asked on behalf of the appellant to refer the case to the Full Bench, it is necessary to examine the cases on the point.

In *Sohobut Ali v. Abdool Ali* (2), *Baneswar Mukherji v. Umesh Ohandra Ohakrabarti* (3), *Sheikh Isif v. Gopal Ohandra Dey* (4), *Akbar Ali v. Durga Kripa Sen* (5) and *Sarat Ohandra Roy v. Abbas Mandal* (6) it

(2) 3 C. W. N. 151.

(3) 7 Ind. Cas. 875; 37 C. 626.

(4) 8 Ind. Cas. 896; 12 C. L. J. 593.

(5) 8 Ind. Cas. 944; 12 C. L. J. 589.

(6) 41 Ind. Cas. 832; 21 C. W. N. cxi (140).

(1) 7 Ind. Cas. 842; 15 C. W. N. 249; 12 C. L. J. 649.

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was held that the lessor was entitled to the market value of the paddy, while in *Afar v. Surja Kumar Ghose* (1), *Nilmadhab Mahapatra v. Keshab Lal* (7), *Dwarika Noth v. Dwijendra Nath* (8) and *Asutosh Mukhopadhyaya v. Haran Ohandra Mukerjee* (9) it was held that the lessor was entitled to recover only the value of the paddy mentioned in the Kabuliyat and not the market value thereof. In all these cases a certain quantity of paddy was stipulated to be paid, and in each the price of the paddy was mentioned in the Kabuliyat, but in some of the cases it was not expressly stated that on default of payment of the paddy the price mentioned in the Kabuliyat was to be paid. This may be a ground of distinction. The decisions in the cases, however, [except in the case of *Sarat Chandra Roy v. Abbas Mandal* (6)] did not proceed upon the said distinction. In the case of *Sohobut Ali v. Abdool Ali* (2), *Baneswar Mukherji v. Umesh Ohandra Ohakrabarti* (3) and *Sarat Ohandra Roy v. Abbas Mandal* (6) there was no express stipulation that the value of the paddy mentioned in the contract was to be paid on default of delivery of the paddy. But the value of the paddy was mentioned, and in construing the document in the first case the learned Judges (Ameer Ali and Pratt, JJ.) held that Rs. 10 was put down in the Kabuliyat as the value of the paddy "for the sake of convenience or to meet the requirements of the law," and in the second (where the rent agreed to be paid was Rs. 12 14 and "40 maunds of paddy of which the value is Rs. 37 in all a rent of Rs. 49 14") Sir Lawrence Jenkins, C.J., (Doss, J., concurring) held: "The terms of that document clearly pointed to the fact that the rent is to be as to part in money and as to part in kind, and this is emphasized by the express provision relating to the delivery of paddy in the month of Pous every year. I think it is impossible to read the document otherwise than as it has been read by the learned Judicial Commissioner. It is quite true that the paddy has a money-value attributed to it, but that is explicable by the desirability of stating that amount for the purpose of fixing the stamp duty." In the third case, *Sarat Ohandra Roy v. Abbas Mandal* (6), the agree-

(1) 40 Ind. Cas. 819; 26 C. L. J. 94; 47 C. 139n.

(8) 53 Ind. Cas. 103; 30 C. L. J. 37.

(9) 53 Ind. Cas. 382; 30 C. L. J. 41; 23 C. W. N. 1021; 47 C. 133.

ment was to pay Rs. 6 as the cash rent and $5\frac{1}{2}$ aris of paddy, whose price was Rs. 11 8 0 as paddy rent, in all Rs. 17 8 0. Fletcher and Newbould, JJ., held that "whose price is" meant "the present price of which is" and allowed the value of the paddy at the market rate. The learned Judges observed that there was no universal rule that if no paddy is delivered the tenant has the right to pay the amount mentioned for the paddy, that it must depend upon the words in each case, and that in cases where the tenant had been held entitled to deliver the paddy or pay the price thereof, the tenant had an absolute right under the terms of the leases either to deliver the paddy or to pay to the landlord the sums of money mentioned in the Kabuliyats.

In the cases of *Sheik Israf v. Gopal Ohandra Dey* (4) and *Akbar Ali v. Durga Kripa Sen* (5), however, the contract provided for delivery of the paddy and on default the value mentioned in the Kabuliyat. In the first case the tenant agreed to pay every year 80 cottas of paddy and 10 cottas of Kalai measured by a cotta of 14 seers, and the Kabuliyat stated "if we fail to give the same then we will pay you its price amounting to Rs. 30." The learned Judges, Brett and Richardson, JJ., observed: "The tenants agreed to pay to the landlord produce rent of a certain amount and on their failure to do so, to pay its price and the document only merely for the convenience of the parties or for the purpose of registration goes on to state the value of the produce rent as existing at the time when the document was executed. In our opinion that estimate of the value was not intended to modify in any way the terms of the contract between the parties, which was that the tenants should pay a yearly rent in kind and that on their failure to do so, they should pay its price," and held that the plaintiff was entitled to the market value of the paddy. In the second case, *Akbar Ali v. Durga Kripa Sen* (5), the agreement was to deliver 128 aris of paddy measured with a measure to be supplied by the landlord. In the tabular statement was entered 28 aris of paddy, value 34 rupees, but in the body of the lease it was said that if the tenant failed to pay the measure of paddy, then the arrears of rent in paddy or the price thereof with damages and costs shall be realizable by legal process.

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Stevens and Handley, JJ., held that what was contemplated was payment of the rent by delivery of the paddy itself and the tenant was not at liberty to deliver either paddy or to pay Rs. 32 and that the tenant was to pay the market value of the paddy. The learned Judges observed: "Now it is obvious that if by the term the price thereof is meant the sum of Rs. 32, entered in the tabular statement, the tenant could at any time when paddy was dear evade the stipulation that he was to pay by delivery of paddy to his own gain. This, we think, could never have been intended; whether the entry of the nominal value in the tabular statement was made as representing the market value of the paddy at the time when the lease was granted or whether it was made for some other object can only be a matter of conjecture, but in view of the stringent provisions relating to the delivery of the paddy we are not prepared to hold that the entry was made with a view to leave it to the tenant at his option either to deliver the paddy or to pay what might at a particular time be a very inadequate sum as the value of it."

On the other hand in the cases of *Afar v. Suria Kumar Ghose* (1), *Nilmadhab Mahapatra v. Keshab Lal* (7), *Dwarika Nath v. Dwijendra Nath* (8) and *Asutosh Mukhopadhyaya v. Haran Chandra Mukerjee* (9) a contrary view was taken. In *Afar's* case (1) the lease provided for payment of 3 *aris* of paddy on account of 4 *bighas* of land and certain cash rent for other lands and also provided that if the tenant neglected to pay the fixed rent and paddy, the landlord would be entitled to realize amicably or by action at law Rs. 12 as the price of the paddy and the cash rent. Mookerjee and Sharfuddin, JJ., held that the plaintiffs were entitled, on failure to deliver the paddy, to realize only Rs. 12 as its value, and not the market value. Referring to the suggestion that Rs. 12 was mentioned in the lease as the value of the paddy only for the purpose of ascertainment of the registration fee payable, the learned Judges observed: "The plaintiffs have attempted to prove this allegation by oral evidence. In our opinion it was not competent to them to do so in view of the provisions of section 92 of the Evidence Act," and pointed out that in the cases of *Sohab Ali v. Abulool Ali* (2), *Akbar Ali v. Dargi Kripa Sen* (5) and *Sheik Isaf v. Gopal Chandra Dey* (4) the Court was not

invited to consider the effect of section 92 of the Indian Evidence Act.

In *Nilmadhab Mahapatra v. Keshab Lal* (7) the agreement was to pay Rs. 8 in cash and 29½ maunds of paddy as rent, the paddy to be delivered in the month of Magh of each year, and there was a provision that if the tenant could not deliver the paddy he was to pay its price at the rate of 1 maund 10 seers per rupee. At that rate the value of the paddy would be Rs. 23-9-2 but Rs. 24 was stated in the schedule. On second appeal it was held that had the parties really agreed that a particular fixed sum was to be paid in lieu of the paddy, there would not have been this difference; that the mention of the price of the paddy did not modify the contract to deliver the paddy, and seemed to have been made only for the purpose of fixing the stamp duty and registration fee, and that it was not left to the tenant at his option either to deliver the paddy or to pay what might at a particular time be a very inadequate sum as the value of it. That decision was reversed on Letters Patent Appeal. The learned Chief Justice (Mookerjee, J., agreeing) held that the rent was payable at the price mentioned in the contract and not at the market rate of paddy at the time the suit was instituted; and observed: "we have no right to make any speculation as to whether certain passages were entered in the contract for some motive which is not apparent on the contract itself; for instance, it has been said that this power to substitute a money payment for the delivery of paddy and the mention of the 24 rupees have been put in for the purpose of registration."

In an earlier case on the point (though recently reported), *Dwarika Nath v. Dwijendra Nath* (8), the *Kabuliyat* provided for rent Rs. 59 10 0 and also the payment of 1½ *Bish* of paddy "which may be valued at Rs. 30 by guess" making a total of Rs. 89 10 0 as the assessed rent. The total rent was described as *Abadharita Jama* (fixed rent) in the lease, which was a *Mourashi Mekarari* lease and the learned Judges (Maclean, C. J., and Banerjee, J.) held that the rent was fixed at Rs. 89-10-0, and that though the parties intended to pay so much rent in money and so much in kind, in order to avoid disputes and the going into any question as to the value of the paddy in the event of its non delivery, the parties agreed that it should be valued

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at Rs. 30 by estimation and that view was supported by the words "making a total of Rs. 89-10-0 as the assessed rent."

The latest case on the point is that of *Asutosh Mukhopadhyaya v. Haran Chandra Mukerjee* (9) and the terms of the contract were similar to those in *Dwarika Nath v. Dwijendra Nath* (8). It stipulated for cash rent at the rate of Rs. 1-6-8 and paddy rent was payable at the rate of Rs. 7-3-16 an *ari*. It further stated that the market value of the paddy was Rs. 15 and that the total rent was Rs. 16-6-8 obtained by the addition of the rent in cash and the money value of the rent in kind, and that there should be no increase or abatement in the Jama. It was held by the learned Chief Justice (Sanderson, C. J.) and Mookerjee, J. that the rent was fixed at Rs. 16-6-8 if the tenant should fail to deliver the paddy under the terms of the contract. Newbould, J., was of a contrary opinion. He followed *Baneswar Mukherji v. Umesh Chandra Chakrabarti* (3) and held that in the absence of any agreement in the *Kabuliyat* to pay the total rent in cash, the statement fixing the total rent at Rs. 16-6-8 was added to the document for the purpose of fixing the stamp duty and registration fee.

The learned Chief Justice in this case also observed: "I do not see why the Court should speculate and as a result of that speculation arrive at the conclusion that the important provision to which I have referred had been inserted merely for the purpose of determining the registration fee." Both the learned Chief Justice and Mookerjee, J., in construing the document in that case relied upon the words *Dharjya Jama* (the fixed rent), which was practically similar to the words (*Abadharita Jama*) which had to be construed by Maclean, C. J., and Banerjee, J., in *Dwarika Nath v. Dwijendra Nath* (8). Mookerjee, J., observed that the suggestion that the money value of the paddy is stated in contracts of this character for purpose of Registration Law was made in the cases reported as *Sohobut Ali v. Abdool Ali* (2), *Sheik Isaf v. Gopal Chandra Dey* (4), *Akbar Ali v. Durga Kripa Sen* (5) and *Baneswar Mukherji v. Umesh Chandra Chakrabarti* (3), while the agreement was construed strictly without travelling beyond the terms expressed there in the cases reported as *Bipro Ohoran v. Suchand Roy* (10), *Afar v. Surja Kumar*

(10) 8 Ind. Cas. 945; 12 C. L. J. 595.

Ghose (1) and *Nilmadhab Mahapatra v. Keshab Lal* (7), and that had the decision of Sir Francis Maclean, C. J. and Banerjee, J., in *Dwarika Nath v. Dwijendra Nath* (8) been reported the current of decisions of this Court might have been uniform.

As stated above in *Afar's* case (1), the plaintiff attempted to prove by oral evidence that the value of the paddy was mentioned in the lease for the purpose of ascertainment of the registration fee payable, and Mookerjee, J., accordingly held that it was not competent to the plaintiff to do so having regard to the provisions of section 92 of the Evidence Act while in the cases reported as *Sohobut Ali v. Abdool Ali* (2), *Sheik Isaf v. Gopal Chandra Dey* (4), *Akbar Ali v. Durga Kripa Sen* (5) and *Baneswar Mukherji v. Umesh Chandra Chakrabarti* (3) the learned Judges in construing the contract were of opinion (as a matter of construction) that the value of the paddy might have been mentioned for the purpose of ascertaining the registration fee, and in *Dwarika Nath v. Dwijendra Nath* (8) Banerjee, J., observed: "whatever weight the explanation offered for the plaintiff that the estimated value of the paddy is given in the *Kabuliyat* for the purpose of determining the amount of stamp duty might have had if the *Kabuliyat* had not contained the words 'making a total of Rs. 89-10-0 only as the assessed rent,' in the presence of those words that explanation loses all its force."

It appears that in the two cases reported as *Dwarika Nath v. Dwijendra Nath* (8) and *Asutosh Mukhopadhyaya v. Haran Chandra* (9) the decision mainly turned upon the particular words used, viz., *Dharjya Jama* or *Abadharita Jama*, in connection with the total rent including the value of the paddy rent. It is to be observed, however, that in the case of *Baneswar Mukherji v. Umesh Chandra Chakrabarti* (3), also decided by Jenkins, C. J., and Doss, J., the total rent was fixed at Rs. 49-4 C which included Rs. 37 the value of the paddy and the lease was a *Mokrari* one, and yet the market value of the paddy was allowed. In the case of *Sheik Isaf v. Gopal Chandra Dey* (4) and *Akbar Ali v. Durga Kirpa Sen* (5) as well as in *Afar v. Surja Kumar Ghose* (1) and *Nilmadhab Mahapatra v. Keshab Lal* (7) there was express stipulation that in default of payment of the paddy, the

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value thereof mentioned in the contract was to be paid. But while in the first two cases the learned Judges held that the plaintiff was entitled to the market value of the paddy, in the third and fourth cases the contrary view was taken. There is, therefore, a conflict of judicial opinion on the point. In the second case it may be open to doubt whether the words "the price thereof" referred to the price mentioned in the tabular statement, but in the first case the provision was clear. I have omitted to mention the case of *Bipro Oharan v. Suchand Roy* (10). But in that case the contract was to pay Rs. 35 as the rent and in lieu thereof a certain quantity of paddy was agreed to be paid. Woodroffe, J., held that the contract was to pay a money rent, and that the question had been decided in a previous suit. The other learned Judge (Richardson, J.) based his decision on the ground that the decision in the previous suit operated as *res judicata*. That case, therefore, does not help us in deciding the question before us. I have discussed the cases on the point at some length, because these cases frequently come up to this Court, and the learned Pleader for the appellant pressed us to refer the matter to the Full Bench.

Contracts for payment of Bhag paddy as stated above are very common, and it is well known that middle class people, specially of the Bhadrilogue class who cannot cultivate lands themselves, let out their lands for getting paddy for the consumption of their family and in some cases the Bhag paddy is the only means of subsistence of the family. A certain value has to be fixed for the paddy in the Kabuliyat not only for the ascertainment of the registration fee, but also (and specially) for fixing the stamp duty payable, though it is not so expressly stated in the Kabuliyat. It is said that the parties may agree as to the value of the paddy in order to avoid disputes and the going into any question as to the value in the event of its non-delivery. But that would be a question of intention, and if it is clear from the Kabuliyat (for instance where it is provided that the paddy is to be delivered in a particular month or measured with a certain

measure) that it is only paddy which the parties intended should be paid, it would be inconsistent with that intention to hold that a fixed sum (which might be a wholly inadequate value of the paddy at the date of the suit) was agreed upon to be paid in the event of non-delivery of the paddy in order to avoid any question as to its value, in cases where the value is merely mentioned without any express stipulation to pay such value in the event of non-delivery of the paddy.

It is a matter of great hardship in such cases, as the value of the paddy at the date of the Kabuliyat might be one rupee a maund, while at the date of the suit, it might be four rupees per maund, and if he is to get the value of the paddy mentioned in the Kabuliyat, he would get only one-fourth of the paddy agreed upon to be paid.

A distinction may perhaps be drawn between such cases and cases where there is an express stipulation to pay the sum mentioned in the Kabuliyat as the value of the paddy in the event of its non-delivery. But as stated above, even where there is such an express stipulation to pay the value mentioned in the Kabuliyat in the event of non-delivery of the paddy, it has been held, upon a construction of the contract in some cases, that the value mentioned was the value of the paddy at the date of the contract or stated for the purposes of registration, while a contrary view has been taken in some other cases. The view taken in the case of *Afar v. Surja Kumar Ghose* (1) and the recent decisions, *viz.*, that it is not open to the Court to hold that the value of the paddy mentioned in the Kabuliyat is explicable on the ground that it was so done for fixing the stamp duty or registration fee, affects not only the latter class of cases, but the former class also where a money value is merely stated without any agreement to pay such value. It is desirable, therefore, that the question should be settled by a Full Bench.

In the present case, however, there is an express contract that if the tenant did not deliver the paddy, the landlord would be entitled to realize by suit Rs. 36 as the price of the paddy. There was no such express stipulation for realiz-

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ing by suit the sum mentioned in the Kabuliyat as the value of the paddy in the other cases, except in the case of *Afar v. Surja Kumar Ghose* (1), and it was held in that case that the landlord was entitled only to the value mentioned in the Kabuliyat. There being thus some distinction between the present case and the cases in which it was held that the landlord was entitled to the market value of the paddy, the case cannot be referred to the Full Bench, and having regard to the decision in the case of *Afar v. Surja Kumar Ghose* (1) and the recent decisions on the point, the appeal must be dismissed with costs.

DUVAL, J.—In my opinion, this appeal should be dismissed with costs.

As I read the contract in the Kabuliyat, it says: "I execute this Kabuliyat in respect of the aforesaid land promising to pay Rs. 4 as rent and 91 *aris* of paddy as share of paddy for permanently enjoying and possessing the said land in succession to sons and grandsons." The document then goes on to say: "If I fraudulently do not pay the aforesaid rent and share of paddy, you shall be competent to realise the said rent and Rs. 36 as price of the paddy together with interest and damages by bringing a rent suit under the current Act or under any other Act which may come in force, to which I shall raise no objection."

The recent rulings on the disputed point as to the realisation of paddy rent go to show that each case should be decided on the terms of the contract.

In the present case, from the wording of the Kabuliyat, it appears to me clear that the only amount which could be realised on default of payment of the share of paddy was Rs. 36 as its value, even though Rs. 36 is by no means the proper value at the present day for 91 *aris* of paddy.

It is urged that by the Solenamah a different contract had been created; but the Soleramah only related to the amount of rent to be paid for the years for which the former suit was brought and was not a binding document for subsequent years.

In my opinion, therefore, the appeal should be dismissed with costs.

Appeal dismissed.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1621 OF 1916.

December 23, 1919.

Present :—Mr. Justice Shadi Lal and Mr. Justice Broadway.

ZIA-UD-DIN AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA
IN COUNCIL—DEFENDANT—

RESPONDENT.

*Land Acquisition Act (I of 1894), ss. 18, 26—
Reference to Court, scope of—Duty of Judge to consider
question of compensation in its entirety.*

When a case is referred under section 18 of the Land Acquisition Act, the whole case is referred subject to the limitation contained in section 26 of the Act, and not merely any particular objection, and the District Judge is empowered, indeed bound, to consider the question of the compensation awarded in its entirety [p 921, col. 2]

Gangadhar Sastri v. Deputy Collector of Madras, 14 Ind. Cas. 270; 22 M. L. J. 370; 11 M. L. T. 327; (1912) M. W. N. 712, followed.

First appeal from the order of the District Judge, Delhi, dated the 6th March 1916, awarding Rs. 11,618.4.6 as compensation for certain land, situate in Delhi, acquired by the Government.

Lala Moti Sagar, R. S., and Mr. A. O. Bose, for the Appellants.

Lala Mul Chand, R. S., Public Prosecutor, for the Respondent.

JUDGMENT.—This is an appeal arising out of proceedings under the Land Acquisition Act. By Notification No. 775, dated the 21st December 1911, the Government acquired the property in suit for the new Capital of India at Delhi. The Special Land Acquisition Officer, Sardar Khazan Singh, awarded Rs. 8,719.11.3 as the value of the land, Rs. 1,590.10.0 *muafi*, and Rs. 1,307.15.3, the 15 per cent. addition by way of compensation, or a total of Rs. 11,616.4.6. The appellants, *Hafiz Zia-ud-Din* and others, who were the owners of the area acquired, raised objections to this award and an order of reference was passed by the Special Land Acquisition Officer in due course. This order of reference is printed at pages 14—16 of the printed paper-book.

The District Judge of Delhi proceeded, on this reference, to record evidence and gave his award on the 6th of March 1916. In his award the learned District Judge came to the conclusion that the market value of the property acquired was approximately

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Rs. 10,000 and as that sum with the 15 per cent. addition amounted to slightly less than that awarded by the Land Acquisition Officer the original award was maintained. In framing his award the Land Acquisition Officer departed from the recognized method of assessment and valued the land according to certain methods of his own, giving a separate valuation for wells, buildings, trees and for the land. The resulting total values, however, were approximately the same.

Rai Sahib Moti Sagar for the appellants expressed himself satisfied with the value placed by the Land Acquisition Officer on the buildings, the trees and the *muafi* rights but challenged the values placed on the wells and the other items. The land acquired is in area 12.43 acres, situate in Mauza Banskauli towards the south-west of the Sadar Bazar, Delhi. It is just beyond a small hamlet known as Shidipura and is not easy of access. The inhabitants of Shidipura are said to be chiefly butchers, Malis and people of that class. A few hundred yards further on there was also a hamlet known as Bagh Karol, which at the time of the notification was occupied by tanners and leather dyers who carried on their trade there. On this land there was a garden which occupied 1.08 acres. The remaining land was under ordinary cultivation. There were two wells and the appellants were entitled further to irrigate about one-third of this land from a Government well. There also appear to have been a few buildings but admittedly these were not of much value. The appellants also held certain *muafi* rights in connection with this land.

Before the District Judge Rai Sahib Mul Chand for the Secretary of State took exception to the method of assessment adopted by the Special Land Acquisition Officer and he pressed the same objection before us, contending that the correct method of valuation for purposes of the Land Acquisition Act was to capitalise the value of the land based on its rental or its potential value if profitably laid out, or to ascertain its value by a consideration of the prices paid for similar lands in the immediate neighbourhood. Admittedly the method of capitalising the value on the basis of its rental would be impossible in this case and Rai Sahib Mul Chand pointed out that there was really no potential value of the area in question so far as its utilisation for

building purposes was concerned. With this view we are in agreement. Having regard to the situation of the area acquired it seems to us that the land had no potential value as a building site at the time when the notification was issued. We are also of opinion that the method adopted by the Special Land Acquisition Officer was not a sound one. The learned District Judge has based his calculations on the prices paid for lands in the immediate vicinity, which in our opinion is the best and safest course in the present case. Rai Sahib Moti Sagar objected to this method, urging that the District Judge had no power to examine the compensation awarded as a whole but should have confined himself to a consideration of the valuation of the various parts into which it had been split up by the Land Acquisition Officer. In support of his contention he referred us to *British India Steam Navigation Co. v. Secretary of State for India* (1). This authority was, however, considered in a case reported as *Gangadhar Sastri v. Deputy Collector of Madras* (2), where it was held that when a case is referred under the Land Acquisition Act, the whole case is referred subject to the limitations contained in section 26, and not merely any particular objection. In this view we concur and hold that the District Judge was empowered, and indeed bound, to consider the question of the compensation awarded in its entirety.

At pages 30 and 31 of the printed paper-book is to be found a list of seven sales of lands in the immediate vicinity of the area acquired. Of these the seventh, a sale by Chhote Lal and others to Raghbar Dial and others, has been correctly eliminated from consideration as, though the most recent transaction, the actual value placed on the land then sold was difficult to ascertain. Items 3 and 4 of this list are two sales effected by the present appellants in 1904 and 1906. The former sale was in favour of certain Punjabi Muhammadans who acquired the land for the purposes of a graveyard. The later sale was in favour of Abdul Hakim and others, and the areas in the two sales were approximately the same and under each sale a well and

(1) 8 Ind. Cas. 107; 38 C. 230; 12 C. L. J. 505; 15 C. W. N. 87.

(2) 14 Ind. Cas. 270; 22 M. L. J. 379; 11 M. L. T. 327; (1912) M. W. N. 712.

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rights therein were conveyed. Calculation shews that the sale in 1904 realised an average rate of Rs. 764 per acre, while in 1906 the average rate was Rs. 707 per acre. The learned District Judge has considered that the sale of 1904 was for a fancy price and, therefore, based his calculation, more or less roughly, on the sale of 1906. In 1899 a transaction took place under which 3.16 acres of land including a well and certain *muafi* rights were sold for Rs. 1,800 or an average of Rs. 570 per acre.

After hearing Counsel on the question of the sale to the Panjabi Muhammadans, we think it would be fairer to take the two sales by the appellants of 1904 and 1906 together and to strike a mean as to the value per acre then realized, at the same time regarding the transaction as one of 1905. This mean or average comes to Rs. 735 per acre. Calculating from the transaction in 1899, we thus have a rise, in the course of six years, of Rs. 165 per acre calculated up to 1905. Allowing a similar rate of appreciation in values for the next six years up to 1911, we arrive at the figure of Rs. 900 per acre and this, in our opinion, would represent the correct market value as near as can be ascertained of the land in question, giving a total of Rs. 11,187 or a slight increase in the amount awarded by the learned District Judge. To this must be added the 15 per cent. allowed by the Act which comes to Rs. 1,678 0.9, giving a total of Rs. 12,865 0.9. We accordingly enhance the amount awarded by Rs. 1,256-12-3.

The claim made by the appellants was exceedingly exorbitant and in the circumstances we consider that the parties should bear their own costs throughout and we order accordingly.

Order accordingly.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 597 OF 1918.

March 31, 1919.

Present:—Justice Sir William Ayling, Kt.

T. A. ANANTHA RAMA AIYAR AND

ANOTHER—DECREE-HOLDER AND

ASSIGNEE—PETITIONERS

versus

KUMARASWAMI PANDARAM—

DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 2, 16—Transfer of decree, application for, recognition of—Uncertified payment out of Court, plea of, sustainability of.

An uncertified adjustment cannot be considered by the Court as a ground for refusing to recognise the transfer of a decree and where the transferee-decree-holder applies for execution, the Court has no discretion to refuse execution on the ground that there has been an adjustment though not certified to the Court [p. 923, col. 2.]

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the order of the Court of the District Munsif, Palghat, dated the 19th February 1918, in Execution Petition No. 1647 of 1917 in Small Cause Suit No. 1641 of 1912.

FACTS.—The joint application of the decree holder and his transferee for execution was resisted by a plea of adjustment before transfer, thereby impeaching the transfer as fraudulent. The Court below found fraud and dismissed the application.

Mr. P. V. Parameswara Aiyar, for the Petitioners.—Where the alleged adjustment has not been certified within the time provided by law, it cannot be pleaded in answer to an application for execution by a transferee-decree holder. *Venkataswami Naidu v. Rangappa Naidu* (1).

[AYLING, J.—Where there is a specific allegation of fraud as against the transfer, is the Court prohibited from going into the question?]

The payment must be got certified within the time allotted. As regards the recognition of the transfer, the Court had no doubt a discretion under section 232 of the Civil Procedure Code of 1882, but the particular words are omitted in Order XXI, rule 16, of the present Code. It has been so held in *Asad Ali Molla v. Haider Ali* (2).

(1) 26 Ind. Cas. 944; 2 L. W. 109.

(2) 6 Ind. Cas. 826; 38 C. 13 at p. 21; 14 C. W. N. 918; 12 C. L. J. 130.

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If the transfer is not recognised, the decree-holder is entitled to execute the decree in spite of the transfer. In the present case, the decree holder has joined the transferee in the application. *Ari Ohetty v. Theerthamalai Ohetty* (3).

Mr. O. Unnikkanda Menon, for the Respondent.—In *Venkataswami Naidu v. Rangappa Naidu* (1) no fraud was specified. That it is so specified in the present case does make a difference. See *Hansi Gothaji Marwadi v. Bhawji Jogaji Marwadi* (4), following *Trimback Ramkrishna v. Hari Laxman* (5).

[Mr. Parameswara Aiyar.—*Trimback Ramkrishna v. Hari Laxman* (5) has been dissented from in *Mathar Dravia Sahaya Ela Nidhi Company Limited v. Subramania Pillai* (6), based on *Budrudeen v. Gulam Moideen* (7)].

[AYLING, J.—*Asud Ali Molla v. Haider Ali* (2) lays down that the Court has no discretion under Order XXI, rule 16, in the matter of recognising the transfer.]

The dictum is purely obiter. And that decision ignores the essential distinction between an allegation of a specific fraud and one of fraud generally. See *Byyyan Ramayya v. Nidamarthi Krishnamurthi* (8), (a case under Order XXI, rule 2).

Next, Order XXI, rule 2, does not apply to transferees of decrees. See the definition of 'decree holder' in the present Code, under the old Code the definition included also an assignee. Order XXI, rule 2, applies only to decree-holders. At most section 49, Civil Procedure Code, applies and the assignee takes only subject to equities. See *Ponnuswami Nadar v. Letchmanan Ohettiar* (9).

[AYLING, J.—That is one specific exception recognised as regards benami transfers and that is the case in *Ponnuswami Nadar v. Letchmanan Ohettiar* (9).]

See also *Thiruvengadam Pillai v. Doridla*

Subbiah (10). An assignee is not included in the definition of 'decree-holder.'

Further this is not a matter to be interfered with in revision.

JUDGMENT—Following *Venkataswami Naidu v. Rangappa Naidu* (1) I must hold that the lower Court was not justified in considering the discharge alleged by the defendant. It certainly could not be set up against the original decree holder [*vide Budrudeen v. Gulam Moideen* (7)]. It is argued that it may nevertheless be considered by the Court as a ground for refusing to recognise the transfer of the decree, but in view of the wording of Order XXI, rule 16, from which the words "if that Court thinks fit" found in the old section 232, have been omitted, it is difficult to hold that the Court has a discretion to decline to allow execution on this ground [*vide Asud Ali Molla v. Haider Ali* (2)].

The order of the lower Court must be set aside and execution must be allowed to proceed. I make no order as to costs.

M. C. P.

Order set aside.

(10) 13 Ind. Cas. 659 at p. 660; 11 M. L. T. 144; (1912) M. W. N. 176.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1561 of 1915.

May 7, 1919.

Present:—Mr. Justice Scott-Smith and Mr. Justice Martineau.

KHAZAN SINGH—PLAINTIFF—APPELLANT
versus

SUHEL SINGH AND OTHERS—DEFENDANTS
—RESPONDENTS.

Custom—Alienation—Necessity—Male proprietor,
whether entitled to anticipate needs.

A male proprietor is no more entitled to anticipate his needs than a widow. [p. 924, cols. 1 & 2.]

Second appeal from the decree of the Additional District Judge, Lahore, dated the 19th February 1915.

The Hon'ble Mr. Fazl-i-Husain, for the Appellant.

Mr. Kishen Chand, for the Respondents.

(3) 34 Ind. Cas. 791; 3 L. W. 521.

(4) 33 Ind. Cas. 232; 40 B. 333 at p. 336; 18 Bom. L. R. 22.

(5) 7 Ind. Cas. 940; 34 B. 575; 12 Bom. L. R. 683.

(6) 40 Ind. Cas. 869; 5 L. W. 644.

(7) 12 Ind. Cas. 562; 36 M. 357; 10 M. L. T. 396; (1911) 2 M. W. N. 473; 24 M. L. J. 541.

(8) 32 Ind. Cas. 952; 40 M. 296; 3 L. W. 186; 19 M. L. T. 124; (1916) 1 M. W. N. 133.

(9) 12 Ind. Cas. 657; 35 M. 659 at p. 668; 10 M. L. T. 442; (1911) 2 M. W. N. 568; 22 M. L. J. 170.

AMIR ALI v. GOPALDAS.

JUDGMENT.—On the 25th August 1902 Phula Singh sold 107 *kanals* 4 *marlas* of land to respondents Nos. 1—5 for Rs. 2,680, which included Rs. 1,760 due to mortgagees, items of Rs. 30 and Rs. 90 and an item of Rs. 800, for which the vendees executed a bond. Phula Singh died in 1907, leaving a widow, who is respondent No. 6. The plaintiff, a collateral of Phula Singh, sues to contest the validity of the sale, and the suit has been dismissed, the Courts below concurring in the finding that the sale was for necessity. The plaintiff has filed a second appeal in this Court, contesting the necessity for the item of Rs. 800, for which the vendees gave a bond.

From the endorsements on the bond it appears that the vendees paid Rs. 806 to Phula Singh in eleven instalments during a period of four years beginning in 1903. It has also been found that they paid an additional sum of Rs. 73 to Phula Singh's widow in 1913. The learned Additional Judge holds that necessity has been made out as Phula Singh, having no land left on which he could live (all except 6 *kanals* being under mortgage), did what was tantamount to purchasing for himself an annuity and was wise in so doing.

The bond is, however, not an instalment bond, but recites that the money is to be paid to Phula Singh in three years. We do not think that by obtaining such a bond from the vendees Phula Singh can be said to have been purchasing an annuity. The reason for the Rs. 800 not being paid at the time of the sale may be that the vendees had not got the money.

It is not shown that Phula Singh was under the necessity of raising the sum of Rs. 800 from the vendees. Not only had he 6 *kanals* free from mortgage, but he was cultivating the mortgaged land as a tenant under the mortgagees, and there is no reason why he should not have been able to maintain himself and his wife by his labour.

Further, we are of opinion that Phula Singh was not entitled to anticipate his needs. A widow cannot do so, as has been held in *Gurdit Singh v. Mehr Singh* (1) and *Nihal Singh v. Musammatt Rajon* (2), and the position of a male proprietor

(1) 67 P. R. 1884.

(2) 11 P. R. 1885.

does not appear to be different from that of a widow in this respect.

We hold that no necessity has been proved for the item of Rs. 800, which must, therefore, be disallowed. We accept the appeal and pass a decree declaring that the sale of 107 *kanals* 4 *marlas* effected by Phula Singh on the 25th August 1902 shall not affect the appellant's reversionary rights, but that respondents Nos. 1—5 will have a charge on the land to the extent of Rs. 1,880, which the appellant will have to pay before he can obtain possession on the death or re-marriage of Phula Singh's widow. Respondents Nos. 1—5 will pay the appellant's costs in this Court. The parties will bear their own costs in the lower Courts.

Appeal accepted.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 196 OF 1915.

October 2, 1916.

Present :—Mr. Mittra, A. J. C.

AMIR ALI—JUDGMENT DEBTOR—APPELLANT
versus

GOPALDAS, MINOR, THROUGH NEXT FRIEND
CHUN YABAI, AND OTHERS—DECREE-

HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 48, O. XXI, r. 15, O. XXXIV, r. 4—Execution, application for—Order delivering possession, whether adjudication that execution not barred—Order, whether can be questioned in subsequent execution proceedings—Decree absolute for foreclosure—Order for possession, absence of—Irregularity—Joint decree-holders—Execution by one, effect of—Decree omitting shares of judgment-debtors, whether enforceable—Limitation for executing decree.

An order delivering possession of property under an execution application amounts in law to an adjudication that the application is in time, and it is not open to the judgment-debtor to question the legality of that order in proceedings started on a subsequent application for execution. [p. 925, col. 1.]

The absence of a formal order for possession in a decree absolute is a mere irregularity and does not vitiate proceedings consequent on the execution of the decree. [p. 925, col. 2.]

Order XXI, rule 15, Civil Procedure Code, allows one of several decree-holders to apply on behalf of all and it is not for the judgment-debtor to say

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that sufficient steps have not been taken to safeguard the interests of the other decree-holders, when they themselves have made no complaint whatever. [p. 925, col. 2.]

Where a decree absolute in a suit for foreclosure is incapable of execution owing to the absence of a formal order for delivery of possession, the rule of 12 years contained in section 48 of the Civil Procedure Code applies from the date the decree becomes capable of execution, that is, from the date of the formal order for delivery of possession. [p. 925, col. 2.]

A decree is not incapable of execution merely because it omits to specify the shares of the judgment-debtors in the property decreed, if the decree-holder has secured possession [p. 926, col. 1.]

Appeal against the decree in Civil Appeal No. 145 of 1914, in the Court of the Divisional Judge, Nagpur Division, decided on 12th December 1914, arising out of the decision in Civil Case No. 87 of 1895, in the Court of the Senior Subordinate Judge, Wardha, decided on 11th July 1914.

Mr. Atmaram Bhagwant, for the Appellant.

JUDGMENT.—This appeal arises out of execution proceedings in Suit No. 87 of 1895 which terminated in a decree absolute for foreclosure on the 26th November 1897, based upon a mortgage, dated the 15th November 1885, executed by Amir Ali. In this suit Faiz Ali was made a defendant on the ground that he was a donee of Amir Ali subsequent to the mortgage. The second appeal has been filed by Amir Ali, but not by Faiz Ali. The first point argued is that the application for execution is barred by limitation, inasmuch as the first application for execution was made on the 14th of May 1901, that is more than three years after the decree absolute, and it is further contended that, although the subsequent applications were made within three years of each other, they also must be held to be equally barred for the reason already assigned. The learned Pleader for the appellant, however, concedes that, upon the application of 1901, possession of some of the property was actually delivered. If that is so, then the order delivering possession of property amounted in law to an adjudication that the application was in time, and it is no longer open to the judgment debtor to contest the legality of that order, and the finding which indirectly underlies the order.

It is next contended that the order

was *ultra vires* as the decree absolute did not contain an order for delivery of possession, as it should have done. The Pleader for the appellant argues that a formal order for delivery of possession was passed on the 22nd of October 1904 and that the proceedings of 1901 were, therefore, of no legal effect. Now the order of 1901 must be held binding on the parties. It was passed after notice to the appellant, and its legality on the grounds just mentioned can no longer be questioned. The absence of a formal order for delivery of property is an irregularity, which cannot be said to have prejudiced the parties, and it is too late now to question the validity of that order.

It is contended that the Muktyar who signed the application for execution was only a Muktyar for some of the decree-holders, but not for all. Therefore, the applications for execution are bad in law. There is no force in this argument. Order XXI, rule 15, allows one of several decree holders to apply on behalf of all, and it is not for the judgment-debtor to say that sufficient steps have not been taken to safeguard interests of the other decree-holders, when they themselves have made no complaint whatever.

The next point urged is that the execution of the decree is barred under section 48 of the Civil Procedure Code, inasmuch as more than twelve years have elapsed since the date of the decree absolute. But the appellant's own contention is that the decree absolute was incapable of execution, until a formal order for delivery of possession was passed on the 22nd of October 1904. The rule of twelve years laid down in section 48 will not apply from the date of the decree absolute, but from the date when the decree became capable of execution and the present application is, therefore, within time.

It is argued that as regards the fields in Moi and Mobarakpur, the decree should be interpreted as allowing possession of only the same share of the fields as in the villages. The decree does not bear any such interpretation. The decree absolute first specifies the shares in the villages of Moi and Mobarakpur, then mentions the fields in Daadi, Isapur, Lakhanwada,

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and thereafter gives the fields of Moi. I do not think it is possible to interpret the decrees in the way suggested.

It is said that the decree-holders are claiming mutation of something like 11-annas share in the two villages of Moi and Mobarakpur. This is really outside the record, but I think I may as well express my opinion that, if they are so claiming, they are claiming more than the decree in Suit Nos. 86 and 87 entitled them to, for it is obvious that the 5-annas 4-pies share of Moi and Mobarakpur decreed in Suit No. 86 is included in the shares decreed in Suit No. 87. It is contended that the decree-holders have obtained possession of fields in Moi and Mobarakpur other than those specifically mentioned in the decree absolute. The possession of the Mobarakpur fields was delivered on the 24th of August 1902, and it seems to me to be too late now for the appellant to dispute the right to these fields. As regards the fields in Moi possession of some of them was taken on the 18th of January 1911 in execution of the decree in Suit No. 87 of 1895, and of the others which are specifically mentioned in the decree in execution of the decree in Suit No. 86 of 1895 on the 11th March 1912. Faiz Ali, in my opinion, is the only judgment-debtor who could have legally objected to the delivery of possession of these fields, for he was sued only as a donee of a portion of the share in the villages. He has not appealed at all in the execution proceedings in Suit No. 87 of 1895. Amir Ali, who has parted with the whole of his share in the village, cannot complain if all the fields belonging to him have been given in the decree-holders' possession. In Second Appeal No. 386 of 1896, Ismay, J. C., overruled Amir Ali's contention that only some of the fields in Moi were mortgaged. These fields appear to be *khudkasht* fields, and they would certainly pass without specification under a decree for the village share. It would have been different if they were in Faiz Ali's possession and Faiz Ali had filed this appeal. But, as I have already pointed out, he has not appealed from the execution proceedings in Suit No. 87 of 1895.

It is contended that the decree is incapable of execution, because it has not been ascertained what share is possessed by each of the judgment-debtors in the two

fields. The village is an undivided village, and only symbolical possession can be given in such a case, except as regards the *sir* and *khudkasht* fields, which I have already dealt with. The decree-holders have been put in accordance with the decree, and it does not lie in the mouth of Amir Ali, the appellant, to raise any such objection. The appeal, therefore, fails and is dismissed with costs. I fix Rs. 40 as Pleader's fee.

Appeal dismissed.

LAHORE HIGH COURT,

SECOND CIVIL APPEAL No. 2405 OF 1918.

May 7, 1919.

Present:—Mr. Justice Broadway and

Mr. Justice Abdul Raoof.

LABHU RAM AND OTHERS—DEFENDANTS—

APPELLANTS

versus

BHAG MAL AND OTHERS—PLAINTIFFS—

RESPONDENTS.

Guardians and Wards Act (VIII of 1890), ss. 20, 27, 33—Guardian and ward, relationship between—Duty of guardian to invest moneys belonging to ward—Moneys belonging to ward used by guardian—Profit, whether must be paid to ward—Compensation—Liability of guardian, extent of.

The relationship between a guardian and his ward is very similar to the relationship existing between a trustee and his beneficiary. [p. 927, col. 2.]

A guardian stands in a fiduciary relation towards his ward and is not allowed to make any profit out of his office. He must deal with the property of his ward as carefully as a man of ordinary prudence would deal with it as if it were his own. If he uses the property of the ward in his own business, he must hand over the profits arising therefrom to the ward. [p. 927, col. 2; p. 928, col. 1.]

Prima facie it is the duty of a guardian to invest moneys belonging to his ward and his liability extends to profits actually received, or profits which could have been received but for his gross and wilful default. [p. 928, col. 1.]

Every plain neglect of duty by a guardian amounts to a breach of trust, and he must compensate his ward for any loss occasioned thereby. [p. 928, col. 1.]

Second appeal from the order of the District Judge, Ludhiana, dated the 26th June 1918.

Bakhshi Tek Chand, for the Appellants.

The Hon'ble Pandit Sheo Narain, for the Respondents.

LABHU RAM V. BHAG MAL.

JUDGMENT.--The facts of the case giving rise to this appeal are briefly as follows:--

Labhu Ram was appointed guardian of the property of his minor cousins Bhag Mal and Dhana Mal on the 5th of January 1911, and proceeded to deal with the same. In 1916, he was removed or allowed to resign from the guardianship and on the 19th October 1917 Bhag Mal was declared to have attained majority, and it was directed that the property be made over to him on behalf of himself and his minor brother, Dhana Mal. On the 6th of November 1917, he, on behalf of himself and his brother, instituted the present suit in which he claimed the sum of Rs. 3,226-14-6 from Labhu Ram, the former guardian. It was alleged that Labhu Ram had, instead of investing funds realized by him belonging to the minors in Banks and other securities, placed this sum in the shop of his father, in which he was a partner, and had utilized it for the purposes of their business. A sum of Rs. 3,076-8-0 was claimed as profits made by Labhu Ram in this way and a further sum of Rs. 150 was claimed as due on account of rent for the use by Labhu Ram of a shop belonging to the minors. With regard to the claim for profits it was alternatively prayed that in the event of it being found that Labhu Ram had not used the money for his own business purposes, he should still be directed to pay interest inasmuch as he had committed breach of trust by neglecting to make proper investments.

The primary Court held that the claim for interest or profits amounting to Rs. 3,076-8-0 was not maintainable but decreed a sum of Rs. 100 as due for rent. Bhag Mal and Dhana Mal appealed against this decree and the learned District Judge, while maintaining the decree for Rs. 100, held that Labhu Ram was in the position of a trustee and that he was liable to pay such interest as he had actually received on moneys belonging to the minors or that if he had not used the money but had kept it uninvested, then he was liable to pay interest thereon inasmuch as he had failed to carry out his duties as a guardian. The case was accordingly remanded to the primary Court for a

decision on issues relating to the user of the money and the ascertainment of such sums as Labhu Ram might be shown to be liable for. Against this order of remand Labhu Ram has preferred this second appeal to this Court, and we have heard Bakhshi Tek Chand in its support while Pandit Sheo Narain has addressed us on behalf of Bhag Mal and his brother.

One of Bakhshi Tek Chand's objections was that the suit was not maintainable by virtue of section 41 (4) of the Guardians and Wards Act, it being alleged that Labhu Ram had been formerly discharged. A reference to the guardians and wards record has, however, disclosed the fact that no order of discharge had been passed and this contention, therefore, cannot prevail.

It was next contended that the learned District Judge had erred in holding that the principles of the Indian Trustees Act, 1882, were applicable to the case of guardians, and our attention was drawn to section 34 (d) of the Guardians and Wards Act. Under section 20 of the Act a guardian stands in a fiduciary relation to his ward and is not allowed to make any profit out of his office. The relationship between a guardian and his ward is very similar to the relationship existing between a trustee and his beneficiary and though the provisions of the Indian Trustees Act cannot, we think, be held to be strictly applicable, nevertheless we think that its provisions can be used as a guide. Section 27 of the Guardians and Wards Act lays down that a guardian of the property of a ward is bound to deal therewith as carefully as a man of ordinary prudence would deal with it if it were his own.

Bakhshi Tek Chand contended that the guardian had periodically filed his accounts and had carried out all orders passed by the Court in connection with them. He, therefore, urged that the correctness of the accounts had not been attacked and as the balances in hand were brought to the notice of the Court, Labhu Ram could not be held to be guilty of any neglect in the management of the minor's property. It was also pointed out to us that Labhu Ram had definitely denied having utilized

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any funds belonging to the minors in his shop, and it was alleged that the said moneys were deposited in his father's firm by Labhu Ram owing to the prevalence of dacoities and many failures of the Indian Banks. These circumstances may possibly afford a good defence and no doubt will receive due consideration in further proceedings before the primary Court. They do not, however, affect the abstract principle that a guardian is bound to take such care of his ward's property as a man of ordinary prudence would take if the property were his own. Further if the plaintiffs-respondents can prove that these moneys have been utilized by Labhu Ram's firm, we think that Labhu Ram is bound to disgorge such profits as the said firm has made out of the use of this money. Whether or not the neglect to invest the moneys would entitle the minors to claim interest at a reasonable rate on the moneys so left uninvested, is also a matter which can only be decided after the inquiry which has been ordered. In Trevelyan's Law relating to Minors, 4th Edition, page 180, it is pointed out that every plain neglect of duty by a guardian amounts to a breach of trust, and he must compensate his ward for any loss occasioned thereby, *Sarat Ohandra Roy v. Raioni Mohan Roy* (1). The guardian's liability extends to profits actually received, or profits which could have been received but for his gross and wilful default. *Prima facie* it is the duty of a guardian to invest moneys belonging to his ward, and section 33 of the Guardians and Wards Act provides means by which a guardian may obtain the assistance and advice of the Court in his dealings with his ward's funds. That Labhu Ram was desirous of keeping these moneys in his own possession is evidenced by an application made by him on the 21st August 1915, in which he asked the Court to direct the withdrawal of moneys, even in the National Bank of India, which were to be made over to him for the use and benefit of the minors, and in this application it was definitely stated that if this was not directed, he did not care to act as a guardian. It is impossible for us to give any expression of opinion as to whether Labhu Ram had made use of and profited by

the retention of moneys belonging to his ward. Nor can we say whether, if he has not used the money, he has been guilty of such neglect as would entitle the wards to claim compensation from him. These are matters which will have to be dealt with by the Court to which the case has been remanded.

We, however, modify the order of remand to this extent. We hold—

(1) that while Labhu Ram is liable to pay to his wards any profits made by him, it is for the wards to show that the moneys have been used by Labhu Ram and his firm and to show approximately at any rate what such profits were; and

(2) that if it be found that the moneys have not been used but allowed to remain idle and uninvested, then it is for the Court to decide whether or not there was any justification for Labhu Ram's action in not investing the said moneys.

In other respects the appeal is dismissed. Costs of this Court will follow the event.

Appeal dismissed; Order modified.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 26 B OF 1919.

January 9, 1920.

Present :—M. Mittra, A. J. C., and Mr Prideaux, A. J. C.

DHARAMCHAND—JUDGMENT-DEBTOR—APPELLANT

versus

MESSRS. MITSUI BUSSAN KAISHA & Co. AND ANOTHER—DECREE HOLDER AND AUCTION-PURCHASER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 92, O. XXXIX, r. 1—Injunction by inferior Court to superior Court to stay sale, effect of—Injunction, when can be issued—Sale, when to be confirmed—Stay order, rule as to, effect of, whether applicable to injunctions—Sale in ignorance of injunction, whether irregularity—Proclamation of sale, notice of.

An order by an inferior Court to a superior Court to stay a sale does not take away the jurisdiction of the latter Court to sell, especially where an appeal lies to the superior Court from that order. [p. 929, col. 2.]

(1) 12 O. W. N. 481.

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A prohibitory order by way of injunction can be issued so long as the property in dispute is in danger of being wrongfully sold in execution of a decree, but once it is sold no such order can be passed [p. 931, col. 2.]

A Court is bound under Order XXI, rule 92, Civil Procedure Code, to confirm a sale after it dismisses an application to set it aside [p. 931, col. 2.]

The rule that a stay order issued by an Appellate Court suspends the power and jurisdiction of the executing Court to conduct further proceedings from the moment the order of the superior Court is passed, cannot be extended to the case of an injunction passed under Order XXXIX, rule 1 of the Civil Procedure Code [p. 929, col. 2.]

A sale held in ignorance of an order by way of injunction staying the sale is an irregularity, but the sale will not be set aside unless the judgment-debtor has sustained substantial injury by reason of such irregularity [p. 930, col. 1.]

A judgment-debtor who sets up another to file an objection to a sale proclamation and himself files an affidavit in support of an application to stay the sale, cannot be said to be ignorant of the proclamation [p. 930, col. 1.]

Appeal against the order passed by the Additional District Judge, East Berar, Amraoti, in Execution Case arising out of Civil Suit No. 11 of 1915, dated the 31st August 1918.

Messrs. M. V. Joshi and O. B. Parakh, for the Appellant.

The Hon'ble Sir Bipin Krishna Bose, Dr. H. S. Gour and Mr. K. G. Khaparde, for the Respondents.

JUDGMENT.—This is an appeal from an order refusing to set aside a sale. The appellant is one of the judgment-debtors who owned a Ginning Factory at Amraoti, which was sold between 8 and 9 A.M. of the 17th June last. The respondents are the decree holder and the auction purchaser. The sale was for Rs. 22,200 subject to a very heavy incumbrance. On the 16th July an application was made to set aside the sale on the ground of various irregularities alleged. It was also contended that the property was worth Rs. 2½ lakhs. The Additional District Judge, in a carefully written judgment, has dealt with all the points urged.

The property was attached on the 19th September 1918 and the sale was to take place on the 4th March 1919. The appellant's nephew Ramjiwan, a child aged 2½ years, filed an objection, which was disallowed on the 12th April. A fresh proclamation was issued for sale on the 23rd April last for an auction sale to be held at 5 A.M. on the 17th June. Ramjiwan filed a suit in the Court of the Subordinate Judge on the last day before

the May vacation, and on the 16th June when the Courts re-opened he obtained an order at 5 P.M. for a stay of the sale. This was an *ex parte* order and did not reach the Court of the Additional District Judge till after the sale had taken place. The order was passed presumably under Order XXXIX, rule 1.

It is contended, on the authority of *Hukum Ohand Boid v. Kamalanand Singh* (1) and *Ramanathan Chetty v. Arunachalam Chetty* (2), that the sale was *ultra vires*, even though the injunction was not served on the decree-holder, nor the order communicated to the Executing Court before the sale. In the two cases cited it was held that a stay order issued by the Appellate Court suspends the power and jurisdiction of the executing Court to conduct further proceedings from the moment the order of the superior Court is passed. This view, which has not been accepted by a later Full Bench of the Madras High Court [*Kasaribada Venkatachelatirao v. Maddipatla Kameswaramma* (3)], cannot, in our opinion, be extended to the case of an injunction passed under Order XXXIX, rule 1. It is difficult to see how the jurisdiction of a superior Court can be taken away by an order of an inferior Court where, as in this instance, an appeal lay from that order to the Court which was requested to stay the sale. As pointed out by Woodroffe, J., in *Hukum Ohand Boid v. Kamalanand Singh* (1), a prohibitory order by way of injunction is directed to a party and not to a Court. If the executing Court has notice of the injunction, it would no doubt compel the decree-holder to do what he is ordered to do by a Court of competent jurisdiction. In other words, it would stay the sale: but after the sale it is no longer in the power of the decree-holder to stay it, and the Court cannot compel him to do what he is legally incompetent to do. If the decree-holder happened to be himself the auction-purchaser with notice of the injunction, he may be treated as a trustee subject to the ultimate order of the Court issuing the injunction. This is not the case here. It has been held that an alienation made in contravention of an injunction is not void, such as would be the case when it is made after

(1) 33 C. 927 at p. 944; 3 C. L. J. 67.

(2) 22 Ind. Cas. 99; 38 M. 766; 26 M. L. J. 275; (1914) M. W. N. 45; 15 M. L. T. 151; 1 L. W. 22.

(3) 43 Ind. Cas. 214; 41 M. 151; 22 M. L. T. 330; 33 M. L. J. 515; 6 L. W. 617; (1917) M. W. N. 785 (F. B.)

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the attachment has been effected. Such an alienation subjects a party to the penalty prescribed by Order XXXIX, rule 2 (3): *Delhi and London Bank Limited v. Ram Narain* (4) and *Manohar Das v. Ram Autar Pande* (5). Assuming that a prohibitory order by way of injunction for certain purposes operates from the date when the order is made, as appears to be the opinion of the learned Judges of the Calcutta High Court, a sale made in ignorance of the order would at the utmost be only an irregularity. Under rule 90 of Order XXI the sale cannot be set aside unless the judgment-debtor has sustained substantial injury by reason of such irregularity.

It is contended that no notice was duly served on the appellant, as required by Order XXI, rule 66. The process-server on the 16th January 1919 found the appellant ill, and affixed a copy of the notice to the house. We cannot, however, accept the appellant's statement that he was ignorant of the proclamation of sale till the 16th June last, as he tells us in his evidence. We have already mentioned that he put up his minor nephew Ramjiwan to file an objection which was followed by a suit. He himself filed the affidavit on the basis of which the stay order was obtained from the Court of the Subordinate Judge.

It is urged that the specification of the property to be sold was not as fair and accurate as it should have been. The argument is that there were four engines, two with 40 horse power each and two small ones of 7 horse power. Only two engines are mentioned in the sale proclamation. It is also urged that the horse power and the name of the maker of the engine should have been set out in the sale proclamation. An ideally perfect description of such machinery can only be given by an expert. If the appellant thought that the sale proclamation was not as accurate as it should have been, he should have come forward and assisted the Court. Although two engines are specifically mentioned, the property advertised for sale included all "machinery".

In a petition filed at a late stage of the
(4) 9 A. 497; A. W. N. (1887) 107.
(5) 25 A. 431; A. W. N. (1903) 92.

case the appellant contended that the inaccuracy as shown in the sale proclamation was inaccurate, inasmuch as he had made subsequent payments to the extent of Rs. 17,840. This plea was not fully inquired into and the appellant's allegation remains unproved, but we find from a certified copy of the decree in the mortgage suit that the amount stated as due under the mortgage was the amount decreed, namely, Rs. 1,22,523-10. This was the amount due to the mortgagee on the 29th June 1916. The decretal amount carried interest at the rate of $4\frac{1}{2}$ per cent. per annum. The mortgagee is the son-in-law of the appellant. The alleged payments were not certified to the Court. If interest is calculated at the stipulated rate, then the alleged payments may fairly be regarded as having wiped off the interest. We do not think there is much force in this contention.

There were only three bidders at the auction sale, and it is contended that the stay order had the effect of discouraging people from attending the sale and bidding. The order was passed so late on the previous day that it could scarcely have been known to intending bidders. There are few people in Amraoti who can afford to buy a big Ginning Factory. The appellant took no steps to have the order of the Court communicated to the Nazir. He himself came to the sale and requested the Nazir to stay the sale for ten minutes, saying that he was going to call his Pleader. He did not turn up within the ten minutes, and when he came he found that the sale had already taken place. He did not notify to the purchasers or to the Nazir that he had obtained an injunction from the Court. Rai Bahadur Ganeshdas, one of the witnesses, says that an agent of the appellant Dharamchand came and told the Nazir to stop the sale, as he was going to obtain an order to stay the sale, a suit having been filed on behalf of a minor. The agent apparently did not know that an order had been already obtained. Though Ganeshdas says that this dissuaded him from making a higher bid, we are not prepared to attach much importance to this evidence. The appellant in his deposition says that he did not make any attempt to raise money because he was prepared to sell the factory if a good price could

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he had. This seems to have been his attitude throughout. If the factory is so valuable, he ought to have been able to raise money within one month and apply under Order XXI, rule 89, to have the sale set aside on payment of the decretal amount and a sum equal to 5 per cent. of the purchase-money.

As regards the value of the factory we are not prepared to attach much importance to the evidence of the judgment-debtor's witness No. 7, who says that his master had told him that the factory may be purchased for Rs. 1,75,000. The master has not been called and no offer was actually made. Similarly, judgment-debtor's witness No. 8, a broker, is said to have offered 2 lakhs for the factory for Rai Bahadur Bachha Raj Jamana Das of Wardha. There is nothing in writing to show that he had authority from a gentleman who has not been cited as a witness. If this evidence is true, there would have been no difficulty in making the application to have the sale set aside after the necessary payments. Judgment-debtor's witness No. 11, a broker, values it at more than 2 lakhs and would purchase for 2 lakhs himself. He made no attempt to purchase it within the month following the sale. The only witness whose evidence appears to be reliable is the expert witness called by the judgment-debtor himself, an engineer in the service of Messrs. Ralli Brothers, P. W. No. 13. He values the property at Rs. 1,63,800, but as the property was subject to a mortgage and no title is guaranteed, he would make a deduction of 7 per cent. from this value. Taking the incumbrance into account the property has not been sold for an unfair price, considering that there is a suit pending as regards one-sixth share and the possibility of further dispute on the part of the defendant who was discharged from liability under the appellate decree. We, therefore, come to the conclusion that no substantial injury has been proved in the case.

We note that the lower Court has not yet confirmed the sale in deference to a request made by the Court of the Subordinate Judge, when the latter found that its stay order was received too late by the executing Court. In our opinion, the Subordinate

Judge was not competent to pass any such order. So long as the property in dispute is in danger of being wrongfully sold in execution of a decree, a prohibitory order by way of injunction can be issued, but once it is sold, no such order can be passed. The lower Court, having disallowed the application to set aside the sale, was bound under rule 92 of Order XXI to confirm the sale. The lower Court will now proceed to do so.

The result is that the appeal fails and is dismissed with costs. We fix Rs. 200 as Pleader's fee to be divided equally between the two respondents.

Appeal dismissed.

LAHORE HIGH COURT.
SECOND CIVIL APPEAL NO. 2091 OF 1915.
May 8, 1919.

Present:—Mr. Justice Broadway and
Mr. Justice Abdul Raoof.

HARMUKH RAI-MUNNA LAL—
DEFENDANTS—APPELLANTS

versus

RADHA MOHAN—PLAINTIFF—
RESPONDENT.

Provincial Insolvency Act (III of 1907), ss. 2 (e), 16, 18—Hindu Law—Joint family—Father adjudicated insolvent—Son's interest in joint family property, whether vests in Receiver—Debts incurred by father—Legal necessity—Burden of proof.

Under the Mitakshara Law a father has the right to dispose of his son's interest in ancestral immovable estate for the payment of his own debts not contracted for immoral purposes and such interest, therefore, is "property" belonging to the father within the meaning of section 2 (e) of the Provincial Insolvency Act and on the father being adjudged insolvent, it vests in the Receiver. [p. 932, col. 2; p. 933, col. 1.]

In such a case the burden of proving that the debts were incurred for immoral purposes is on the son. [p. 933, col. 1.]

Second appeal from the decree of the Additional District Judge, Delhi, dated the 29th June 1915.

Lala Moti Sagar, R. S., for the Appellants.

Mr. M. N. Mukerji, for the Respondent.

JUDGMENT.—This appeal has arisen out of a suit brought by Lala Ram Kishen Das, Receiver of the property

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of Jai Narain, insolvent, proprietor of the firm Rama Nand-Jai Narain, for the recovery of a sum of Rs. 2,382-15-9 from Harmukh Rai Munna Lal. The facts of the case are fully stated in the careful judgment of the lower Appellate Court and need not be given in detail. It is only necessary to mention a few dates and facts which are necessary for the decision of this appeal.

Jai Narain and his son Banwari Lal constituted a joint Hind family and were the proprietors of the firm Rama Nand-Jai Narain mentioned above. Some of his creditors applied to have Jai Narain adjudicated insolvent. An order of adjudication was made on the 21st of August 1912. A Receiver was appointed on the 24th of August 1912, and this fact was formally notified to the District Judge of Delhi on the 5th of November 1912 as certain execution proceedings in execution of decrees were pending in his Court.

In 1912 a suit was brought by Ishar Das-Nirbhe Ram against Jai Narain and Banwari Lal for the recovery of a sum of money, in which a decree was passed on 1th of May 1912 for the sum of Rs. 1,512-9 6. This decree was put into execution on the 11th of July 1912 and a Cotton Press belonging to the father and son, namely, Jai Narain and Banwari Lal, was attached and sold on the 7th of October 1912 and Rs. 5,050 were realized. The sale was confirmed in due course on the 9th of November 1912.

In the meantime, the firm of Harmukh Rai-Munna Lal, defendants, had also obtained a decree against the same judgment-debtors, which they put into execution and applied to share *pro rata* in the sale proceeds of the Cotton Press. They succeeded in realizing Rs. 2,382-15 9 on the 28th November 1912. The decree obtained by Harmukh Rai-Munna-Lal was passed *ex parte* against Jai Narain and Banwari Lal. It appears that Banwari Lal, being a minor, applied for the setting aside of the decree on the ground of his minority. The subsequent proceedings show that eventually the decree was maintained against Banwari Lal also. Those proceedings, however, are not material and as no argument has been based on them in this Court, it is not necessary to discuss them here. The present suit was instituted by the Receiver in April 1914 against

Harmukh Rai-Munna Lal for the recovery of the amount above mentioned which they had realized from the District Judge's Court on the 28th November 1912, on the ground that Jai Narain having been adjudicated insolvent the Cotton Press along with other properties of Jai Narain had vested in the Receiver before the date of the sale. The Court of first instance dismissed the suit, holding that the Cotton Press belonged to both the father and the son and that as Jai Narain alone had been adjudicated insolvent, the order of adjudication could not have affected the interest of Banwari Lal and as also because only half of the sum due under the decree had been realized, the plaintiff was not entitled to succeed. From the decree of Court of first instance dismissing the suit of the Receiver an appeal was preferred to the lower Appellate Court, which reversed the decree of the Court of first instance and passed a decree in favour of the Receiver.

The defendants have come up in appeal to this Court, and it has been argued on behalf of them that the order of adjudication could not and did not affect the property of the minor son of Jai Narain. The decision of the appeal depends upon the correct interpretation of clause (e) of section 2 of the Provincial Insolvency Act, III of 1907. According to it "property" includes any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit. It is argued on behalf of the respondent that Jai Narain, as the father of his minor son Banwari Lal, had full authority under the Hindu Law to alienate the property of his son for the payment of his debts. Therefore, if the debt was of such a nature as to entitle Jai Narain to alienate the property of his son for its payment, the adjudication would have the effect of vesting the entire property in the Receiver. This argument is fully supported by decided cases. A similar question arose in the Bombay High Court in the case of *Fukirc and Motichand v. Motichand Hurruckchand* () and it was held that under the Mitakshara Law a father has the right to dispose of his son's interest

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in ancestral immoveable estate for the payment of his own debts not contracted for immoral purposes, and a vesting order made under section 7 of the Indian Insolvency Act vested that right in the Official Assignee who could give a good and complete title to such ancestral immoveable estate to a purchaser. This decision was followed in two Madras cases reported as *Rangryya Ohetti v. Thanikachalla Mudali* (2) and *Nunna Brahmayya v. Ohidara. boyina* (3). These cases have been relied upon by the lower Appellate Court in support of its decision and in our opinion they fully support the view taken by the lower Appellate Court.

On behalf of the appellant it has been argued that it lay upon the plaintiff to establish that the debts of the father had been incurred for legal necessity. This argument, however, cannot prevail in the face of the decision of a Division Bench of the Punjab Chief Court reported as *Amar Nath v. Rustomji* (4). According to this decision it lay upon the defendant to show that the debt had been incurred for immoral purposes and that, therefore, it was not the moral duty of the son to pay. The Privy Council ruling in *Sahu Ram Ohandra v. Bhup Singh* (5) has been relied upon by the learned Counsel for the appellants in support of his contention that it is the duty of an alienee to establish under such circumstances that the alienation was made for legal necessity. This ruling was cited and considered by the Division Bench who decided the case *Amar Nath v. Rustomji* (4) and we are bound by the construction which they have placed upon the decision of their Lordships of the Privy Council.

The defendants did not raise the question in the Court of first instance that the debts incurred by the father Jai Narain were incurred for immoral or for similar purposes. An attempt was made to raise this plea before the lower Ap-

pellate Court but as its decision would depend upon evidence to be given on the point, in our opinion the learned Additional District Judge was fully justified in not allowing the appellant to raise the question in appeal before him. Two other questions were argued before us, namely, that the suit by the Receiver was bad as it had been instituted without the sanction of the Judge of the Insolvency Court. On the facts found by the lower Appellate Court there can be no possible doubt that the necessary sanction had been obtained and the suit was rightly instituted.

The second contention somewhat faintly put forward was that the suit ought to have been a suit for the setting aside of the execution sale and not for the recovery of the money claimed. We entirely agree with the lower Appellate Court that a complete answer to this question is to be found in the provisions of section 34, Provincial Insolvency Act, III of 1907.

The question of limitation raised in paragraph 2 of memorandum of appeal was not seriously pressed before us nor does it arise in this case. Articles 12 and 13 of the Limitation Act, having regard to our view on the facts of the case, have no manner of application.

In our opinion the view taken by the lower Appellate Court is perfectly correct. We accordingly dismiss the appeal with costs.
Appeal dismissed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE ORDER NO. 198 OF 1919.

January 8, 1920.

Present:—Mr. Justice Adami.

SOBRAN MAHTON—DECREE-HOLDER
—APPELLANT

versus

Musammat SIBILAS KUER—JUDGMENT.

DEBTOR—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 182 (5)—
Civil Procedure Code (Act V of 1908), O. XXI, r. 17—Execution of decree—Amendment of application, whether step-in-aid of execution—Attachment, order directing, effect of—Limitation, objection as to, when can be raised.

(2) 19 M. 74.

(3) 26 M. 214.

(4) 43 Ind. Cas. 678; 15 P. R. 1918; 24 P. W. R. 1918; 112 P. L. R. 1918.

(5) 39 Ind. Cas. 250; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 31 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.).

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If a decree-holder files a defective application and has to be ordered to amend it, he cannot gain profit from the amendment on the ground that it is a step-in-aid of execution. [p. 934, col. 2.]

In the absence of an application by the decree-holder moving the Court to make an order directing attachment to issue, such order made on the original application for execution does not amount to a step-in-aid of execution. [p. 934, col. 2.]

An order made in execution proceedings without notice to the judgment-debtor does not estop the latter from subsequently contending that the application on which the order was made was barred by time. [p. 935, col. 1.]

Appeal from a decision of the District Judge, Gaya, dated the 17th June 1918.

Mr. Kailas Patti, for the Appellant.

Messrs. Bishun Prasad and Rai Tribhuvan Nath Sahai, for the Respondent.

JUDGMENT.—The decree-holder, appellant in this miscellaneous appeal, obtained a decree for possession and costs and mesne profits on the 8th July 1915. He applied for execution by delivery of possession and for recovery of costs by attachment on the 7th August 1915. The Court returned his application for amendment in certain particulars, and the decree-holder returned it to the Court and got it finally registered on the 30th August 1915. Possession was delivered on the 7th September 1915. On the 28th September 1915 the Court ordered the issue of attachment in regard to costs on condition that the decree-holder filed a copy of Register D within six days. The decree-holder failed to file this copy and the application for execution was then dismissed for default in October 1915. No further steps were taken till the 9th August 1918, when the decree-holder applied for a transfer of the decree for execution to the Court of the 3rd Munsif of Gaya, to whom the decree was transferred accordingly. Then on the 2nd March 1919, the decree-holder applied again for execution of the decree. The judgment-debtor objected on the ground that execution was barred since the application for transfer of the decree, dated the 9th August 1918, was made more than three years after the first application on the 7th August 1915. The Munsif found that limitation would run from the 30th August 1915, on which date the amended application had been filed, and that, therefore, the execution proceedings were not barred.

On appeal to the District Judge of Gaya, the learned District Judge disagreed with the Munsif and decided that limitation must run from the 7th August when the application was first made and that the petition for transfer on the 9th August was beyond time. He held too that the order for the issue of attachment on the 28th September 1915 could not be taken to be a step taken by the decree-holder in aid of execution, for there was no evidence that the decree-holder had applied either in writing or verbally for an order for the issue of attachment. Evidence was sought to be given that the judgment-debtor had admitted on the 25th June 1918 her liability under the decree and that this was an acknowledgment within the meaning of section 19 of the Indian Limitation Act. The learned District Judge refused to admit this evidence in the appeal at so late an hour, but found that even if admitted the evidence would not amount to an acknowledgment of liability. He found that the application for execution made on the 2nd March 1919 was out of time and, therefore, allowed the appeal and set aside the order of the Munsif.

Before me it has been argued that the amendment of the application in consonance with the orders of the Court was a step-in-aid of execution and that, therefore, time should be reckoned from the 30th August 1915. I can find no support for this contention. Rule 17 of Order XXI of the Civil Procedure Code lays down that where an application is amended under the rule, it shall be deemed to have been presented when it is first presented. If a decree-holder files a defective application and has to be ordered to amend it, he cannot gain profit from the amendment on the ground that it is a step-in-aid of execution.

With regard to the order of the 28th September it is clear from the finding of the lower Appellate Court, and in the absence of any evidence that the decree-holder moved to have the attachment issued, that the order for issue of attachment was not a step-in-aid of execution. The Court issued the order in accordance with the prayer contained in the application filed on the 7th August 1915, and not

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in accordance with any fresh prayer made by the decree-holder.

Thirdly, it is argued that when the Court on the 9th August 1918 granted the decree holder's petition for a transfer of the decree to the Court of the Munsif at Gaya, this was a condonation of any defect in the matter of limitation. Reliance has been placed on *Mungul Pershad Dichit v. Gria Kant Lahiri* (1), but that ruling will not help the appellant here for the order to transfer the decree was made without any notice to the judgment-debtor, respondent so that there was no chance for her to raise any objection on the ground of limitation. *Mungul Pershad Dichit's case* (1) applies where though a judgment-debtor has had an opportunity to urge his objections, he has taken no steps and has allowed the Court's order to go unchallenged.

With regard to the alleged acknowledgment, the evidence has been refused by the lower Appellate Court and there is no good reason given for its admission in evidence now. I may only say that I agree with the learned District Judge in his finding that the words cited only go to show that the judgment-debtor had freed herself from liability at the time when the statement was made.

The above are the only points taken on behalf of the appellant and they afford no good reason for allowing the appeal. The appeal is accordingly dismissed with costs.

Appeal dismissed.

(1) 8 C. 51.

LAHORE HIGH COURT.

CIVIL MISCELLANEOUS CASE No. 91 OF 1919.

April 17, 1919.

Present:—Mr. Justice Broadway.

SHIV PARSHAD—DEFENDANT

—PETITIONER

versus

KANHAYA SHAH-RUCHI SHAH—

PLAINTIFFS—KIDAR NATH—DEFENDANT

—RESPONDENTS.

*Civil Procedure Code Act V of 1908), s. 22—
Transfer of case, when to be directed*

A case should not be transferred from one Court to another merely on the ground that the defend-

ant has all his evidence at the latter place. A strong case must be made out in order to overrule the rights of the plaintiff to select the forum of his suit. [p. 936, col. 1.]

Bohitram v. Chimunbux, 8 Ind. Cas. 449; 3 Bur. L.T. 60, *Muthia Chetty v. Arunachallam Chetty*, 23 Ind. Cas. 345; 7 Bur. L.T. 1; 7 L.B.R. 129, *Sachendra Nath v. Muhammad Habibullah*, 24 Ind. Cas. 707, *Shamussuddin v. Ali Mahomed*, 25 Ind. Cas. 874; 8 S.L.R. 43, *Syed Husain v. Musammam Sajjadi Begam*, 34 Ind. 686; 3 O.L.J. 200, relied upon.

Application under section 22 of the Civil Procedure Code, 1908, for transfer of the case from the Court of the Senior Subordinate Judge, Rawalpindi, to some competent Court at Delhi.

Mr. Govind Das, for the Petitioner.

The Hon'ble Pandit Sheo Narain, for the Respondents.

JUDGMENT.—This is an application, under section 22, Civil Procedure Code of 1908, in which it is sought by the defendants to obtain the transfer of a case instituted at Rawalpindi to a Court at Delhi. It appears that the plaintiffs are residents of Rawalpindi and carried on business there. The defendants are a firm known as Seth Mul Chand-Kidar Nath. They also have a branch at Delhi apparently under the name of Mul Chand-Ganga Bishen. A contract was entered into between the plaintiffs and the defendants' firm at Delhi. The principal defendant is a resident of Rawalpindi and the second defendant also lives a good deal at that place. The plaintiffs allege that there has been a breach of contract inasmuch as goods undertaken to be delivered over to them have not been so delivered.

It is not disputed and is quite clear that the Courts at Rawalpindi have jurisdiction to try the suit. *Prima facie*, the plaintiffs are entitled to bring their suit in any Court which has jurisdiction. On behalf of the defendants applicants Mr. Govind Das contends that the balance of convenience renders it advisable, as well as necessary, that the case should be tried at Delhi. Mr. Sheo Narain on behalf of the plaintiffs opposes this application on the ground that it would occasion great inconvenience to his clients if the case were transferred from Rawalpindi to Delhi. He also contended that no valid reason had been shown for such a transfer being ordered. In *Bohitram v. Chimunbux* (1) it was

(1) 8 Ind. Cas. 449; 3 Bur. L.T. 60.

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held that a plaintiff should not without sufficient cause be deprived of the right given him by law to select the Court in which he will sue. In *Muthia Ohetty v. Arunachallam Ohetty* (2) it was held that very strong reasons must be shown for depriving a plaintiff of the right to bring his suit in any Court in which the law allows. *Sachendra Nath v. Muhammad Habibullah* (3) is to the same effect. In *Shamussuddin v. Ali Mohamed* (4) it was held that a case should not be transferred from one Court to another merely on the ground that the defendant has all his evidence at the latter place. In *Syed Husain v. Musammatt Sajjadi Begam* (5) it was held that a strong case must be made out in order to overrule the right of the plaintiff to select the *forum* of his suit.

The question for determination here is whether, having regard to the principles enunciated in the above rulings, with which I am in complete accord, any such case can be said to be made out by the applicant. Mr. Govind Das urged that there were three points primarily involved in the suit; first, whether a contract was entered into; secondly, whether a breach of contract had been committed; and thirdly, what the damages, if any, were; and he contended that most of the evidence especially with regard to the third point would have to come from Delhi. I am not prepared to hold that this alone would be a sufficient cause for transferring the case to that district. It seems to me that, if anything, the balance of convenience is in favour of the case being tried in the *forum* selected by the plaintiffs. The head office of the defendants' firm is at Rawalpindi. The mere fact that in the branch of this firm at Delhi there is another partner with the two defendants does not to my mind affect the situation. The bulk of the property of the defendants' firm is situated at Rawalpindi, and it is obvious that it would put the plaintiffs to considerable inconvenience if they had to go from Rawalpindi to Delhi for every hearing in the case, whereas if it was found necessary to take any evidence on commission at Delhi the defendants, at any rate, would

have no cause for complaint, inasmuch as the evidence taken on commission would be taken in a city where they have their own branch. In all the circumstances it seems to me that instead of the plaintiffs having instituted this suit at Rawalpindi in order to harass the defendants, the defendants have put in this application with a view to doing their utmost to hamper and harass the plaintiffs.

I accordingly dismiss this application with costs—Counsel's fee Rs. 150.

Application dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 619 of 1917.

August 13, 1918.

Present:—Sir Henry Drake Brockman, Kt.,
J. C.

RAMCHANDRA RAO—APPELLANT

versus

VENKAT RAO—RESPONDENT.

Easements Act (V of 1882), s. 15 Right of way—Uninterrupted enjoyment—Acquiescence by servient tenement, whether necessary—Question of fact—Burden of proof.

The uninterrupted enjoyment for 20 years of a right of way, which raises a presumption of right amounting to a presumption of law, must have been acquiesced in by the owner of the servient tenement. [p. 938, col. 2.]

Knowledge of the fact of enjoyment on the part of the owner of the servient tenement is an essential condition to the acquisition of an easement where the Court is asked to presume a grant. The fact that there has been active obstruction on the part of such owner would negative any such presumption. [p. 938, col. 2; p. 939, col. 1.]

In order to negative submission to an interruption the party interrupted need not have brought a suit. [p. 939, col. 1.]

The question whether there has been submission to, or acquiescence in, an obstruction is a question of fact, and the burden of negating submission should be placed upon the party alleging that he did not submit, the matter being within his special knowledge. [p. 939, cols. 1 & 2.]

Appeal against the decree of the Additional District Judge, Nagpur, in Civil Appeal No. 2 of 1917, dated the 14th September 1917, arising out of Civil Suit No. 58 of 1917, decided by the Junior Munsif, Nagpur, on the 21st February 1917.

(2) 23 Ind. Cas. 345; 7 Bur L. T. 1; 7 L. B. R. 123.

(3) 24 Ind. Cas. 707.

(4) 25 Ind. Cas. 874; 8 S. L. R. 43.

(5) 34 Ind. Cas. 686; 3 O. L. J. 200.

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Messrs. M. B. Khinkhede and M. B. Bobde, for the Appellant.

Messrs. P. S. Kotwal and Dhabe, for the Respondent.

JUDGMENT.—This second appeal arises out of a suit brought on the 25th June 1915 to obtain an injunction directing the defendant to allow the plaintiff a way at one of two points in the eastern wall of the defendant's compound and thus afford access to the eastern door of the plaintiff's dwelling-house. The injunction was granted by the trial Judge, whose decree was reversed in appeal by the Additional District Judge. The plaintiff has come here in second appeal.

The plaint alleges that the plaintiff's dwelling-house was constructed by his father and grandfather 30 or 32 years before the suit, but it is now common ground that the construction took place in the middle of 1888, i. e., 27 years before this litigation began. The existence of a right of way was pleaded, being based on a presumed grant and also on acquisition in the manner laid down in section 15 of the Indian Easements Act, 1882.

There is a public road immediately to the east of the defendant's compound and the right of way claimed by the plaintiff is said by him to have been originally exercised over the ground between the south-east corner of the compound and the plaintiff's eastern door. He further pleaded that seven or eight years before the suit the defendant built a wall on the east of his (defendant's) compound, but left a passage at the south east corner through which the right of way continued to be exercised. The cause of action was said to have arisen in January 1915, when the plaintiff having evacuated his house on account of plague, the defendant closed the passage at the south east corner of the compound and made a new opening further north nearly opposite the plaintiff's eastern door. The plaintiff assumed that this new passage was meant to be substituted for the original one and used it accordingly till the beginning of June 15, when he was obstructed and refused further access.

The defendant pleaded that the plaintiff's house was built in 1888, that no right of way was ever enjoyed through either

of the spots mentioned in the plaint, that the south-east corner was closed three years back, that the plaintiff never passed through the northern opening and that the northern opening was made in 1913.

The trial Judge found that the plaintiff's house was built in 1888; that a gate had been constructed at the south-east corner of the defendant's compound 10 or 12 years before the suit; that the gate was closed less than a year before the suit; and that for more than 20 years prior to the closing of the gate the plaintiff has enjoyed a right of way in such a manner as to acquire a right under section 15 of the Indian Easements Act.

The 4th and 5th issues framed run as follows:—

(4) Whether plaintiff lost his right of way in question by his non-user for more than two years prior to the suit owing to the closing of the gate as alleged by the defendant?

(5) Does or does not the closing of the gate CD amount to interruption?"

It was no part of the defendant's case that even if the gate was blocked three years before the suit, the obstruction did not constitute an interruption within the meaning of section 15, Indian Easements Act. Explanation II to that section is in the following terms:—

"Nothing is an interruption within the meaning of this section, unless where there is an actual cessation of the enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorizing the same to be made."

This provision has not been referred to by either of the Courts below.

In appeal the Additional District Judge found that the plaintiff's house was constructed in 1888, and assumed in his favour that the eastern door was opened at the same time; he also found that the plaintiff had enjoyed a right of way from the south-east corner of the defendant's compound as an easement for more than 20 years as of right, without interruption, peaceably and openly, but that the gate at the aforesaid spot was closed before the 26th September 1913, and that the plaintiff had, therefore,

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failed to discharge the burden of showing enjoyment for a period of 20 years ending within two years next before the institution of the suit. The plaintiff's plea that a grant should be presumed from long user was fully considered and rejected. The result was, as already stated, that the claim was dismissed.

In second appeal the first point pressed is that a grant of the right of way should have been presumed. Reliance is placed upon the following cases as indicating that enjoyment for 25 years furnishes an ample basis for such a presumption:—

Ponnusawmi Tevar v. Collector of Madura (1), *Kisto Mohun Mookerjee v. Juggurnath Roy* (2) and *Koylash Chunder Ghose v. Sonatun Chung Barooie* (3).

All these cases were decided prior to the enactment of the Indian Easements Act. In the first Scotland, C. J., remarked as follows:—

"In the absence of any definite law of prescription, I think, the proper general rule to be acted upon is that the grant of an easement may be presumed from mere continued user of the privilege openly enjoyed by the occupiers of the dominant tenement as of right throughout any long period of time without interruption on the part of the proprietor of the servient tenement, but with this qualification that the user should be for at least the period of adverse possession which is prescribed by section 1, clause (12), of the Act of Limitations as a bar to the enforcing of a title to corporeal property. The 20 years' user from which an easement is presumable by the English Law was no doubt adopted with reference to the period of limitation barring the right of suit for the recovery of land, and it would, it seems to me, be an unreasonable inconsistency in the law that a right by prescription to a servitude upon land might be acquired by enjoyment, which, if had of the land itself, would not suffice to give a similar right to the possession of the land."

In the second Jackson, J., remarked:—

"Cases are quite conceivable in which the plaintiff might not be able to give

evidence of actual use for more than four or five or six years, and yet the circumstances might be such that a Court would be warranted in inferring the existence of a right."

In the last the learned Judges (Garth, C. J., and McDonell, J.) indicated an *obiter dictum* at the close of their judgment that after 25 or 30 years' enjoyment the Court might presume a right unless the contrary could be shown: they treated the case in fact as governed by section 26, Indian Limitation Act, 1877, and no question whether a grant should be presumed or not arose for decision. In England the question whether a grant should be presumed seems to be treated as one of fact: see *Duke of Norfolk v. Arbuthnot* (4). In this country opposite views on this point were expressed by Markby, J., and Peacock, C. J., in *Bagram v. Khettranath Karformah* (5). The Chief Justice, however, laid down that the uninterrupted enjoyment for 20 years, which raised a presumption of right amounting to a presumption of law, must have been acquiesced in by the owner of the servient tenement. In the present case, as I understand the lower Appellate Court's judgment, the learned Judge was not satisfied that the defendant had knowledge of the plaintiff's user of the way. That knowledge is an essential condition to the acquisition of an easement where the Court is asked to presume a grant appears from the judgment of Couch, C. J., in *Bhubun v. Elliot* (6), see also the judgment of Garth, C. J., in *Arzan v. Rakhai Chunder Roy* (7). It is also clear from Exhibits P-1 to P-8, a set of papers belonging to the Court of Wards which had the management of the defendant's estate from 1892 to 1912, that the defendant was in that year desirous of denying and did actually deny passage through the south-east corner of his compound even to Rao Sahib Pratapji Sirke (P. W. No. 9), whose house was granted to him by the defendant's father and cannot be reached except by that way. The erection of the gate at the corner shows that the defendant was

(1) 5 M. H. C. R. 6.

(2) 11 W. R. 236.

(3) 7 C. 132.

(4) (1880) 5 C. P. D. 390; 49 L. J. C. P. 782; 43 L. T. 302; 44 J. P. 796.

(5) 3 B. L. R. (o. c.) 18.

(6) 6 B. L. R. 85.

(7) 10 C. 214.

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not only not acquiescing in the exercise of any right of way there but actively opposed to it, and that opposition was only overborne by the Deputy Commissioner whose decision of the 22nd March 1909 was based on the fact that the Rao Sahib, who had applied to him on the 8th February to have the gate opened, could not get to his house except through the gate. Exhibit P-3 shows that the Rao Sahib's passage was obstructed as far back as 1908. There is room for doubt as to the defendant's knowledge, and it seems clear that he actively obstructed passage through the south-east corner of his compound in 1908. In these circumstances I think there would be no legal basis for a finding that a grant ought to be presumed.

The second ground of appeal proceeds on the assumption that a prescriptive acquisition as distinct from one under section 15 of the Indian Easements Act has been made out. This assumption not being justified, the ground does not require separate consideration.

The third ground is rested upon Explanation II to section 15, Indian Easements Act, the terms of which have already been quoted. It is urged that the defendant did not plead any submission to or acquiescence in the obstruction complained of on the plaintiff's part. It is correctly pointed out that in order to negative submission the party interrupted need not have brought a suit: See *Subramaniya Ayyar v. Ramchandra Rau* (8) and *Glover v. Coleman* (9); also *Bennison v. Cartwright* (10). The two cases last cited are also authorities for the proposition that the question whether for the purposes of section 4 of the English Prescription Act (2 and 3 Will. 4, c. 71), which restricts the meaning of "interruption" in a way similar to that in the Explanation now being considered, there has been submission to or acquiescence in an obstruction is one of fact. The plaintiff's case is that he closed the gate at the south-east corner three years before the suit and the lower Appellate Court's finding is in his favour on this point. I think it was for the defendant to allege any ground he might

have to rely upon for the view that he did not submit to acquiesce in this obstruction. As remarked by Bratt, J., in *Glover v. Coleman* (9) (above cited) at page 119, * to ascertain whether the claimant to an easement submitted to an obstruction calls for inquiry into the state of mind of the person said to have submitted and whether his state of mind was made apparent by either expressions or acts. The same learned Judge understood by "submission" submission without satisfaction and without any direct act of opposition but made apparent by some expression or some act. It seems to me that the burden of negating submission should be placed on the defendant, the matter being one within his special knowledge: See sections 103 and 106, Indian Evidence Act. And as I understand the judgments in *Glover v. Coleman* (9) both Brett and Grove, JJ., treated the question as in effect one as to whether the claimant to the easement had not submitted to or acquiesced in the obstruction, the burden being upon the claimant. In the present case there could hardly have been a more effectual obstruction than the closing of the gate, and it is not suggested that the evidence shows the plaintiff to have done anything by way of remonstrance after moving the Deputy Commissioner in his undated application (Exhibit P.) which was presented on the 26th September 1913. That application prayed for an enquiry and mentioned that one made a year previously asking for a copy of the order on previous complaints of obstruction in 1908 and 1909 had not been disposed of: the management of the estate having already been relinquished, the plaintiff was merely informed that the copy asked for would not be granted. I hold that it is now too late for the plaintiff appellant to urge that in view of Explanation II to section 15, Indian Easements Act, his enjoyment really lasted to a date within two years before the institution of the suit, inasmuch as he did not for one year after notice of the obstruction and of the person making it submit to or acquiesce in it.

The fourth ground of appeal attributes to the lower Appellate Court the view that in order to negative submission or acquiescence the dominant owner is required to

*Page of 10 C. P.—Ed.

(8) 1 M. 335 at p. 339.

(9) (1864) 10 C. P. 108; 44 L. J. C. P. 66; 31 L. T. 684; 23 W. R. 163.

(10) 136 R. R. 456 at p. 465; 5 B. & S. 1; 33 L. J. Q. B. 137; 10 Jur. (N. S.) 847; 10 L. T. (N. S.) 264; 12 W. R. 425; 122 E. R. 733.

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bring a suit. No passage in the judgment of that Court can be pointed to as warranting this inference. Indeed it would appear from the omission to make any reference to the Explanation that the plaintiff relied before the Additional District Judge merely on his allegation that the gate was closed within one year before the suit.

The fifth ground of appeal has reference to Exhibits P.9 and P.10. P.10 is the earlier application for a copy of certain orders of which mention has already been made. It is urged that Exhibit P. shows that the plaintiff was determined in September 1913 not to submit to the obstruction caused by the closing of the gate. The suit was filed on the 25th June 1915, and the gate was closed about June 1912. Exhibit P.9 is, therefore, more than one year subsequent to the closing of the gate and as already remarked, there was no plea by the plaintiff in the Court of first instance which called for consideration of Explanation II.

The sixth ground of appeal raises an entirely new point, namely, that when the gate was closed access through a small sub-gate within it was still possible and that complete closure of the entire gate could not have taken place until an opening was made further north in the compound wall, inasmuch as the defendant himself required access to the compound. Here again we have questions of fact which should have been raised at an earlier stage. It is too late now to demand consideration for them.

The seventh ground is not seriously pressed. It relates to the evidence of one Shiwaji (D. W. No. 7), the defendant's maternal uncle. This person is 60 years old and his deposition as recorded makes him out to have admitted in examination in-chief that the plaintiff's house was built 20 years before the witness was examined in February 1917, and that "on occasions the plaintiff used to go to his house from the east during the last two or three years." Then in cross-examination the witness said:—

"It is an incorrect statement that plaintiff used the way for the last two or three years. I did not make any statement that the plaintiff has his passage for the last two or three years."

It seems to me clear that no value could possibly be attached to these state-

ments of the witness. The plaintiff himself admitted obstruction before the institution of the suit and the witness gave evidence after the litigation had lasted for nearly 20 months.

The eighth ground of appeal alleges that all the evidence has not been considered and that all the necessary findings have not been given by the lower Appellate Court. I am not pointed to any evidence which has been left unconsidered. The issue said to have been left undecided is the trial Judge's fifth above quoted, and the finding said to be missing is one on the question whether the plaintiff submitted to or acquiesced in the obstruction by closing the gate. I have already explained why I do not consider this subsidiary question to have been properly raised.

The ninth ground of appeal relates to the allegation in the plaint that when the gate was closed, the plaintiff was for some time permitted to use the substituted opening further north in the compound wall, that opening being regarded by the plaintiff as made for his benefit. The allegation in the plaint, however, does not amount to attributing to the defendant a desire to benefit the plaintiff by the new opening and there is admittedly no evidence of such desire. What does appear is that the gate was closed and the new opening made almost simultaneously. It is further clear that if the new opening was substituted for the old one, the claim should have left the old one out of account.

The tenth ground of appeal does not call for separate consideration.

Holding that no ground for interference with the lower Appellate Court's decision has been made out, I dismiss this appeal with costs. In the Courts below costs will be paid as already ordered.

Appeal dismissed.

JIWAN SINGH v. SAWAN MAL.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 3023
OF 1917.

April 17, 1919.

Present:—Mr. Justice Broadway.

JIWAN SINGH—DECREE-HOLDER—
APPELLANT

versus

SAWAN MAL AND OTHERS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 104 (2),
O. XXI, r. 92, O. XLIII, r. 1 (j)—Execution of decree
—Sale set aside—Appeal, second, whether lies.*

Where an execution sale is set aside under Order XXI, rule 92, of the Civil Procedure Code and the right of appeal given by Order XLIII, rule (j), of the Code is availed of, no second appeal is competent from the order passed by the Appellate Court.

Miscellaneous second appeal from the order of the District Judge, Attock, dated the 4th August 1917.

Mr B. R. Puri, for the Appellant.

Mr. D. R. Sawhney, for the Respondents.

JUDGMENT.—The facts of this case are briefly as follows:—

Dandu Mal obtained a decree against Sawan Mal and Gumani Mal and in execution attached a certain house and asked for it to be sold. One Multani Mal, another son of Sawan Mal, filed certain objections against the sale of this property, which were rejected. Multani Mal then filed a regular suit asking that the house be released from attachment. This case Multani Mal kept pending by resorting to various devices and while this suit was pending, Jiwan Singh instituted a suit against Sawan Mal and Multani Mal, etc., obtained an *ex parte* decree, attached the same house, brought it to sale and got the sale confirmed. When Dandu Mal came to know of this, he put in an application under Order XXI, rule 90, Civil Procedure Code, asking for the sale to be set aside on the ground that it had been effected in a decree obtained fraudulently. The learned Munsif on the 17th March 1915 set aside the sale under Order XXI, rule 92, Civil Procedure Code. Dandu Mal then instituted a suit against Jiwan Singh and Multani Mal, etc., for a declaration that the decree had been obtained by fraud. He could not very well have asked for the sale to be set aside in a regular suit, inasmuch as it had already been set aside under Order XXI, rule 92, Civil

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Procedure Code. Jiwan Singh appealed against the order under Order XXI, rule 92, as well as against the decree in the regular suit and the learned District Judge dismissed both the appeals. A second appeal to this Court in the regular suit proved infructuous, and a second appeal was filed against the order of the learned District Judge, dismissing the appeal made to him under Order XLIII, Civil Procedure Code.

Mr. Dev Raj on behalf of the respondents raised an objection to the effect that no second appeal was competent inasmuch as section 104 (2) rendered orders passed on appeal under Order XLIII, Civil Procedure Code, final. In my opinion this contention is correct. The application was made under Order XXI, rule 90, and the sale was set aside under rule 92. Order XLIII gave the right to appeal and this right was availed of. No further appeal is competent, and Mr. Puri on behalf of Jiwan Singh suggested that in this event his appeal should be treated as a revision. Whether or not the order passed under Order XXI, rule 92, Civil Procedure Code, was legal is, perhaps, a matter which is debatable, but the circumstances of this case are such that I certainly do not think I should be justified in interfering in favour of Jiwan Singh. The decree was obtained by him fraudulently and collusively and, therefore, the equities are all against him. The appeal is not competent and I decline to interfere on the revision side. Jiwan Singh will pay the costs of the other side. Counsel's fees Rs. 32.

Appeal dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 449 OF 1918.

January 16, 1920.

Present:—Mr. Justice Coutts and

Mr. Justice Sultan Ahmed.

ABDUL GHANI SHAH AND OTHERS—
DEFENDANTS—APPELLANTS

versus

SYED MOHAMMAD RAZA AND OTHERS—
PLAINTIFFS AND ANOTHER—DEFENDANT—
RESPONDENTS.*Evidence Act (I of 1872), s. 63, Ill. (c)—Copy of
copy, whether admissible in evidence.*

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A copy of a copy of a document is not admissible in evidence and no question of the construction of such a document can arise.

Second appeal from a decision of the District Judge, Darbhanga.

Mr. Muhammad Tahir, for the Appellants.

Messrs. Fakhruddin and Hasan Jan, for the Respondents.

JUDGMENT.

SULTAN AHMED, J.—The plaintiffs brought this suit for partition of 2 *bighas* 10 *cittas* of Minhaj Lakhraj land in Mauza Haveli, Darbhanga, and prayed for the allotment of a separate *takhta* to them of one anna nine pies share in the said land. All the defendants with the exception of defendant No. 3 resisted the suit, mainly on the ground that the land sought to be partitioned was created *waqf* under a Sanad, dated the 15th of Ziqad 1135 Fasli, and as such was not capable of partition or alienation. Defendant No. 3 supported the plaintiffs. The learned Munsif held that the land in suit was *waqf* property and so was incapable of partition and accordingly dismissed the suit. On appeal the Appellate Court, however, came to a different conclusion and held that the property sought to be partitioned was not *waqf* property and awarded the usual preliminary decree in favour of the plaintiffs. Against this decision the defendant has now appealed to this Court. The main ground urged by the learned Vakil appearing on behalf of the appellants is that the lower Appellate Court has not properly construed the Sanad and that the learned Judge in appeal was wrong in coming to the conclusion that no valid and operative *waqf* was created under that document. The learned Vakil appearing on behalf of the respondents maintained that the view taken by the learned Judge with respect to the rights created under the Sanad was correct, and he further contended that the document under which the defendant claimed the land to be *waqf* was not admissible in evidence inasmuch as it was a copy of a copy, and he submitted that the Court would not be entitled to look into the document and construe it unless and until the Court was satisfied that it was admissible in evidence. It is, therefore, necessary to consider the latter objection before we consider the document itself. It is clear that if the document

was not properly brought on the record and that it was not legally admissible, no question of construction of the document can arise. It appears that the objection was taken in the Courts below, but the lower Courts came to the conclusion that it was not a copy of a copy. I have carefully considered this question and have absolutely no doubt that the document is a copy of a copy and one has only to look to the heading of the document, which has been marked Exhibit B, to be satisfied that that is so. It distinctly purports to be a copy of a certain document which was filed in some Court. That document from which Exhibit B was made was itself a copy of another document as the following endorsement will show. It runs as follows:—"This copy has been taken from the records of objection filed by Ramzu Shah and Bhattu Shah." Then later on one finds that "that copy was prepared, signed and sealed by the Court and made over to one Bhattu Shah." Under the circumstances one is forced to come to the conclusion that Exhibit B is not a copy of the original, but it is a copy of a copy which was taken from the records of objection filed by Ramzu Shah and Bhattu Shah in an execution case. The law does not permit a copy of a copy to be used, and I must, therefore, hold that this document is inadmissible in evidence.

There is a further objection, that the document does not show who the original grantor was nor his designation, and it is difficult to say whether the grantor had any authority to grant it. The document is hardly a Sanad, it is simply a *pirwana* to the tenants, resident and non-resident, and cultivators and Gomasthas and Patwaries, etc. It does not purport to create any rights. At the highest it may be evidence that certain rights were created previously under some other grant. Under these circumstances, I am clearly of opinion that the document is inadmissible, and no question of its construction, therefore, arises. As this document is the basis of the defendants' title and as it has been rejected, their case must fail. I would accordingly dismiss this appeal with costs.

Courts, J.—I agree.

Appeal dismissed.

In the matter of THE INDIAN DIVORCE ACT. BASAVANAGUDI NARAYAN KAMATHY v. LINGAPPA SHETTY.

LAHORE HIGH COURT.
SPECIAL BENCH.

MATRIMONIAL REFERENCE No. 6 OF 1918.

April 25, 1919.

Present:—Sir Henry Rattigan, Kt., Chief Justice, Mr. Justice Broadway and Mr. Justice Martineau.

In the matter of THE INDIAN DIVORCE ACT.

Divorce Act (IV of 1869), s. 43—Decree nisi passed by District Judge—Custody and maintenance of children, order as to, nature of—Procedure.

An order under section 43 of the Divorce Act as to the custody and maintenance of the children should not form part of a decree nisi for the dissolution of marriage passed by a District Judge.

Such an order is merely *ad interim* and is liable to terminate upon the confirmation of the decree by the High Court.

Case referred by the District Judge, Lahore, for the confirmation of his decree, dated the 1st June 1918, dissolving the marriage between the parties.

Mr. Oertel, for the Petitioner.

ORDER.—A return has now made to our order, dated 12th March 1919, and we agree with the District Judge that the petitioner has succeeded in proving that he did not connive at the adultery committed by the respondent. We accordingly confirm the decree nisi for dissolution of marriage passed by the District Judge on the 1st of June 1918. The latter part of the District Judge's decree, which directs under section 43 of the Indian Divorce Act that the custody of the children shall remain with the respondent and that the petitioner shall pay a specified sum monthly for the education and maintenance of the two elder children, should not have formed part of the decree nisi [see *Burroughs v. Burroughs* (1)]. These were merely *ad interim* orders liable to terminate upon the confirmation of the decree by this Court. Our present order must not be taken to embody these *interim* orders of the District Judge, and it will be for the petitioner to apply to the District Judge if he desires to obtain the custody of the children. We make no order as to costs.

Decree nisi confirmed.

(1) 62 P. R. 1887 (F. B.).

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 780 OF 1918.

September 22, 1919.

Present:—Mr. Justice Spencer and Mr. Justice Krishnan.

BASAVANAGUDI NARAYANA KAMATHY AND OTHERS—DEFENDANTS
—APPELLANTS

versus

M. LINGAPPA SHETTY AND OTHERS—
PLAINTIFFS AND DEFENDANT—RESPONDENTS.

Easements Act (V of 1882), s. 12—Landlord and tenant—Tenant, whether can acquire easement as against landlord.

A tenant is incapable of acquiring any easement right in the land demised to him as against his landlord. [p. 944, col. 1.]

Mani Chander Chakerbutty v. Baikanta Nath Biswas, 29 C. 363, followed.

Second appeal against the decree of the Court of the Subordinate Judge, South Kanara, in Appeal Suit No. 212 of 1917 (Appeal Suit No. 174 of 1917, on the file of the District Court), preferred against the decree of the Court of the District Munsif, Mangalore, in Original Suit No. 192 of 1915.

FACTS appear from the judgment.

Mr. A. Krishnaswami Aiyar, for the Appellants.—The appellant, though a tenant of the respondents, has a permanent interest in the land. He can acquire an easement right as against the landlord. The decision in *Mani Chander Chakerbutty v. Baikanta Nath Biswas* (1) does not apply as the Easements Act is not in force in Bengal.

As the tenant had been in enjoyment of the right for a long time, a grant of the easement right by the landlord may be presumed.

Mr. B. Sitarama Rao, for the Respondents.—A tenant cannot acquire an easement right in respect of property held by him as a tenant. It is immaterial that he has permanent rights. See *Mani Chander Chakerbutty v. Baikanta Nath Biswas* (1). Any benefit acquired by him enures for the landlord's benefit. See *Gayford v. Moffatt* (2). Under section 12 of the Easements Act the right can be acquired only by owners.

The point as to presumption of a grant from long enjoyment was not taken in the lower Court and is raised for the first time here in second appeal.

JUDGMENT.—Following the ruling in *Mani Chander Chakerbutty v. Baikanta Nath* (1) 29 C. 363.

(2) (1868) 4 Ch. App. 133.

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Biswas (1) we must hold that the appellants were not in a position to acquire any easement right over the respondent's land as they were his tenants. The fact that the tenants were permanent tenants was held to make no difference on this point in the Calcutta case.

That case is sought to be distinguished on the ground that the Easements Act did not apply to Bengal, but it is not shown how the Easements Act has made any difference on the point. Section 12 of that Act enables only owners of immoveable property to acquire easement rights and not persons who are mere lessees. If a lessee by his user acquires any easement right over another's land, he acquires it for the benefit of the tenement he is holding and as that belongs to his landlord the benefit will go to the latter and it follows, therefore, that such a right could not be acquired or set up against the landlord. The English Law is clear on the point. *Vide* the case cited by the learned Subordinate Judge, *Gayford v. Moffatt* (2). The question whether the land over which the easement is claimed was originally Government land or land belonging to the appellant's landlord is immaterial on the above view. It now admittedly belongs to the latter and any claim by way of easement, therefore, fails.

It was then suggested that from long enjoyment a grant of an easement right by the landlord at the time of its inception might be presumed. This case was not made in the lower Courts, and it cannot be allowed to be raised in second appeal for the first time as plaintiff has not had a proper opportunity to meet it. There is also difficulty in raising such a presumption if the land over which the right of way is claimed belonged to the Government. Even if it was the landlord's land, the *Mulgeni* in favour of the appellants having been created presumably by a *Mulgeni* document, oral evidence adding to its terms cannot be allowed. But it is suggested that this grant may have been subsequent to the grant of the *Mulgeni* right itself. In such a case, perhaps, the creation of a right of way in the appellants' favour by an oral grant might have been pleaded, but such a special case was not set up at all and we cannot allow it now. The second appeal fails and is dismissed with costs.

Appeal dismissed.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 1125 OF 1919.

January 20, 1920.

Present:—Mr. Justice Scott-Smith.

GURDITTA MAL—DECREE-HOLDER—
APPELLANT

versus

PARTAP SINGH AND OTHERS—JUDGMENT-

DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 2, 16—Assignment of decree—Enquiry as to character of assignment, whether permissible—Benamidar assignee, whether can execute decree.

On an application for execution of a decree by the transferee thereof it is permissible to enquire whether the transferee is really a *benamidar* for the judgment-debtor. [p. 945, col. 1.]

Where the transferee of a decree is found to be a *benamidar* for the judgment-debtor, the Court is bound by Order XXI, rule 16, of the Civil Procedure Code to refuse execution in his favour. [p. 945, col. 1.]

Nagendra Bala Dassi v. Debendra Nath, 44 Ind. Cas. 13; 22 C. W. N. 491; 27 C. L. J. 88, distinguished.

Bayyana Ramayya v. Nidamarthi Krishnamurthi, 32 Ind. Cas. 952; 40 M. 296; 3 L. W. 186; 19 M. L. T. 124; (1916) 1 M. W. N. 133, *Chellam Chetti v. Seeni Chetti*, 43 Ind. Cas. 801; 7 L. W. 201; (1913) M. W. N. 226, followed.

Miscellaneous first appeal from the order of the Senior Subordinate Judge, Rawalpindi dated the 24th February 1919, rejecting the application.

The Hon'ble Pandit Sheo Narain and Mr. Sewaram Singh, for the Appellant.

Lala Moti Sagar, R. S., for the Respondents.

JUDGMENT.—The Punjab National Bank obtained a decree on the 7th July 1919 against Partab Singh and Sant Singh, judgment-debtors. The decree was for Rs. 5,771 and subsequently Rs. 1,000 was paid by Sant Singh. On the 27th July 1920, the decree was ostensibly sold to Gurditta Mal, the present appellant, who applied to the executing Court under Order XXI, rule 16, Civil Procedure Code, for execution against Partab Singh on the ground that the decree had been transferred to him by assignment in writing. The lower Court has held that Gurditta Mal was a *Benamidar* for Sant Singh, judgment-debtor, and has accordingly rejected the application for execution under the second proviso to Order XXI, rule 16. From this order Gurditta Mal has appealed, and the first point urged by his Counsel, Mr. Sheo Narain, is that no enquiry was permissible in execution proceedings as to whe-

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ther the ostensible assignee was a Benamidar for one of the judgment debtors. Now, it appears to me that the provisions of the law contained in the second proviso aforesaid could be easily defeated if it was not permissible upon the application of the transferee to enquire whether he was really a Benamidar for one of the judgment debtors. Pandit Sheo Narain has referred to *Nagendra Bala Dassi v. Debendra Nath* (1), wherein it was held on the facts of that particular case that it was not practicable in execution proceedings to go behind the decree and to enquire whether the assignee of the decree was a Benamidar for somebody else. That case is in several respects distinguishable from the present one. On the other hand in *Bayyana Ramayya v. Nidamarthi Krishnamurthi* (2) it was held that Order XXI, rule 2 (3), Civil Procedure Code, does not disentitle a judgment debtor from proving the fact that a transferee of a decree applying for execution is merely a Benamidar of another judgment-debtor, and it was held also that when the transferee was found to be such a Benamidar, the Court is bound by Order XXI, rule 16, to refuse execution in his favour. The same view was taken by another Bench of the Madras High Court in the case reported as *Ohellam Ohetti v. Seeni Ohetti* (3), where it was held that a person who gets an assignment of a decree Benami for another is entitled to execute the decree in his own name provided he is not the Benamidar of the judgment debtor himself. If he is such a Benamidar it is clear that he cannot execute the decree, and it is difficult to see how the real facts can be ascertained without an enquiry. I, therefore, see no force in the first point urged by Counsel for the appellant. As to the actual fact whether Gurditta Mal is a Benamidar for Sant Singh, I have no difficulty in agreeing with the finding of the lower Court. In the first place it is clear from Resolution No. 22 of the 22nd April 1911 by the Local Board, Rawalpindi, of the Punjab National Bank that the Board recommended that a promissory note

(1) 44 Ind. Cas. 13; 22 C. W. N. 431; 27 C. L. J. 388.

(2) 32 Ind. Cas. 952; 40 M. 236; 3 L. W. 186; 19 M. L. T. 124; (1916) M. W. N. 133.

(3) 43 Ind. Cas. 801; 7 L. W. 201; (1918) M. W. N. 226.

of Rs. 6,700 carrying interest at $7\frac{1}{2}$ per cent. per annum should be taken from Sant Singh in full settlement of this very decree against Partab Singh and Sant Singh and of another claim against Hira Singh and Sant Singh. It is no doubt true that in a subsequent letter No. 457, dated 5th August 1911, from the Rawalpindi Branch to the Head Office, Lahore, it was stated in paragraph D that the money of this promissory note had been advanced in cash and would have nothing to do with the decree, yet I am quite satisfied that no cash actually passed. It might be said that cash was given to Sant Singh in return for the promissory note and was immediately returned by him in settlement of the claim against him. I do not, however, believe that actual cash was made available to Sardar Harbans Singh, son of Sardar Sant Singh, as is alleged. The entry in the account books of the Bank:—"By amount at the disposal of Harbans Singh, on account of two decrees against his father Rs. 7,000" makes it, in my opinion, absolutely clear that there was a connection between this sum and the amount of the two decrees. The debit and credit entries in the name of Sant Singh and Harbans Singh, which are set forth in the judgment of the lower Court, satisfy me that they were mere paper entries and were made in order to give the transaction an appearance of reality. The statement of Bhagat Ishwar Das, Advocate of this Court, is very important and supports the theory that Sant Singh was the real purchaser of the decree. Moreover Gurditta Mal has not produced his own account books in which there should be an entry showing that he had paid cash as consideration for the transfer of the decree in his favour. He says that his account books have been lost, but this is the usual excuse put forward where a party does not wish to produce his account books, and no evidence has been referred to which bears out the statement in this respect. I, therefore, am fully in agreement with the lower Court that Gurditta Mal is merely a Benamidar and that Sant Singh is the actual transferee of the decree.

In these circumstances Gurditta Mal is not entitled to take out execution against Partab Singh and I dismiss his appeal with costs.

Appeal dismissed.

SUKHDEO JHA V. JHAPAT KAMAT.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 522 OF 1918.

January 16, 1920.

Present:—Mr. Justice Coutts and Mr. Justice Sultan Ahmed.

SUKHDEO JHA AND OTHERS—PLAINTIFFS
—APPELLANTS

versus

JHAPAT KAMAT AND OTHERS—DEFENDANTS
—RESPONDENTS.*Hindu Law—Joint family—Alienation by manager—Power to alienate, limits of—'Antecedent debt,' meaning of—Burden of proof.*

One co-parcener of a Mitakshara joint family cannot, without the consent of the other co-parceners, alienate by way of gift, sale or mortgage the joint family property. [p. 47, col. .]

One exception to this rule is when the father, as manager of the family, mortgages or otherwise deals with the joint property for family necessity or for antecedent debt. [p. 947, col. .]

The exception in favour of alienations by the father for antecedent debts is more or less the creation of case-law and should not be extended and should be very carefully guarded [p. 947, col. .]

An antecedent debt is an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate. [p. 47, col. 2; p. 949, col. .]

There is a distinction between a case where the property has passed out of the hands of the family by mortgage, sale or other alienation by the father, and the son sues for the recovery of the same and the case where the mortgagee seeks to enforce the mortgage executed by the father against the sons who are in possession of the property. In the former case the son must show the grounds on which he seeks to set aside the alienation by the father, in the latter it is the mortgagee who has to show how he claims for the re-payment of the debt of the father. [p. 948, col. 2; p. 949, col. .]

Appeal from a decision of the District Judge, Darbhanga.

Mr. P. K. Sen, for the Appellants.

Mr. S. C. Mitter, for the Respondents.

JUDGMENT.

SULTAN AHMED, J.—The plaintiffs-appellants instituted this suit for the recovery of Rupees 675 principal *plus* interest on the mortgage bond alleged to have been executed by one Gobind Kamat, father of defendants Nos. 1 to 4, on the 7th July 1909. The consideration of the bond was stated to be an old debt of Rs. 411 and a fresh advance of Rs. 264 for legal necessities. The plaintiffs are members of a joint Mitakshara family and so are the defendants. The defence was that there was non-joinder of plaintiffs and that of defendants, that there was no

valid consideration for the mortgage, that the father of the defendants could not legally bind the joint family property and that the bond was otherwise invalid and inoperative.

The learned Munsif who tried the suit held that it was bad, as all persons interested in the bond were not made parties, that the bond was inoperative and invalid inasmuch as the alleged previous debt was not established and that the advance of Rs. 264 was not proved to have been made for family or any legal necessity. He also held that the defendants had separated from the father at the time of the execution of the bond. He accordingly dismissed the suit. The learned Judge on appeal held that there was non-joinder of parties and that the bond was executed after the defendants and the father had separated, and that the advance of Rs. 264 was not for family necessity. As regards the old debt of Rs. 411 he held that though it was a reality, it was not such as could legally affect the joint family property, and he, therefore, dismissed the appeal with costs.

This second appeal has now been preferred by the plaintiffs. Mr. Sen has presented a very clear argument before us. He concedes that on the findings, he is not in a position to contest the order of the District Judge with respect to the advance of Rs. 264. But he strenuously contends that he is at least entitled to a decree for Rs. 411 *plus* interest on that amount, inasmuch as it was an antecedent debt and as such capable of binding the family property, and he submits that the learned Judge on appeal has clearly misunderstood the observations of the Judicial Committee of the Privy Council in the case of *Sahu Ram Chandra v. Bhup Singh* (1). In my opinion, this appeal could have been disposed of on the question of non-joinder of parties and also on the ground of the separation of the father, Gobind, from the defendants prior to the date of the execution of the mortgage bond. But it is not necessary to deal with these points in view of our opinion with respect to the main

(1) 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 693; 1 P. L. W. 57; 15 A. L. J. 437 19 Bom. L. R. 496; 23 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.).

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contention of Mr. Sen on the question of the liability of the family property for an antecedent debt of the father, and I now proceed to examine the validity of this contention. No authority is needed for the elementary proposition of Hindu Law that one co-parcener of the Mitakshara joint family cannot without the consent of the other co-parceners alienate by way of gift, sale or mortgage the joint family property. But exceptions have been made, one of them being when the father, as manager of the family, mortgages or otherwise deals with the joint property for family necessity or for antecedent debt. It may be pointed out that the exception in favour of the alienation by the father for antecedent debt is more or less the creation of case law and is said to be "an innovation destructive to a great extent of the Mitakshara system," see Golap Chandra Sastri's Hindu Law, page 216, and it is, therefore, not surprising that the Judicial Committee in the case of *Sahu Ram Chandra v. Bhup Singh* (1) observed that "this being an exception from a general and sound principle, their Lordships are of opinion that the exception should not be extended and should be very carefully guarded." So far as the claim for Rs. 411 plus interest is concerned, an appeal has been made to us only on the ground of its being an antecedent debt, so the whole question is what is an antecedent debt of the father. The term had been the subject of conflicting interpretations for a very long time. In some decisions it was understood to be a debt which was only prior in time to the father's security, though not quite independent of it. See *Debi Dat v. Jadu Rai* (2), *Babu Singh v. Behari Lal* (3), *Ram Dayal v. Ajudhya Prasad* (4), *Chinnayya v. Perumal* (5), *Sami Ayyangar v. Ponnammal* (6). Other decisions took it to be simply a debt prior in time to the suit in which it was sought to be enforced. See *Gunga Prasad v. Ajudhia Pershad* (7), *Luchmun Dass v. Giridhur Chowdhry* (8), *Khalilur Rahman v. Gobinda Pershad* (9), *Surja*

Prasad v. Golab Chandra (10), *Maheswar Dutt Tewari v. Kishun Singh* (11). The third view was that it was a debt which was not only prior in time but completely apart from the security which was sought to be enforced, *Chandradeo Singh v. Mata Prasad* (12). All the doubts arising from such divergence of Judicial opinion now have been removed by the Privy Council accepting the last view. Their Lordships in the case of *Sahu Ram Chandra v. Bhup Singh* (1) observed as follows:—"In their Lordships' opinion these expressions, which have been the subject of much difference of legal opinion, do not give any countenance to the idea that the joint family estate can be effectively sold or charged in such a manner as to bind the issue of the father, except where the sale or charge has been made in order to discharge an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate..... The exception being allowed, as in the state of the authorities it must be, it appears to their Lordships to apply, and to apply only, to the case where the father's debts have been incurred irrespective of the credit obtainable from immovable assets which do not personally belong to him but are joint family property. In their view of the rights of a father and his creditors, if the principle were extended further, then the exception would be made so wide as in effect to extinguish the sound and wholesome principle itself, namely, that no manager, guardian or trustee can be entitled for his own purposes to dispose of the estate which is under his charge. In short, it may be said that the rule of this part of the Mitakshara Law is that the joint family estate is in this position: under his management he can neither obtain money for his own purposes for it nor can he obtain money for his own purposes upon it. To permit him to do so would enable him to sacrifice those rights which he was bound to conserve. This would be equivalent to sanctioning a plain and, it might be, a deliberate breach of trust. The Mitakshara Law does not warrant or legalise any such transaction."

"The limits of the principle of the exception have been thus set forth, because in their Lordships' opinion they form a guide to the

(2) 24 A. 459; A. W. N. (1902) 123.

(3) 30 A. 156; A. W. N. (1903) 61; 5 A. L. J. 175.

(4) 28 A. 328; A. W. N. (1906) 40; 3 A. L. J. 81.

(5) 13 M. 51.

(6) 21 M. 28.

(7) 8 C. 131; 9 C. L. R. 417.

(8) 5 C. 855; 6 C. L. R. 473 (F. B.).

(9) 20 C. 328.

(10) 27 C. 762.

(11) 34 C. 184; 11 C. W. N. 294; 5 C. L. J. 441.

(12) 1 Ind. Cas. 479; 31 A. 176; 6 A. L. J. 266.

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settlement of the conflict of authority in India on the subject of antecedent debt."

Therefore, applying these principles laid down above to the facts of the present case it comes to this, that if the father, Gobind, had borrowed the sum agreeing to give the plaintiffs a mortgage bond later, the bond would not be for antecedent debt as obviously the whole would be one transaction. On the other hand, if he borrowed the money independently of the joint family property and finding that he could not pay it off at all, executed a bond as a security, then it would certainly be a bond for antecedent debt. Mr. Sen, however, contended that the decision of the Privy Council must be construed to define the expression antecedent debt with reference to the facts of that particular case and the definition must not be taken to be applicable to other cases, and he brought to his aid the well-known observations of Lord Halsbury in the case of *Quinn v. Leatham* (13). A perusal of the whole judgment of their Lordships, coupled with a careful study of Stanley, Chief Justice's judgment in the case of *Chandradeo Singh v. Mata Prasad* (12), which was fully considered and approved of by their Lordships, will clearly show that their Lordships had in mind not only the facts of the particular case before them but the wider question what is an antecedent debt. I have already shown the conflict of authority on this question and it was to put an end to this divergence of judicial opinion that their Lordships were pleased to definitely settle the law on the subject. If that were not so and if their Lordships had only the facts of the particular case they were deciding, in view, they would not have expressed themselves in these terms: "*The limits of the principle of the exception have been thus set forth, because in their Lordships' opinion they form a guide to the settlement of the conflict of authority in India on the subject of antecedent debt*" The italics are mine. In view of this clear statement I have absolutely no doubt that their Lordships meant what they actually said, that is, they were settling the conflict of authority in India on the subject of antecedent debt. I am confirmed in the view I have taken

of the observations of their Lordships by the decision of Spencer and Krishnan, JJ., in the case of *Badagala Jogi Naidu v. Bendalam Papiiah Naidu* (14) and that of Tudball and Rafique, JJ., in the case of *Brij Narain Rai v. Mangla Prasad* (15); Mr. Sen has, however, placed before us a very recent decision of the Madras High Court in the case of *Arumugham Ohetty v. Muthu Koundan* (16), which has taken a different view. I have very carefully considered that judgment and with the greatest respect to the learned Judges who decided that case, I feel unable to construe the observations of the Judicial Committee quoted above in the manner in which they have done. It seems to me and I say so again with great respect to them, that their decision tends to extend the operation of the doctrine of validity of the alienation by the father for antecedent debts against his sons, and thus create a result which their Lordships expressly deprecate. I entirely agree with the following remarks of Krishnan, J. in the case of *Badagala Jogi Naidu v. Bendalam Papiiah Naidu* (14) on the observations of the Privy Council quoted above: "There cannot be any doubt on their language that they meant to restrict the doctrine of cases of antecedent debts borrowed on the father's sole responsibility with no obligation on the joint family or on its properties. We are bound to follow this expression of opinion which is quite clear, and we cannot consider any arguments about its correctness."

Mr. Sen further contended that the learned Judge in the Court below has wrongly thrown the onus on the plaintiff to show that the debt was an antecedent debt. I regret I cannot accept the contention as sound. The law is quite clear on this point. Courts have always drawn a distinction between a case where the property has passed out of the hands of the family by mortgage, sale or other alienation by the father, and the son sued for the recovery of the same and the case where the mortgagee seeks to enforce the mortgage executed by the father against the sons who are in possession of the property. In the former case the son must show the

(14) 48 Ind. Cas. 287; 35 M. L. J. 382.

(15) 50 Ind. Cas. 104; 41 A. 235; 17 A. L. J. 249; 1 U. P. L. R. (H. C.) 49.

(16) 52 Ind. Cas. 525; 42 M. 711; 9 L. W. 567 (1919, M. W. N. 409; 37 M. L. J. 166; 26 M. L. T. 91).

(13) (1901) App. Cas. 495; 70 L. J. P. O. 76; 85 L. T. 289; 50 W. R. 139; 65 J. P. 708; 17 T. L. R. 749.

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grounds on which he seeks to set aside the alienation by the father, in the latter it is the mortgagee who has to show how he claims for the re-payment of the debt of the father. See *Jimna v. Nain Sukh* (17) and *Ohindra-deo Singh v. Mata Prasad* (12).

I am, therefore, of opinion that the onus was rightly placed upon the plaintiff in this case. The two grounds on which this appeal was pressed before us, therefore, fail and I would dismiss this appeal with costs.

COURT, J.—This was a suit brought on a mortgage bond for Rs. 675 executed by one Gobind Kamat, who died leaving four sons and four grandsons who are the defendants in the suit. The suit was dismissed in the Court of first instance on the ground that the bond, so far as the money was actually received, was not executed for legal necessity, that Gobind Kamat was separate from his sons at the time of the execution of the bond and that the suit was bad for defect of parties. This decision has been confirmed on appeal to the learned District Judge of Darbhanga. He has found that Gobind was separate from his sons at the time of the execution of the bond and that the suit was bad for defect of parties, but there is a difference in his finding on the first point which it is necessary to consider.

The consideration of the bond was said to be an old debt of Rs. 411 and a fresh advance of Rs. 264 for cultivation, domestic expenses and payment of other Mahajans. The learned Munsif who tried the suit found that there was in fact no old debt and that, therefore, the defendants were not bound to pay the amount. On the other hand the learned District Judge has found that there was an old debt of Rs. 411, but he has dismissed the plaintiffs' claim *in toto* on the ground that an antecedent debt of a Hindu father will, as such, only bind the family estate when it is incurred wholly apart from the credit obtainable on the joint family property and that it does not appear that this condition was fulfilled in the present case.

The first argument in appeal is that the learned District Judge is wrong in law on the question of the meaning of antecedent debt and reliance is placed on the case of *Arumugham Ohetty v. Muthu Koundan* (16). In the case of *Sahu Ram Ohandra v. Bhup Singh* (1) their

Lordships of the Privy Council after considering all the previous cases remarked: "In their Lordships' opinion these expressions, which have been the subject of so much difference of legal opinion, do not give any countenance to the idea that the joint family estate can be effectively sold or charged in such a manner as to bind the issue of the father except where the sale or charge has been made in order to discharge an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate. The exception being allowed, as in the state of the authorities it must be, it appears to their Lordships to apply, and to apply only to the case where the father's debts have been incurred irrespective of the credit obtainable from immoveable assets which do not personally belong to him but are joint family property."

The meaning of this is clear, and in my opinion there can be no doubt that their Lordships of the Privy Council intended to lay down generally what is meant by the term "antecedent debt." This meaning was adopted in *Brij Narain Rai v. Mangla Prasad* (15), where in a similar case Tudball and Muhammad Rafique, JJ., remanded the case with the following remarks: "It must be clearly understood that the words 'antecedent debts' must be read within the clear meaning of the ruling in *Sahu Ram Ohandra v. Bhup Singh* (1). It would be for the present appellant to show and prove that the debts incurred under those mortgages were incurred to discharge not only obligations antecedently incurred, but incurred wholly irrespective of the ownership of the joint family property, in other words, that they were personal debts incurred by the father for his own purpose and apart from the security of the joint family property."

Reliance, however, as I have already said, has been placed by the learned Counsel for the appellants on *Arumugham Ohetty v. Muthu Koundan* (16). In that case the meaning of the decision in *Sahu Ram Ohandra v. Bhup Singh* (1) was considered by a Full Bench of the Madras High Court. The learned Judges in that case appear to have been of opinion that it was not the intention of their Lordships of the Privy Council to lay down any general principle and that their remarks should be construed as applying

(17) 9 A. 423; A. W. N. (1887) 116.

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only to the case before them. In this view I am unable to agree. Their Lordships considered all the previous cases and with all respect to the learned Judges who decided the case of *Arumugham Chetty v. Muthu Koundan* (16), I am unable to adopt their view. On this ground, therefore, the appeal must, in my opinion, fail.

The appeal must also fail on a further ground, namely, the finding of fact that Gobind was separate at the time of the execution of the bond. I would, therefore, dismiss the appeal with costs.

Appeal dismissed.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2590 OF 1915.

April 25, 1919.

Present :—Sir Henry Rattigan, Kt., Chief Justice, and Mr. Justice Abdul Raoof.
JAMES SYMONDS EVANS—PLAINTIFF
—APPELLANT

versus

SECRETARY OF STATE FOR INDIA
—DEFENDANT—RESPONDENT.

Malicious prosecution—‘Malice,’ meaning of—Police Officer directing prosecution as result of enquiry, liability of—Secretary of State, whether liable for acts of officers done in discharge of duty—Tort.

In cases of malicious prosecution the term ‘malice’ does not necessarily imply personal spite or grudge on the part of the defendant or his agent, and it exists wherever there is an improper or indirect motive which actuated the prosecutor in instituting criminal proceedings against the plaintiff. [p. 951, col. 2.]

Where a Police Officer acting in the honest discharge of his duties directs the prosecution of a person on a criminal charge as the result of an enquiry, he cannot be held liable in damages if it subsequently turns out that there was no reasonable or probable cause for the prosecution. [p. 951, col. 2.]

The Secretary of State cannot be held civilly liable for tortious acts committed by Police Officers in the performance of duties imposed upon them by the Legislature. [p. 952, col. 1.]

First appeal from the decree of the Senior Subordinate Judge, Rawalpindi, dated the 24th May 1915.

Mr. Raghu Nath Sahai, for the Appellant.

Mr. Herbert, Government Advocate, for the Respondent.

JUDGMENT.—Plaintiff, Mr. James Symonds Evans, Coachbuilder, Rawalpindi, sued the Secretary of State for India in Council through the Agent, North Western Railway, Lahore, for Rs. 1,50,000 as damages for an alleged malicious prosecution of the plaintiff by the defendant's servants and agents, under section 411, Indian Penal Code.

On behalf of the defendant, preliminary objections were filed to the effect that the suit did not lie against the Secretary of State and should be brought against the Government officials alleged to be guilty of the tort in question; that even if the Secretary of State could be held ordinarily liable for the torts of his servants, no such liability attached to the defendant on the facts set out in the plaint; that the plaint was vague and indefinite in that it did not specify who were the servants and agents alleged to be guilty of the wrong done to the plaintiff, or the acts which were complained of as being negligent and malicious; and finally that it was not stated how and why defendant could be held responsible for the unspecified acts of servants and agents not named in the plaint. It appears that after some consultation between Counsel for the plaintiff and the learned Assistant Legal Remembrancer, an agreement was arrived at as regards the supplying of particulars relating to the servants and agents alleged to have been guilty of the tort and as to the specific acts alleged to have been committed by them. In pursuance of this arrangement, according to the argument of the learned Vakil who appeared before us, the third paragraph of the plaint, which had been originally in general terms, was amended and a specific allegation was made that the defendant's servant and agent “known and styled as the District Loco. Superintendent of the North Western State Railway at Rawalpindi” had, while acting within the scope of his duties, instituted criminal proceedings against the plaintiff negligently and maliciously and without reasonable cause. Mr. Herbert, who represented the defendant in the lower Court, explains that the agreement was merely to the effect that the defence would raise no objection if plaintiff specified the servant or agent by his official designation and not by name. Six issues were fixed by the Senior

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Subordinate Judge, but he found it unnecessary to deal with others than the first two. These were as follows :—

1. Was there no reasonable and probable cause for the prosecution ?

2. Was the prosecution actuated by malice ?

The learned Judge in a lengthy judgment has discussed the facts which led up to the prosecution of the plaintiff and to his eventual discharge by the Magistrate, 1st Class, and has arrived at the conclusion that there was no reasonable and probable cause for the prosecution. He has, however, dismissed plaintiff's suit on the ground that the District Loco. Superintendent, North Western Railway, Rawalpindi, was specifically named in the amended plaint as the servant or agent of the defendant who had committed the tortious act complained of and that it had been proved by the evidence on the record that the said District Loco. Superintendent was not the actual prosecutor in the criminal case, was not directly responsible for the plaintiff's prosecution and consequently there could have been "no malice on his part in respect of the prosecution."

The Judge finds upon the evidence that neither the District Loco. Superintendent nor the Railway Department had any hand in the institution of the criminal proceedings against the plaintiff, that they merely placed all the facts in their possession before the Police and that it was the Police authorities who actually instituted those proceedings. He finds further that the Police authorities were also the servants and agents of the defendant, but that it was unnecessary to consider whether they had acted maliciously or whether the defendant was civilly liable for their action, inasmuch as the plaintiff had not alleged that the tortious act of which he complained was committed by the Police Officers concerned. At the same time the learned Subordinate Judge points out that "it was almost impossible for the defendant to know that the case had not been launched against him at the instance of the Railway authorities, as he could not know of anything that transpired behind the scenes and it was only natural, therefore, that he should have named the District Loco. Superintendent, Rawalpindi, as the person responsible for the prosecution." On this ground he directed the parties to bear their own costs.

Plaintiff has appealed to this Court and it has been urged on his behalf that upon the findings arrived at the Subordinate Judge should have allowed the plaint to be amended (if necessary) so as to make the defendant liable for the acts of the Deputy Inspector General of Police who actually directed the institution of the criminal proceedings, and we are asked to allow the amendment at this stage. On behalf of the respondent, Mr. Herbert, Officiating Government Advocate, has taken exception to the finding of the Subordinate Judge as regards the absence of reasonable and probable cause for the prosecution and has urged that in any event plaintiff's claim must fail, because the criminal proceedings against him were instituted by the late Mr. Wallace, Deputy Inspector General of Police, whose action in the matter was *bona fide* and in no way actuated by malice in the sense that that term is understood in connection with cases of this kind, and also because the Secretary of State is not responsible for an act done by a Government official, not in obedience to an order of the executive Government but in performance of a statutory power vested in him by the Legislature.

After hearing lengthy arguments upon these points we have no hesitation in holding that Mr. Herbert's objections to the claim are sound. The term "malice" does not necessarily imply personal spite or grudge on the part of the defendant or his agent, and it exists wherever there is an improper or indirect motive which actuated the prosecutor in instituting criminal proceedings against the plaintiff. In the present case it is clear from the evidence that the Railway authorities consulted Mr. Wallace, the Deputy Inspector General of Police, and placed all the facts in their possession before him, that Mr. Wallace had an enquiry made by his Police Officers and that as the result of that inquiry he, in the honest discharge of his duties, was of opinion that a *prima facie* case under section 411, Indian Penal Code, had been made out against the plaintiff. It is not and never has been, so far as we know, suggested that Mr. Wallace bore any ill-feeling towards the plaintiff or that in directing the latter's prosecution he was actuated by any indirect or improper motive. Even upon the assumption, then, that there was no reasonable and probable cause for the prosecution, the present suit must fail inasmuch as

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one of the ingredients which go to constitute the tort known as malicious prosecution—namely, malice on the part of the prosecutor—has not been established. Apart from this objection the suit must also fail on the ground that the Secretary of State cannot be held civilly liable for tortious acts committed by Police Officers in the performance of duties imposed upon them by the Legislature [see *Shivabhojan Durgoprasad v. Secretary of State for India* (1) and the remark of Maclean, C. J., in *Moti Lal Ghose v. Secretary of State for India* (2)]. It is unnecessary for us, upon the view that we take, to discuss the more general question regarding the civil liability of the Secretary of State for wrongs committed by the servants and agents of Government.

We dismiss this appeal with costs.

Appeal dismissed.

- (1) 28 B. 314 at p 325; 16 Bom. L. R. 65.
(2) 9 C. W. N. 425 at p. 497; 1 C. L. J. 255.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 984
AND 1282 OF 1918.

July 20, 1919.

Present:—Mr. Justice Chatterjea and
Mr. Justice Duval.

APURBA KRISHNA ROY AND OTHERS—
APPELLANTS

versus

SYAMA CHARAN PRAMANIK AND OTHERS
—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), ss. 103B, 105, 105A, 107, 109—Record of Rights, entry in—Presumption of correctness—Declaration that entry in Record of Rights is erroneous, suit for—Decision of Settlement Officer—Jurisdiction of Civil Court, whether barred—Res judicata.

An entry in the Record of Rights under the provisions of section 103B of the Bengal Tenancy Act must be presumed to be correct until it is proved by evidence to be incorrect, and, therefore, in a proceeding under section 105 of that Act for settlement of fair and equitable rent, the Settlement Officer, in the absence of any evidence to the contrary, is not only justified but is bound to act upon such entry. [p. 953, col. 2.]

Where a question has in effect, though not in express terms, been necessarily decided between parties to a suit, they cannot raise the same question as between themselves in any other suit in any other form. [p. 954, col. 1.]

Where a question is decided by necessary implication, the decision would operate as *res judicata*. [p. 954, col. 1.]

Section 105A of the Bengal Tenancy Act does not lay down that the "issues" referred to in the section can only be raised by an applicant; on the contrary, some of them from their very nature must be raised by the opposite party. [p. 954, col. 2.]

After the final publication of a Record of Rights the landlord applied for settlement of fair and equitable rent under the provisions of section 105A of the Bengal Tenancy Act. The tenant thereupon raised the objection that the land, being *lakheraj*, was not liable to assessment of rent. In consequence several issues were framed, one of them being whether the land was *niskar lakheraj* property of the tenant. The tenant, however, did not produce any evidence and the Settlement Officer by his judgment assessed certain rent upon the land. The tenant then brought a suit for a declaration that the entry in the Record of Rights stating that the land was liable to assessment was erroneous:

Held, (1) that the decision of the Settlement Officer under section 105A of the Bengal Tenancy Act was binding upon the tenant, having regard to the provisions of section 107 of the Bengal Tenancy Act; [p. 954, col. 1.]

(2) that apart from the provisions of section 107 the suit was not maintainable under section 109 of the Bengal Tenancy Act. [p. 954, col. 1.]

Appeals against the decrees of the Subordinate Judge, 1st Court, Hooghly, dated the 6th of February 1918, reversing the decrees of the Munsif, 2nd Court at Amta, dated the 20th of July 1915, and remanding the suit to his Court to re-admit it in its original number and to decide it on merits.

FACTS appear from the judgment.

Dr. D. N. Mitter (with him Babu Heramba Chandra Guha), for the Appellants.—These two appeals arise out of two suits, one by the tenants and the other by the landlord. The Appeal No. 1282 arises out of the tenants' suit and the other appeal arises out of that by the landlord. The principal points relating to the two suits are the same. The landlord, plaintiff in Appeal No. 984, brought a suit for damages and prayed for injunction restraining the tenants (plaintiffs in Appeal No. 1282) from constructing *pucca* structures and making excavations on the land in dispute. The tenants' suit was for a declaration that an entry in the Record of Rights that the land held by the tenants was assessable to rent was wrong. The first Court tried the suits together and partly decreed the landlord's suit and dismissed the tenants'

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suit, holding that the suit was barred by *res judicata* and was, therefore, not maintainable. The tenants appealed in both these cases and the learned Judge held that the tenants' suit was not barred by *res judicata* and remanded the case for trial on the merits. Against that decision the present appeals have been preferred. After the final publication of the Record of Rights we, the landlords, instituted proceedings for settlement of fair rent under section 105 of the Bengal Tenancy Act. The tenants contested the suit and the Settlement Officer decided in our favour. I submit that his decision operates as *res judicata* on the question whether the lands held by the tenants are rent free or not as, in the absence of evidence to the contrary, the presumption of correctness of the entry in the Record of Rights stood un rebutted. Hence no subsequent suit is maintainable on the question thus expressly decided by the Settlement Officer. Refers to *Gregory v. Molesworth* (1), *Puhlwan Singh v. Matara Mohessur Buksh Singh* (2), sections 107 and 109 of the Bengal Tenancy Act. The order of remand is, therefore, bad and as upon this question the other appeal depends that should also be decreed.

Babu Monmotha Nath Roy, for the Respondents.—I submit that the Settlement Officer having decided the suit *ex parte* as would appear from his judgment, the proceedings cannot be said to operate as *res judicata*. Further the question as to whether the land was rent-free or not was not expressly raised and decided in those proceedings. Sections 107 and 109, Bengal Tenancy Act, do not apply. Refers to *Parhati v. Toolsi Kapri* (3), *Nawab Bahadur of Murshidabad v. Ahmad Hussain* (4). Under these circumstances the question of *res judicata* does not arise.

JUDGMENT.

S. A. No. 1282 of 1918.

This appeal arises out of a suit for a declaration that an entry in the Record of Rights, stating that the plaintiff held the land in dispute under the defendant and that the land was liable

(1) (1747) Atk 616 2^d E. R. 1160.

(2) 12 B. L. R. 391 at p. 395 (P. C.); 18 W. R. 182; 2 Suth. P. C. J. 660; 3 Sar. P. C. J. 163.

(3) 20 Ind. Cas. 1; 18 C. W. N. 674; 18 C. L. J. 128.

(4) 25 Ind. Cas. 695; 21 C. W. N. 1004; 25 C. L. J. 459; 44 C. 783.

to assessment of rent, is erroneous, the lands being *nishkar* (rent-free).

The Court of first instance held that the order of the Settlement Officer under section 105 of the Bengal Tenancy Act operated as *res judicata*. That decision has been set aside on appeal by the learned Subordinate Judge, who remanded the suit for trial on the merits. As against that decision, the present appeal has been preferred by the defendants.

As stated above, in the Record of Rights the land was entered as Mal land liable to assessment of rent. After final publication of the Record of Rights, the landlords defendants in the present case applied for settlement of fair and equitable rent under the provisions of section 105 of the Bengal Tenancy Act. The present plaintiff thereupon raised the objection that the land was not liable to assessment of rent, it being *lakhraj*. Several issues thereupon were framed, one of them being whether the land in suit is *nishkar lakhraj* property of the defendants. The defendants, however, did not produce any evidence and the Settlement Officer by his judgment, dated the 19th November 1913, assessed certain rent upon the land. The Settlement Officer in his judgment stated that the lands were recorded in the names of the defendants as tenants under the plaintiffs and noted as being liable to assessment of rent in the Record of Rights. He further said that the defendants had failed to produce any evidence after the framing of the issues and so the cases had been proceeded with *ex parte*.

It is contended before us that there was no decision by the Settlement Officer that the lands were not *lakhraj*. But the defendants expressly raised the issue whether the land was *nishkar lakhraj* and did not adduce any evidence upon that issue. The entry in the Record of Rights under the provisions of section 103 B of the Bengal Tenancy Act shall be presumed to be correct until it is proved by evidence to be incorrect. The Record of Rights was before the Settlement Officer and was expressly referred to by him in his judgment. In the absence of any evidence to show that it was incorrect, the Settlement Officer was not only justified but was bound to act upon that record, and he did act upon that record. That is what he meant by saying that the case

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had been proceeded with *ex parte*. The landlord had not to adduce any other evidence except to produce the Record of Rights and it was upon that record that the Settlement Officer proceeded and fixed the rent.

We do not see, how, in these circumstances, it can be said that there was no decision by the Settlement Officer.

It may be pointed out that where a question has been necessarily decided in effect though not in express terms between parties to a suit, they cannot raise the same question as between themselves in any other suit in any other form. See *Gregory v. Molesworth* (1) and *Soorjomonee Dayee v. Suddanund Mohapatra* (5). It may also be pointed out that where a question is decided by necessary implication, the decision would operate as *res judicata*. See *Puhlwan Singh v. Maharaja Mohessur Buksh Singh* (2). We have referred to these authorities only in answer to the argument advanced that there was no express decision as to the land not being *lakhraj*, but it seems to us, taking the judgment as a whole, that there was a decision upon the question raised before us.

We think, therefore, that the decision of the Settlement Officer under section 105A is binding upon the plaintiff in the present case, having regard to the provisions of section 107 of the Bengal Tenancy Act.

Apart from the provisions of section 107, we think that the present suit cannot be maintained under the provisions of section 109 of the Bengal Tenancy Act. That section lays down that "subject to the provisions of section 109A, a Civil Court shall not entertain any application or suit concerning any matter which is, or has already been, the subject of an application made, suit instituted or proceedings taken under sections 105 to 108, both inclusive." In this case the question whether the land is *lakhraj*, was the subject matter of an application under section 105A of the Bengal Tenancy Act before the Settlement Officer.

It was contended that the question was not raised by the landlord but by the tenant in his objection and that, therefore,

it was not the subject of an application. But we think it is unnecessary that the question should be raised by the applicant before the Settlement Court, because section 105A clearly refers to the "issues." It says:—"Where in any proceedings for the settlement of rents under this part, any of the following issues arise, (a) whether the land is or is not liable to the payment of rent, &c., &c.....the Revenue Officer shall try and decide such issue and settle the rent under section 105 accordingly." It does not lay down that those issues can only be raised by the applicant; on the contrary, some of them (from their very nature) must be raised by the opposite party.

The learned Pleader for the respondent referred us to the case of *Nawab Bahadur of Murshidabad v. Ahmad Hussain* (4), but that case merely lays down that "section 109 requires that the civil suit should have for its subject a matter which has already formed, and not one which might have formed, the subject of an application under section 105." There the question which formed the subject-matter of the suit before the Civil Court was never raised before the Settlement Court and the decision, therefore, does not affect the case before us.

We were also referred to the case of *Parbati v. Toolsi Kapri* (3). All that the case decided is that "the decision of a Settlement Officer to which the force and effect of a decree of a Civil Court is given by section 107 of the Bengal Tenancy Act does not include an order of dismissal of a suit under section 106 of the Act for default, the word 'decision' implying an adjudication on the merits."

In the present case, as we have seen, the question was directly raised and there was an express issue on the point and even though the defendant did not adduce any evidence in Court, the decision of the Settlement Officer was open to appeal and to second appeal to this Court.

In all these circumstances, the order of the Subordinate Judge remanding the case must be set aside and the decision of the Court of first instance dismissing the suit must be restored with costs in all Courts.

It appears from the order passed by Teunon and Walmsley, JJ., on the 13th

(5) 12 B. L. R. 304 at p. 315 (P. C.); 20 W. R. 377; L. A. Sup. Vol. 212; 3 Sar. P. C. J. 285.

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February 1919 that the appeal was dismissed against the minor respondents Nos. 3, 4, and 5, as the appellant's Pleader informed the Court that the appellant would not proceed against them. The appeal will, therefore, stand dismissed against the said respondents.

S. A. No. 984 of 1918.

In the view we have taken in Second Appeal No. 1282 of 1918, the decree of the lower Appellate Court in this case is set aside and the case sent back to that Court in order that the questions other than that dealt with by us in Second Appeal No. 1282 of 1918 may be decided and the case disposed of according to law. Costs to abide the result.

It appears from the order passed by Teunon and Walmsley, JJ., on the 13th February 1919 that the appeal was dismissed against the minor respondents Nos. 3, 4, and 5 as the appellant's Pleader informed the Court that the appellant would not proceed against them. The appeal will, therefore, stand dismissed against the said respondents.

Suits dismissed.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1869 of 1914.

April 29, 1919.

Present:—Mr. Justice Scott Smith and
Mr. Justice Broadway.

GAHL SINGH AND OTHERS—PLAINTIFFS—
APPELLANTS

VERSUS

SURJAN SINGH AND ANOTHER—DEFENDANTS
—RESPONDENTS.

Hindu Law—Religious endowment—Bunga, right of management of, whether can be transferred.

A *bunga* being partly religious and partly charitable, the office of manager of a *bunga* partakes of the nature of a religious office and cannot be alienated in the absence of a custom justifying such alienation. [p. 958, col 1.]

First appeal from the decree of the District Judge, Amritsar, dated the 23rd June 1914.

The Hon'ble Pandit Sheo Narain and Mr. Sewa Ram Singh, for the Appellants.

Dr. Gokal Chand Narang, Lala Moti Sagar, Diwan Ram Lal and Bawa Harcharan Das, for the Respondents.

JUDGMENT.—The suit out of which this appeal has arisen was instituted in the following circumstances:—

One Sardar Partab Singh was the owner of moveable and immoveable property valued approximately at rupees three lakhs. He died somewhere in the year 1873 leaving him surviving a widow, Sardarni Partab Kaur, but no issue. Sardarni Partab Kaur obtained possession of her deceased husband's estate, and on the 6th of January 1881 executed a *supurdnama* in favour of Mahant Chanda Singh, which is printed at page 7 of the paper-book and in which it is stated that the Sardarni had made the Samadh of Sardar Partab Singh and certain properties *wakf*. These properties are detailed in the said deed, and it is declared that they together with the said Samadh were to remain in charge of Mahant Chanda Singh, who would receive the income derived from the properties and would be responsible for all necessary repairs and maintenance. He was not, however authorised to sell or mortgage any of these properties and the Sardarni retained the right to dismiss the said Mahant at will. The properties thus dedicated were detailed in the said *supurdnama* and consisted of houses and shops, situated in Katra Sabunian and Katra Chanasti Atari also known as Kantayan. The shops situated in the Katra Sabunian were said to have been purchased by the Sardarni out of her Stridhan.

On the 25th of November 1882, the Sardarni executed another document in favour of the same Mahant Chanda Singh. This document is printed at page 47 of the paper book. It was described and registered as a "Will" and by it some property situated in Katra Ahluwalian was also made *wakf*. In it the Sardarni states that her husband had died about 9 years previously and that before his death he had made a Will expressing a desire that after his demise his Samadh should be constructed in his residential *haveli* at Amritsar and that the Granth should always be recited in the said Samadh. Further, a *sadabart* should be opened in connection

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with the said Samadh, houses were to be constructed for the comfort of *fakirs* and Sadh Sangat and that the whole of the immoveable property situated in Katra Ahluwalian should be attached to the Samadh and that the *sadabart* should continue permanently. The document then goes on to recite the fact that in order to carry out the said wishes of her deceased husband and for his spiritual benefit, the Sardarni had constructed his Samadh and had also built a temple, that further she had opened a *langar* and *sadabart* according to his wishes which are still in existence, that she had purchased certain houses from her own private funds and had dedicated all these houses for the upkeep of the Samadh, executing and registering a *wakfnama* in favour of Mahant Chanda Singh on the 6th of January 1881. As, however, the income of the said *wakf* property was not sufficient to meet the expenses of the *langar*, the *sadabart*, the Samadh and the recitation of the Granth, therefore, in accordance with the late Sardar's wishes and for the sake of his good name the property in Katra Ahluwalian had also been dedicated and made *wakf* in order that it might be used as a public sitting place where *fakirs* might be comfortably lodged and the *langar* and *sadabart* might continue for ever. The property was then described in detail and it was declared attached to the Samadh aforesaid to be considered as *wakf* property. It was to remain in the hands of Mahant Chanda Singh, who was to receive the rents and out of the same defray the expenses in connection with the Samadh, the recitation of the Granth, etc., and to open a *langar sadabart* in the name of the Sardar for feeding Sadhus and others. The property was not to be sold or mortgaged or alienated in any way, but the Mahant was empowered to make over the property to any of his Chelas, the Nirmala Sadhs. The document then goes on to recite that the said Mahant had been lawfully put in possession of the above noted property, and two advantages are mentioned as accruing from the dedication of the property for the purposes mentioned:—

(1) "That the good memory of the Sardar will always be kept in the world," and

"(2) That a good reward will be given in the world to come."

As has been said above, this document was registered as a Will.

On the 7th of April 1883 certain reversioners of Sardar Partab Singh instituted a suit against Sardarni Partab Kaur and Mahant Chanda Singh, asking for a declaration to the effect that an alienation by the widow of immoveable property to the value of Rs. 9,500 should be declared null and void after her death. This suit related to the property referred to in the *supradn. m.*, dated the 6th of January 1881 and in paragraph 5 of the plaint (page 11 of the paper book) it was stated that the Sardarni had executed a Will in favour of Chanda Singh in respect of other immoveable property and that as the Sardarni had a life-interest in the property and as the Will came into force only after the death of the testatrix, it did not injure their rights and, therefore, no claim was made with regard to the property dealt with under the said Will in that suit. That case was decided against the reversioners up to the Chief Court, *vide* page 28 of the paper-book. In their judgment the learned Judges of the Chief Court held that it had been established by trustworthy evidence that the late Sardar authorized the building of the Samadh and Shivala and the making of provision for their maintenance and that the widow was simply carrying out his instructions. They considered that the purpose for which the alienation was made was a necessary one, *viz.*, to provide funds for the maintenance of her husband's Samadh and that it was justifiable under the circumstances, an expenditure of Rs. 30 to Rs. 35 a month for the maintenance of his Samadh and for other charitable purposes not being considered excessive having regard to the fact that the late Sardar had left property worth rupees two or three lacs.

Chanda Singh having died, on the 29th of November 1907 the Sardarni executed a document in favour of Chanda Singh's Chela, Surjan Singh. This document is printed at page 129 of the paper book and recites the fact that the Sardarni had, in accordance with her husband's wishes, built a Samadh for his spiritual benefit and had constructed a temple and other buildings along with

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the Samadh, and to meet the expenses of the Dharm Arth had executed a *wakfnama* on the 6th of January 1851 dedicating certain properties for necessary uses, that Mahant Chanda Singh had carried out his duties properly, but that as the income of the property attached to the Samadh had proved insufficient, the Sardarni had dedicated certain other property subsequently, that as her collaterals had been opposed to her, she feared that they would not make proper arrangements with regard to the Dharm Arth property and that she, therefore, in order to prevent any interference on their part, made over the whole of the dedicated property and the Samadh to Chanda Singh's successor and Chela, Surjan Singh. Surjan Singh was appointed to carry out the duties regarding the dedication and no right was reserved either for the Sardarni or, after her death, for the relations of her husband to interfere in the management of the property by Surjan Singh, who was appointed in perpetuity, his Chelas succeeding him on his death.

On the 3rd of July 1913 Sant Harnam Singh, special agent of Sardarni Partab Kaur, executed a document in favour of Mahant Budha Singh, the Sardarni's religious preceptor, by which the Sardarni purported to make over a certain Bunga in Amritsar to the said Mahant Budha Singh. This Bunga was gifted to Mahant Budha Singh, and the descendants of the original founders were deprived of all manner of control with regard to it.

On the 9th of September 1913 Sardarni Partab Kaur died, and on the 19th of January 1914 the present suit was instituted by the plaintiffs appellants against the defendants, Surjan Singh and Budha Singh, in which the plaintiffs-appellants sought to obtain possession of the property situated in Katra Abluwalian and the Bunga. The defence set up was that the Sardarni had acted in accordance with the wishes of her deceased husband in building the Samadh and Shivala and opening a *sadabart* and *langar* to perpetuate his memory. It was pleaded that the property in suit had been dedicated by a registered deed on the 25th of November 1852, since when it had been in the possession of Surjan Singh and his predecessor, Chanda Singh, that as the plaintiffs had taken no action with regard to the property

in suit when they instituted their suit referred to above in 1883, the present suit was barred; that it had been held up to the Chief Court that the dedication of property yielding an income of Rs. 30 to Rs. 35 per mensem was justified and that the Sardarni had been competent to do what she did. With regard to the Bunga, it was pleaded that the Sardarni had been the proprietor and in possession and that she was justified in making the gift in favour of her spiritual Guru and in doing so only intended to secure spiritual benefit for herself, her husband and his ancestors. It was further pleaded that improvements had been made at a cost of Rs. 1,450, and it was urged that in any event the plaintiffs should be called upon to pay this sum if their suit for possession were decreed. The learned District Judge considered that the deed, dated the 25th of November 1852, was a deed of gift or endowment and not a Will, inasmuch as possession had been given at the time and that as the reversioners had remained silent for 31 years, their silence was "unaccountable." He also held that a widow was competent to alienate property, in which she had a life interest only, for legal necessity and that charitable purposes and spiritual benefits were included in the category of legal necessities. Referring to the judgment of the Chief Court in the suit instituted in 1883, the learned District Judge pointed out that it had been there held that as the Sardar had left property of considerable value, the amount alienated at the time could not be regarded as excessive. He considered that the action taken by the Sardarni had been in accordance with the wishes of her deceased husband and for his spiritual benefit.

With regard to the Bunga, he considered that an alienation made in order to benefit herself, her husband and his ancestors in after life could not be questioned. The value of the Bunga being small and the value of the property inherited by the reversioners being large, he considered the alienation valid. The plaintiffs' suit was, therefore, dismissed. They have preferred this appeal through Mr. Sneo Narain, and after hearing Mr. Moti Sagar for the respondents we are of opinion that the

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appeal must succeed. With regard to the Bunga, it was held in *Mehr Singh v. Sochet Singh* (1) that such institutions being partly religious and partly charitable, the office of manager partakes of the nature of a religious office and that the sale of the right of management for the personal gain of the vendor was, therefore, invalid. The nature of a Bunga is given in the said ruling and need not be here repeated. With regard to this particular Bunga in suit, Sardarni Partab Kaur in 1899 instituted a suit for the removal of Bhai Kishen Singh, who was then the Bungai. In that suit, which was decided on the 31st of January 1901, *vide* page 29 of the paper book, it was held that the Bunga had been founded by the ancestors of Sardar Partab Singh and that the family of the said founders were entitled to the management and to appoint a Bungai. Mr. Ram Lal on behalf of the respondent contended that the alienation of the Bunga had been made for the benefit of the soul of the deceased Sardar and that the Sardarni had power to make the alienation. He urged that as the alienation was by way of gift, it should be upheld and referred us to *Ramanathan Ohetty v. Murugappa Ohetty* (2) in support of the proposition that a trustee could divest himself of his trusteeship when by doing so he obtained no personal gain. That decision, however, does not appear to have any bearing on the present case. Here it seems perfectly clear that the Sardarni acted as she did with a view to depriving the reversioners of their right to manage this Bunga and appoint its Bungai. The right of managing a religious or charitable endowment cannot be alienated in the absence of a custom to the contrary (and here no such custom is even alleged), *vide* Ram Krishna's Hindu Law, Volume II, page 451, and the cases therein cited. There was thus no justification for this gift.

With regard to the question of compensation for improvements, our attention is drawn to the statements of certain witnesses who state that certain sums of money had been expended by Budha Singh

on repairs that had become necessary. The document was executed on the 3rd of July 1913 and the Sardarni died on the 9th of September 1913. The improvements thereon could not have been very great during this period. It was contended, however, that as a matter of fact this document was merely evidence of the gift which had already been made many years previously. It is true that in the deed of gift a previous gift of the same property is referred to, but when that took place it did not state. The property left by the deceased Sardar was considerable and we are unable to see why this particular Bunga should have been allowed to fall into disrepair. We have no hesitation in holding that the gift of the Bunga was beyond the power of the Sardarni and that the respondent is not entitled to any sums of money expended in connection with repairs.

Turning now to the alienation of the property in Katra Ahluwalian, it was contended by Counsel for the appellants that no legal necessity had been made out justifying this transaction. Further it was pointed out that while the Sardarni was competent to alienate the property she did in 1881, she was not justified in making any further endowments. It appears that the whole of the property left by the deceased Sardar in Amritsar has now been alienated and it was contended that the subsequent alienations could not in any way be justified. With regard to the contention that the deed of the 25th of November 1882 was a deed of endowment and not a Will, it was pointed out that whatever the nature of the document might actually be, it was drawn up as a Will and registered as such, that, therefore, the plaintiffs-appellants were not in a position to know its actual contents and that, therefore, their omission to include the property it related to in the suit brought by them in 1883 could not in any way affect their present rights. In the plaint filed by them in 1883, they distinctly referred to this transaction describing it as a Will and pointing out that inasmuch as the Will only took effect after the demise of the testator, they did not include any property devised by the said Will. No attempt was then made to assert that the document was not a Will. In our opinion

(1) 35 Ind. Cas. 620; 9 P. R. 1917; 151 P. W. R. 1916; 17 P. L. R. 1917.

(2) 27 M. 192

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the plaintiffs-appellants did all that they were bound to do in the matter. They were not aware that the so called Will was really a deed of endowment and in a way they foreshadowed the present suit. Their silence is clearly accountable, and we are unable to see that the said silence can be regarded as prejudicing their interests in any way. As to the power of a Hindu widow to alienate property for the spiritual benefit of the last male holder, we were referred to B. D. Sirvya's Hindu Woman's Estate, page 195 and page 199. Our attention was also drawn to *Puran Dai v. Jai Narain* (3), *Chooramani Dasi v. Baidya Nath* (4), *Ramkawal Singh v. Ram Kishore Das* (5) and *Harmanage v. Ram Gopal* (6) and it was contended that an alienation made by a widow should not be for her own benefit but for the benefit of the last male holder. Mr. Moti Sagar, on the other hand, referred us to *Collector of Masulipatam v. Cataly Vencata Narrainapah* (7), *Rhub Lal Singh v. Anodhya Misser* (8) and pages 200-202 of Sirvya's Hindu Woman's Estate. It is not, however, necessary to discuss these rulings in detail, as there is no real dispute between the parties on the question. Clearly, whether or not an alienation made by a widow is for the benefit of her deceased husband is a question of fact to be decided on the circumstances of each case. Similarly whether or not the amount of property alienated is excessive is a question that has to be decided according to the relative values of the total estate and of the property alienated. No rule of Hindu Law nor any other authority has been cited laying down any definite fractional proportion that can be regarded as being within the competence of a widow to alienate. In the present case it will be seen that in 1881 the Sardarni dedicated certain property, which dedication was subsequently attacked by the reversioners. It appears from the judgment of the Chief Court that this alienation was justified, as having been authorised by the deceased Sardar and also by the fact that the value of the property alienated could not be

regarded as excessive having regard to the value of the estate left by the said Sardar. Now the learned Judges of the Chief Court say that what had been authorised by the deceased Sardar was the building of the Samadh and Shivala and the making of provision for their maintenance. This the widow had carried out and property had been endowed. No mention was then made of any *langar* or *sadabart*. The Will or expression of the Sardar's wishes (for it was an oral and not a written Will) was subsequently further amplified in the deed dated the 25th November 1882. There is, however, not a tittle of evidence on the record to support this fact and, as pointed out by Mr. Sheo Narain, the first contention appears to have been that it had been the desire of Sardar Partab Singh that a Samadh and Shivala alone should be built. We are unable to see any reason for holding that the widow was carrying out any expressed wish of her deceased husband when she thought fit to establish a *langar* and *sadabart* and endowed property for that purpose. It is also curious that the widow should have deemed it necessary to establish a *langar* and *sadabart* nine years after the death of her husband. It would appear that the deceased lady was very much under the influence of Nirmala Sadhs and that it was they who induced her to make these subsequent alienations. Had the deceased Sardar really expressed any wish or made any Will to the effect that a *langar* and *sadabart* should be established in connection with his Samadh, it is a little difficult to understand why his wishes were not given effect to in 1881 when the first deed of dedication was executed. It will be seen that in the deed of the 25th November 1882 it is said that the income of the houses already made *waqf* was not sufficient to meet the expenses of the *langar*, the *sadabast*, the Samadh and the recitation of the Granth. There is nothing to show that the income of the *waqf* property was not sufficient to meet the legitimate expenses in connection with the Samadh, Shivala and the recitation of the Granth therein. In these circumstances we are of opinion that there was no justification for the alienation of the property in suit and we accordingly accept this appeal and grant plaintiffs-appellants a decree for possession of the properties in suit. The respondents will pay the costs of the appellants.

(3) 4 A. 482; A. W. N. (1882) 115.

(4) 32 C. 473.

(5) 22 C. 506.

(6) 19 Ind. Cas. 417; 17 C. W. N. 782.

(7) 8 M. I. A. 529; 2 W. R. 61 (P. C.); 1 Suth. P. O. J. 476; 1 Sar. P. O. J. 820; 19 E. R. 631.

(8) 31 Ind. Cas. 433; 43 C. 574; 22 C. L. J. 345.

KISUN PRASAD SINGH v. SURAJ NARAIN PRASAD.

throughout: Surjan Singh and Budha Singh will pay the costs in the proportion of 6 to 1.

Appeal accepted.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 615
OF 1918.

January 9, 1920.

Present:—Mr. Justice Adami.

KISUN PRASAD SINGH AND OTHERS
—APPELLANTS

versus

SURAJ NARAIN PRASAD SAHI—PLAINT-
IFF AND OTHERS—DEFENDENTS 2ND PARTY—
RESPONDENTS.

*Limitation Act (IX of 1908), Sch I, Arts 142, 144—
Possession, suit for—Record of Rights, entry in, in
favour of defendant—Limitation—Burden of proof.*

In a suit for the recovery of possession, where the entry in the Record of Rights is in favour of the defendant, the plaintiff must prove his possession within twelve years of the suit. [p. 961, col 1.]

Appeal from a decision of the District Judge, Mczaffarpur.

Messrs. Ramesh Prasad and Sambhu Saran,
for the Appellants.

Messrs. Ganesh Dut Singh and S. N. Rai,
for the Respondents.

JUDGMENT.—The plaintiff in the suit which gave rise to this second appeal alleged that the lands in dispute fell into his *patti* under a Collectorate partition, but that the defendants 1st party had fraudulently procured the entry of their names in respect to the lands in the Settlement Record and had dispossessed him from $5\frac{1}{2}$ *kathas* in plot No. 304 and threatened his possession of 10 *dhurs* of plot No. 304 and 2 *kathas* of plot No. 267.

The defendants on their side claimed the lands as part of their *patti* and as having been all along in their possession. They also pleaded limitation.

The suit was instituted on the 16th December 1913, and about two months later a Commissioner was appointed to report whether the land was in the *patti* of the plaintiff or in that of the defendants. The Commissioner first reported in favour of the defendants, but on objection by the

plaintiff was directed to make a second enquiry which resulted in a report favourable to the plaintiff. The defendants then in their turn objected and asked for the examination of the Commissioner and for a postponement of the hearing, but the Court refused the request and proceeded to try the case. The plaintiff appeared himself alone for examination, and the defendants, owing to the Court's refusal of their request for time, declined either to cross-examine the plaintiff or to call witnesses of their own. The Munsif then proceeded to deliver judgment and decreed the suit *ex parte*, basing his finding on the plaintiff's evidence and the second report of the Commissioner.

There was an appeal to the District Judge who upheld the Munsif's judgment, but on second appeal to this Court the decree of the District Judge was set aside and the judgment and decree of the Munsif vacated. The case was remanded to the Munsif's Court with a direction to obtain the attendance of the Commissioner and to allow both parties to examine him. He was not to allow either party to call further evidence but was to hear arguments and pass judgment on the basis of the evidence of the Commissioner.

On remand the Munsif found that the settlement entry was correct and that the defendants were in possession at the time of the settlement and continued in possession, and that the plaintiff had failed to show that he was in possession before 1320 or that he had been in possession within 12 years of the suit. He held the suit to be barred by limitation. At the same time he decided that the disputed lands fell in the plaintiff's *patti*. He dismissed the suit.

On appeal the Additional Subordinate Judge reversed the finding of the Munsif, holding that as title was found with the plaintiff and the defendants had failed to file the Settlement *khatian* to show when the record was finally published, the Munsif was not entitled to hold that possession since the entry in the record amounted to possession for 12 years adverse to the plaintiff. He held that the suit was not barred and so decreed the appeal and the suit.

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The only question arising in this second appeal is one of limitation.

The learned Additional Subordinate Judge has laid much stress on the fact that the defendants did not produce the Settlement Khatian showing them to be in possession. Considering that in his plaint the plaintiff admitted that the settlement entry was against him, it was not necessary that the Khatian should be produced to throw the onus on the plaintiff of showing that the entry was incorrect. The plaintiff examined himself only to rebut the presumption. With regard to the date of the final publication of the record, it is well known by the Courts in Mozafferpur that there have been no settlement proceedings in the district since 1900 at the latest, so that the Munsif was justified in finding that a possession dating since the final publication of the settlement had become in 1913, when the suit was instituted, a possession for more than 12 years.

With regard to the allegation of fraud in procuring the entry in the Settlement Record, the plaintiff produced no evidence, so that it cannot be held that there was any fraud.

The learned Additional Subordinate Judge argues that prior to 1907, the Settlement Officer had no power to decide questions of title between proprietor and proprietor, but the fact is that in the Settlement Khatian the entry relates not to title but to possession; the defendants were found in possession and the plaintiff failed to prove that he had ever been in possession. It may be true that under the partition the lands in dispute fell within the *patti* of the plaintiff, but he has failed to show that he was ever in possession. The burden of proof in this case was on the plaintiff to show that he was in possession sometime within twelve years of the suit; to show an anterior title was not sufficient—*Mohima Ohunder Mozoomdar v. Monesh Ohunder Neoghi* (1), *Mahammud Amanulla Khan v. Badan Singh* (2), *Dharani Kanta Lahiri Chowdhury v. Gabar Ali Khan* (3). The learned Additional Subordinate Judge has

(1) 16 C. 473; 16 I. A. 23; 5 Sar. P. O. J. 321.

(2) 17 C. 137; 23 P. R. 1890; 16 I. A. 148; 5 Sar. P. O. J. 412; 13 Ind. Jur. 330.

(3) 18 Ind. Cas. 17; 17 C. L. J. 277; 25 M. L. J. 95; 13 M. L. T. 185; (1913) M. W. N. 157; 15 Bom. L. R. 445; 17 C. W. N. 389 (P. C.).

not come to any finding that the plaintiff was ever in possession.

There is no doubt as to the findings of both Courts as to the plaintiff's title, but the lower Appellate Court has misconceived the effect of that finding on the question of possession; it does not rebut the entry of possession in the Settlement Record. I do not find that on the question of limitation the Munsif's findings are vague, as suggested by the lower Appellate Court. I hold in agreement with the learned Munsif that the plaintiff failed to show that the entry in the Record of Rights was incorrect, that he also failed to show that he had ever been in possession, and that the defendants must be held to have been in possession since the final publication of the Record of Rights at least.

On these findings the decree of the lower Appellate Court must be set aside and the judgment and the decree of the Munsif restored. The appeal is allowed with costs in both the Appellate Courts.

Appeal allowed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2541 OF 1914.

April 7, 1919.

Present:—Mr. Justice Shadi Lal and
Mr. Justice LeRossignol.

QASIM ALI AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

GHULAM MUHAMMAD AND OTHERS—
DEFENDANTS—RESPONDENTS.

Custom—Alienation—Collaterals, remote, right of, to challenge alienation—Burden of proof—Awans of Mauza Pholriwala, Jullundur District.

No general rule can be laid down as to the applicability to all cases alike of the principle that up to a certain degree of propinquity it is to be presumed that agnatic relations of the alienor are entitled to impeach an alienation of ancestral land and that beyond that degree it is to be presumed that they have no such right. [p. 962, col. 1.]

The general custom of the Punjab does not recognise the right of a collateral, however remotely related, to challenge alienations; and in the case of very distant collaterals the onus of proving a right

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to control rests on the person who challenges an alienation and not on the alienee. [p. 962, col. 2.]

Among Awans of Mauza Pholriwala in the Jullundur District there is no special custom entitling collaterals in the 10th degree to contest an alienation effected by a childless proprietor. [p. 962, col. 2.]

Second appeal from the decree of the Divisional Judge, Jullundur, dated the 25th July 1914.

Mr. Oertel, for the Appellants

The Hon'ble Mr. Muhammad Shafi, for the Respondents.

JUDGMENT.—This was an action for the recovery of a plot of land sold by one Fattu, a childless Awan proprietor of Mauza Pholriwala in the District of Jullundur. It is beyond dispute that the land is ancestral *qua* the plaintiffs, who are the alienor's collaterals in the 10th degree; and the sole question, which arises upon the certificate granted by the lower Appellate Court, is whether collaterals so remotely related as the plaintiffs are entitled to contest the alienation.

Now, we are prepared to accept the contention that no general rule can be laid down as to the applicability to all cases alike of the principle that up to a certain degree of propinquity it is to be presumed that agnatic relations of the alienor are entitled to impeach an alienation of ancestral land, and that beyond that degree it is to be presumed that they have no such right. If the matter rested on theoretical grounds alone, it could be said that, as long as the property was proved to be ancestral, an agnate irrespective of the remoteness of his relationship with the alienor would be entitled to object to the alienation; but the decision of such cases does not proceed upon purely theoretical grounds. We find that the members of the tribes governed by agricultural custom do draw a distinction between near agnates and remote agnates, and that in at least four cases, *vide* *Muhammad v. Jahan Khan* (1), *Dula Singh v. Warir Singh* (2), *Mangal v. Uhetu* (3) and *Sawan Singh v. Harnaman* (4), it was held that collaterals related in the 10th degree were not entitled to control the power of alienation of a childless proprietor. There is only one case, namely, *Khazan Singh*

v. Relu (5); in which a collateral within the 10th degree succeeded in establishing his claim. The whole question was considered in a Division Bench judgment reported as *Pal Singh v. Ganda Singh* (6) and it was laid down, after a consideration of the authorities on the subject, that the general custom of the Punjab does not recognise the right of a collateral, however remotely related, to challenge alienations; and that in the case of very distant collaterals the *onus* of proving a right to control rests on the person who challenges an alienation, and not on the alienee. In that case the collaterals were related the 8th degree and the learned Judges held that the *onus* of proving a special custom entitling them to control the power of alienation rested upon them and that they had failed to prove such a custom.

In view of the authorities cited above, and having regard to the fact that the alienor was a member of the Awan tribe, a tribe which recognises very wide powers of alienation, we are of opinion that the lower Courts were justified in placing the *onus* of proving a special custom upon the plaintiffs. It is admitted that there is no evidence to establish the custom, and we accordingly dismiss the appeal with costs.

Appeal dismissed.

(5) 35 P. R. 1906.

(6) 22 Ind. Cas. 319; 37 P. R. 1914; 40 P. L. R. 1914; 29 P. W. R. 1914.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 342-B OF 1918.

August 23, 1919.

Present:—Mr Mittra, A. J. C.

RAJIB HUSSAIN AND ANOTHER—DEFENDANTS NOS. 1 AND 2—APPELLANTS

versus

ZINGRAJI AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 3 AND 4—RESPONDENTS.

Evidence Act (I of 1872), ss. 92, 115—Oral evidence varying terms of document, whether admissible between parties on same side—Estoppel, applicability of doctrine of, against witness.

(1) 119 P. R. 1883.

(2) 69 P. R. 1887.

(3) 20 P. R. 1890.

(4) 162 P. L. R. 1901.

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Section 92 of the Evidence Act merely prevents evidence being given to vary the terms of a document in a proceeding between the parties to that document and their representatives. There is nothing to prevent two persons who are arrayed on the same side, such as joint vendees, to give evidence to vary the terms of the written instrument in a contest between themselves [p. 963, cols. 1 & 2.]

In the absence of an allegation or proof that relying upon the recitals in a sale-deed a person has acted to his detriment, the plea of estoppel is not available to him. [p. 964, col. 1.]

The doctrine of estoppel cannot be applied to a witness who is not a party to the suit, where the party calling him is not estopped. [p. 964, col. 1.]

Appeal against the decree of the Additional District Judge, Amraoti, in Civil Appeal No. 163 of 1917, decided on the 19th of June 1918, arising out of Civil Suit No. 244 of 1915, decided on the 3rd of September 1917 by the Munsif, Ellichpur.

Messrs. M. R. Bobde and J. J. Ghose, for the Appellants.

Messrs. G. L. Subhedar and R. B. Tikekar, for the Respondents.

JUDGMENT.—One Govind Ambadas, who was the original owner of survey numbers 5 and 22, executed on the 25th June 1904 a sale-deed in favour of Zingraji and one Jansa for Rs 1,250 (one thousand two hundred and fifty). The defendants Nos. 1 and 2, in execution of a decree against the heirs of Jansa, attached half share of field No. 22 and half share of the crops of that field. The plaintiff Zingraji sues for possession of half share of the field and compensation for the value of the crops. The plaintiff has been successful in the Courts below. The lower Courts have found that though the sale-deed stands in the names of Zingraji and Jansa as joint vendees of the two fields, in reality each was the owner of one field, and that the property has been enjoyed in this manner up to the date of the attachment, which took place on the 28th November 1914.

The first point for consideration is whether notwithstanding the language and terms of the sale-deed evidence can be admitted, as between the parties to this suit, to vary its terms. Section 92 merely prevents evidence being given to vary the terms of a document in a proceeding between the parties to that document and their representatives. In this case

no evidence could have been given as against Govind Ambadas or his heirs and representatives to show what has been allowed to be shown in the present case. But Govind Ambadas is not a party to this suit. There is nothing to prevent two persons who are arrayed on the same side, as in this case, as joint vendees to give evidence to vary the terms of the written instrument in a contest between themselves. This view is supported by the case cited by the lower Court, *Mulchand v. Madho Ram* (1), also by the local case of *Gangabai v. Pandoo* (2). The case of *Rahiman v. Elahi Baksh* (3) has not been subsequently followed by the Calcutta High Court, and the facts seem to be somewhat meagrely reported.

If oral evidence is admissible to prove the allegations of the plaintiff, then I think the finding is justified by the evidence. Upon the death of Jansa, mutation took place, and the vendor Govind Ambadas was examined before the Revenue Officer. Both he as well as Jansa's widow admitted that the sale, though apparently a joint sale was a sale of field No. 5 to Jansa and of No. 22 to Zingraji. In the Record of Rights field No. 22, the one now in dispute, is shown as being exclusively in the possession and ownership of Zingraji. The vendor has been examined as a witness, and he proves the allegations of the plaintiff. There were mortgages in which the representatives of Jansa have been mortgaging field No. 5 and Zingraji field No. 22, but it seems on the 16th June 1913 the appellants' father Fida Ali took a mortgage of half share of each of the fields from Jansa's son. This mortgage is called a possessory mortgage, but simultaneously with the mortgage there is said to have been a lease to Jansa's son: in other words, possession was never actually transferred in pursuance of the mortgage and lease to Fida Ali. Fida Ali sued for the rent of the fields, and in execution of this decree the attachment complained of has taken place. The conduct of Jansa's representatives shortly before the present disputes cannot have any weight attached to it. Moreover, the transactions were purely paper transactions, no possession having been transferred. There is nothing to show that Zingraji's ex-

(1) 10 A. 421; A. W. N. (1888) 127.

(2) 4 N. L. R. 115.

(3) 28 C. 70.

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exclusive possession of field No. 22 has been disturbed. These facts justified the finding of the Courts below.

It is urged that assuming that evidence can be given, the vendor is estopped from giving evidence. This is a novel plea. There was no plea of estoppel on the part of the appellant in the Court of first instance. He could not have been misled by the terms of the document if he had made the slightest inquiry. As there is no allegation or proof that relying upon the recitals in the sale-deed he has acted to his detriment, the plea of estoppel is not available to him. Moreover, there is no authority for the application of the doctrine of estoppel to a witness who is not a party to the suit, where the party calling him is not estopped.

It is urged that there was no motive for one sale-deed, if the transaction was really of the nature deposed to by the vendor. The vendor says that delivery of possession took place separately to each of the vendees of their respective fields. There does not appear to be any adequate motive, but one reason is suggested on behalf of the respondents, namely, that by this procedure they saved a rupee in stamp and a little in registration fee and probably a little in other conveyancing charges.

It is urged that as the property vested jointly by the sale-deed in the two vendees, they cannot, without a further registered instrument as between themselves or without proof of a partition, claim exclusive title to any parcel. The argument, however, overlooks that the Transfer of Property Act was not in force in Berar when the transaction took place. If separate payment and separate delivery were made and this was followed by separate mutation, and if the understanding of the parties was as pleaded by the plaintiff, then I think the plaintiff has sufficiently proved that he is the exclusive owner of field No. 22 and of the crops therein.

The result is that the appeal is dismissed with costs.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2706 OF 1915.

April 15, 1919.

Present:—Mr. Justice Shadi Lal and
Mr. Justice LeRossignol.

HIRU—DEFENDANT—APPELLANT

versus

SOHNUN AND OTHERS—PLAINTIFFS—
RESPONDENTS.

Punjab Limitation (Ancestral Land Alienation) Act (I of 1900), applicability of—Alienor, death of, leaving widow, effect of.

The Punjab Limitation (Ancestral Land Alienation) Act contemplates only those cases in which the reversioner can obtain possession of the estate immediately upon the death of the alienor, and does not apply to a case in which the alienor died leaving a widow during whose lifetime the reversioner could not obtain possession of the property alienated by the male proprietor. [p. 964, col. 2.]

Second appeal from the decree of the Additional District Judge, Hoshiarpur at Gurdaspur, dated the 10th May 1915.

Bakhshi Tek Chand, for the Appellant.

Messrs. Nand Lal and Mehar Chand Mahajan for the Respondents.

JUDGMENT.—The facts of this case are set out *in extenso* in the judgment of the Additional Judge, and the sole question for determination is whether the Punjab Limitation Act of 1900 applies to a case in which the alienor died leaving a widow during whose lifetime the reversioner could not obtain possession of the property alienated by the male proprietor. We have considered the arguments advanced by the learned Vakil for the appellant and are of opinion that the aforesaid Act contemplates only those cases in which the reversioner can obtain possession of the estate immediately upon the death of the alienor and that it was not intended that that Act should apply to a case of this kind. This view has been taken in *Miran Bakhsh v. Ahmad* (1), *Sohnu v. Labha* (2), *Khiali Ram v. Gulab Khan* (3) and *Bhagat Singh v. Sher Singh* (4), but Mr. Tek Chand contends that these cases are distinguishable on the ground that in every one of them the alienor had died before the aforesaid Act came into force,

(1) 145 P. R. 1907; 185 P. W. R. 1907.

(2) 7 Ind. Cas. 476; 62 P. R. 1910; 98 P. W. R. 1910; 111 P. L. R. 1910.

(3) 11 Ind. Cas. 392; 33 P. R. 1911; 190 P. L. R. 1911.

(4) 24 Ind. Cas. 212; 29 P. R. 1914; 156 P. L. R. 1914.

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and that the provisions of the said Act were consequently not applicable. It is, however, clear that the learned Judges, who decided these cases, did not proceed upon the ground suggested by the learned Vakil; and conceding for the sake of argument that the decisions are *obiter dicta*, we are of opinion that those *dicta* contain the correct enunciation of the law, and that the suit is governed by Article 141 of the Indian Limitation Act.

We observe that the judgment of a single Bench in *Ganesha Ram v. Panju Singh* (5) is directly to the point, and that that case cannot be distinguished even on the ground put forward by Mr. Tek Chand. We accordingly hold that the suit has been rightly held to be within time, and we must, therefore, dismiss the appeal with costs.

Appeal dismissed.

(5) 47 Ind. Cas. 977; 95 P. R. 1918; 174 P. W. R. 1918; 128 P. L. R. 1918.

PATNA HIGH COURT.

CIVIL REVISION No. 270 OF 1919.

January 15, 1920.

Present:—Mr. Justice Sultan Ahmed.

Babu RAMESH PRASHAD AND OTHERS—
PLAINTIFFS—PETITIONERS

versus

GULAB CHAUDHURY—DEFENDANT—
OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115, O. IX, r. 13—*Ex parte* decree, setting aside of—Sufficient cause for non-appearance—Revision—High Court, power of interference of.

Under Order IX, rule 13, of the Civil Procedure Code a Court can set aside an *ex parte* decree only when it is satisfied that the defendant was prevented by sufficient cause from appearing when the suit was called on for hearing. [p. 966, col. 1.]

Where the very basis which would give the Judge jurisdiction to set aside an *ex parte* decree does not, on his own order, exist, the High Court can interfere under section 115 of the Civil Procedure Code. [p. 966, col. 2.]

Appeal from an order of the District Judge, Darbhanga.

Mr. Janak Kishore, for the Petitioners.

Mr. Bimoli Ch. Sinha, for the Opposite Party.

JUDGMENT.—The petitioners, who are the plaintiffs in the Courts below, instituted a suit against the opposite party in the Court of the First Munsif for declaration of title with respect to 12 *kottas* of land and for recovery of possession and also mesne profits.

After the usual preliminary steps, the case came on for hearing on the 25th March 1919. On that day the plaintiffs filed a *Hazira* of his witnesses, and the defendant applied for time. That petition for time was rejected by the Court on the ground that it was frivolous. After having disposed of this application on behalf of the defendant the case was taken up. The defendant's Pleader stated at that time that he would then contest the suit. The Court then waited from 4 to 4-15 P. M. for the *Hazira* of defendant's witnesses, but no such *Hazira* was filed and the Court then proceeded to hear the suit.

The plaintiff examined Ramesh Prashad and the Commissioner's report was marked Exhibit 1, Khatyan was marked Exhibit 2, Barawarda was marked Exhibit 3, and the Court held that the claim of the plaintiff was true to the extent of 11 *kottas* and 18½ *dhurs* of land. It is clear from the order of the Munsif passed on the 25th March, and it has been conceded by the learned Vakil for the opposite party, that after the defendant's application for a re-issue of summons and time was rejected by the Munsif, neither the defendant nor his Pleader appeared in his Court. As I have already said, the suit was, therefore, decided *ex parte*.

The defendant thereupon filed an application under Order IX, rule 13, Civil Procedure Code, before one Mr. Mukherji, who succeeded the Munsif who had passed the *ex parte* decree. Mr. Mukherji, after considering the grounds stated in the petition for restoration of the suit, came to the conclusion that no case had been made out for the restoration of the suit.

Against this order, the opposite party defendant went up to the District Judge, who, by his order dated the 9th of August, directed the suit to be restored and the case to be proceeded with, from the stage at which it was decided *ex parte*.

This Court has now been moved by the plaintiffs to interfere with the order passed

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by the District Judge and I now proceed to consider the objection that has been raised by the petitioners against the validity of that order. Under Order IX, rule 13, a Court can restore a suit only when the Court is satisfied that the defendant was prevented by any sufficient cause from appearing when the suit was called on for hearing. It is remarkable that the learned Judge in his order comes to no finding whatsoever with respect to the cause of non-appearance of the defendant. There is not a syllable in the whole order, which would give any indication as to why the defendant was prevented from appearing on that day, because that and that alone would give the learned Judge jurisdiction to interfere with the decree passed by Mr. Lahiri on the 25th of March 1919. The learned Judge does not seem to have appreciated that he was dealing with an application under Order IX, rule 13, and not dealing with an appeal against the decree of the Munsif. His whole order deals with the propriety of the Munsif's decree, and not with the only point that he had to consider, i.e., the sufficiency of cause for defendant's non-appearance. His order, therefore, must be set aside on that ground. I, however, proceed to examine further the learned Judge's order. The learned Judge has assumed that the defendant was actually present with his witnesses, when the suit was decided *ex parte*. Where the learned Judge gets this from, it is difficult to understand, because if the defendant and his witnesses were present, the case could not have been decided *ex parte* and there could be no application under Order IX, rule 13. Therefore, in my opinion, the learned Judge acted entirely beyond his jurisdiction to hold in one breath that the defendant and his witnesses were present when the case was decided and in the same breath to hold that he was restoring the suit under Order IX, rule 13. It is conceded before me that the learned Judge is clearly in error on this point, but this is, however, the only ground on which he has restored the suit. The order is, therefore, bad also on the ground that the learned Judge decided the case upon a ground which had no existence.

I am, however, reminded of my powers under section 115 of the Civil Procedure

Code and it is respectfully urged that when there was no defect of procedure, but the Judge came to wrong conclusions on law and fact, this Court will not interfere in exercise of its powers under revisional jurisdiction. If I had been of the opinion that the learned Judge had gone wrong in weighing evidence or had taken an erroneous view on any question of law, I would have no doubt agreed with the learned Vakil appearing on behalf of the opposite party. But where I find that the very basis which would give the Judge jurisdiction to restore the suit did not, on his own order, exist, I could not only interfere under section 115, clause (c), but under section 115 (a). In my opinion it was a wrong exercise of jurisdiction and also in the exercise of jurisdiction an illegality was committed by the lower Appellate Court. The authorities that have been cited by the learned Vakil for the opposite party in my opinion have no application whatsoever to the facts of the present case. I, therefore, make this Rule absolute, discharge the order passed by the District Judge dated 9th August 1919, restore the order of the Munsif, dated the 10th of May 1919, refusing to set aside the *ex parte* decree and I allow hearing fee one gold mohur.

Rule made absolute.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 670 OF 1915.

April 22, 1919.

Present:—Mr. Justice Scott Smith and
Mr Justice Broadway.

BASHESHAH NATH—DEFENDANT

—APPELLANT

versus

RAM KISHEN DAS AND OTHERS—

PLAINTIFFS AND ANOTHER DEFENDANT

—RESPONDENTS.

Appeal—Review Decree appealed from set aside during pendency of appeal—Appeal, whether can be heard.

Where during the pendency of an appeal by one defendant the decree under appeal is set aside on review at the instance of another defendant, the

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decree ceases to exist and the appeal cannot, therefore, be heard.

First appeal from the decree of the Subordinate Judge, 1st Class, Delhi, dated the 18th January 1915.

Mr. Santanam, for the Appellant.

Lala Moti Sagar, Messrs. Balwant Rai and Mukerji, for the Respondents.

JUDGMENT.—This is a first appeal from the final decree passed by the Subordinate Judge, Delhi, in a partnership case. There were three partners, Ram Kishen Das, plaintiff, and Basheshar Nath and Raghu Mal, defendants. According to the final decree Basheshar Nath and Raghu Mal are to pay Rs. 1,742-13-0 and Rs. 3,944 respectively into Court and out of those sums the plaintiff is to receive Rs. 5,537-13-0.

Basheshar Nath filed an appeal to this Court on the 5th of March 1915. It appears, however, that prior to the filing of this appeal Ram Kishen had on the 28th January 1915 filed an application for review in the lower Court, and this application was accepted and the decree was set aside by order of the 6th May 1915, the Court at the same time ordering a further inquiry to be made in the case.

As the decree appealed from no longer exists, we are clearly of opinion that the appeal cannot be heard. This view is supported by *Kanhaiya Lal v. Baldeo Frasad* (1). That case is on all fours with the present one and it was held that the order for review superseded the original decree, the decree under appeal had ceased to exist and the appeal could not be heard. This was followed in *Birbasi Lal v. Salig Ram* (2). We see no reason to differ from these authorities and we hold that the present appeal cannot be heard and we accordingly dismiss it but leave the parties to bear their own costs in this Court.

As the original decree has been set aside by the lower Court, it is open to it to make any further inquiries into the case which it may deem necessary.

Appeal dismissed.

(1) 28 A. 240; A. W. N. (1905) 265.

(2) 14 Ind. Cas. 472; 34 A. 252; 9 A. L. J. 183.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1643 OF 1917.

July 28, 1919.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Burn.

MONGOLA SWAYI—DEFENDANT No. 5
—APPELLANT

versus

VISVANATHA SANTASO SINGARAO

AND OTHERS—PLAINTIFF AND DEFENDANTS

Nos. 1 TO 4 AND 6—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 66—Money decree, execution of—Attachment of immovables—Mortgage, execution of, by judgment-debtor to avoid sale—Money borrowed, non-payment of, to decree-holder—Auction-sale of attached property—Suit by mortgagee against judgment-debtor and auction-purchaser, maintainability of.

One V. obtained a money-decree against the 1st defendant. In execution he attached the latter's properties. The 1st defendant executed a mortgage of the properties to plaintiff in order to avoid the sale by paying the borrowed amount to the purchaser. The payment, however, was not made and V. brought the properties to auction-sale and they were purchased by 4th defendant, who mortgaged them to 5th defendant. Plaintiff sued the 1st defendant and his sons and 4th and 5th defendants on his mortgage:

Held, that section 66, Civil Procedure Code, did not bar the suit as 4th and 5th defendants did not hold the properties for the benefit of the 1st defendant. [p. 968, col. 2.]

Ganga Sahai v. Kesri, 30 Ind. Cas. 265; 37 A. 545; 13 A. L. J. 999; 29 M. L. J. 329; 18 M. L. T. 203; 19 C. W. N. 1175; 22 O. L. J. 508; (1915) M. W. N. 713; 2 L. W. 837; 17 Bom. L. R. 998; 42 I. A. 177 (P. C.), followed.

Kishan Lal v. Garuruddhwaja Prasad Singh, 21 A. 238; A. W. N. (1899) 42, *Ram Narain v. Mohanian*, 26 A. 82 (F. B.); A. W. N. (1903) 199 and *Rama Kurup v. Sridevi*, 16 M. 290; 2 M. L. J. 173, not approved.

Second appeal against the decree of the Court of the District Judge, Ganjam, in Appeal Suit No. 283 of 1915, preferred against the decree of the Court of the Additional District Munsif, Berhampur, in Original Suit No. 224 of 1914.

FACTS appear from the judgment.

Mr. O. S. Venkatachariar, for the Appellant.—The suit is barred by the provisions of section 66, Civil Procedure Code. The mortgage was after the attachment and is obnoxious to section 64, Civil Procedure Code. The last sentence of clause (2) of section 66 will not apply, as that applies only to execution proceedings and not to suits.

The Hon'ble Mr. S. Srinivasa Aiyangar (Advocate-General), for the Respondents.—

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Section 66, Civil Procedure Code, does not operate as a bar. The suit is based on the mortgage to the plaintiff and is brought against 1st defendant as the owner and defendants Nos. 4 and 5 as the persons in possession. There is no allegation that defendants Nos. 4 and 5 do hold the property as *aliases* for plaintiff.

Section 64, Civil Procedure Code, will not affect the plaintiff, as defendants Nos. 4 and 5 have no better rights than the plaintiff.

See *Ganga Sahai v. Kesri* (1).

JUDGMENT.—The first defendant was the owner of the property. A money-decree was obtained against him by one Venkateswara Rao. In execution of that decree, the properties in suit were attached. To obviate the sale, the 1st defendant borrowed from the plaintiff and gave him a mortgage on the property. Without paying the amount to the decree-holder, he retained the money. He did not enter up satisfaction of the decree. Venkateswara Rao brought the property to sale in Court auction and 4th defendant became the purchaser. The 5th defendant is a mortgagee under the 4th defendant. Plaintiff sues on his mortgage.

The defence is that section 66 of the Code of Civil Procedure (Act V of 1908) bars the suit. The Courts below have rejected this plea and we think rightly. The suit is based on the mortgage and treats the 1st defendant as the owner. The 4th and the 5th defendants are impleaded as being in possession. The plaintiff's case is, not that the 4th and 5th defendants hold the property for his benefit, but that they are unlawfully in possession against his mortgagor's rights. As pointed out by the Judicial Committee in *Ganga Sahai v. Kesri* (1), the object of the section is to prevent purchases being made in Court sales *benami* for the plaintiff. If the plaintiff comes into Court with the case that the person who stands between him and the property is his *alias*, then the section would bar him. The present question under section 66 arises, not because of plaintiff's claim under a *benami* purchase, but because the defendant sought

to resist the mortgage on the ground that it was made after an attachment and was, therefore, obnoxious to section 64 of the Civil Procedure Code. The reply of the plaintiff was that section 64 cannot affect him because the 4th and the 5th defendants have no better rights than the 1st defendant has. In our opinion, section 66 does not affect this class of cases. It is open to argument, as pointed out by the Patna High Court in *Ram Khelawan Pande v. Asgar Ali* (2), that a plaint will not be within the mischief of section 66 if the claim was anterior to that of the resisting purchaser. Even apart from this view, as the claim against defendants Nos. 4 and 5 is not based on their purchase being for the benefit of the plaintiff, the objection fails and must be overruled. The view taken in Allahabad in *Kishan Lal v. Garuruddhwaja Prasad Singh* (3) and in *Ram Narain v. Mohanian* (4) did not do justice to the intention of the Legislature as pointed out by the Privy Council in *Ganga Sahai v. Kesri* (1) and we are not prepared to follow them. As regards *Rama Kurup v. Sridevi* (5) it is enough to say that the narrow view taken in that case did not find favour with Subramania Aiyar and Benson, JJ., in *Kollantavida Nanikoth Onnakkann v. Tiruvalli Kalandan Aliyamma* (6). On another ground also, we can uphold the lower Court's decision. By the last sentence of clause (2) of section 66, the Legislature has expressly saved the rights of third parties. Mr. Venkatachariar contended that this sentence only applies to proceedings in execution and not to suits. We are unable to agree. This part of the Civil Procedure Code deals with suits and objections thereto and not to execution proceedings. The language "or interfere with the rights of a third person to proceed against that property" would exactly cover the present case. For these reasons, we are of opinion that the Courts below are right and dismiss the second appeal with costs.

M. C. P.

Appeal dismissed.

(1) 30 Ind. Cas. 265; 37 A. 545; 13 A. L. J. 999; 29 M. L. J. 329; 18 M. L. T. 203; 19 O. W. N. 1175; 22 C. L. J. 808; (1915) M. W. N. 713; 2 L. W. 837; 17 Bom. L. R. 993; 42 I. A. 177 (P. O.).

(2) 36 Ind. Cas. 681.

(3) 21 A. 238; A. W. N. (1899) 42.

(4) 26 A. 82 (F. B.); A. W. N. (1903) 199.

(5) 16 M. 290; 2 M. L. J. 173.

(6) 20 M. 862.

JIWAN V. MOHAMMAD HAYAT.

COURT OF THE FINANCIAL COMMISSIONERS, PUNJAB.

REVENUE REVISION No. 47 OF 1918-19.

August 29, 1919.

Present :—Mr. Maynard, F. C.

JIWAN AND OTHERS—PLAINTIFFS—

APPLICANTS

versus

MOHAMMAD HAYAT—DEFENDANT—

RESPONDENT.

Punjab Tenancy Act (XVI of 1887), ss. 5 (1) (c), 111, 112—Occupancy rights, acquisition of—Construction of clause (1) (c) of s. 5—Record of Rights, entry in, whether agreement—Admission, erroneous effect of.

Clause (c) of sub-section (1) of section 5 of the Punjab Tenancy Act provides that a tenant who is at the date of the passing of the Act the representative of a person who settled as a cultivator in the village, in which the land occupied by such tenant is situate, along with the founders of the village, is to be deemed to have a right of occupancy in the land so occupied: whether the land was occupied from the time of first settlement or from a later date [p. 969, col. 2.]

A mere entry in the Record of Rights does not necessarily amount to an agreement [p. 969, col. 2.]

An erroneous admission by a tenant that he is a non-occupancy tenant, even though recorded in the Record of Rights, will not operate to deprive him of his right. [p. 970, col. 2.]

Revision from the order of the Commissioner, Jullundur, dated the 23rd July 1918.

Mr. Beni Pershad, for the Petitioners.

Mr. Taj Din, for the Respondent.

ORDER.—I have heard Counsel for the parties. The so called *parcha tasdiq*, which forms a part of the Record of Rights of the Settlement of 1882, contains a passage, which I translate as follows :—

“Jiwan, tenant, on behalf of himself and his minor brothers made to-day the following statement:—My father came and settled in this village in the Sambat year 1902 (A. D. 1845), broke up the waste of Khasra No. 131 in that year and cultivated it thereafter. We have been in possession since his death and are entered as occupancy tenants in the former record. We broke up Khasra No. 156 in Sambat 1920-21 (A. D. 1863-64). We are tenants-at-will in respect to this and (here the record changes from the first person to the third) it was stated that the rent was rent in kind as in Khata No. 3.

“Accordingly the owner, Jalal Din, admitted the statement of the tenants. Since the father of tenants cultivated the occupancy land at the time that he settled

in the village, they must be recorded as occupancy tenants in respect of it, in accordance with section 5 (3) of Act XXVIII of 1868. And the land which is non-occupancy land will continue to be recorded as non-occupancy.”

The first point to be noticed about this record is that it indicates an apparent misunderstanding of the law contained in section 5 (3) of Act XXVIII of 1868, on the part of the officer who passed the order and recorded the proceeding. He appears to have thought that the law drew a distinction between land cultivated at the time of the tenant's first settlement in the village, and land cultivated by him thereafter. But the clause provides that a tenant who is at the date of the passing of the Act the representative of a person who settled as a cultivator in the village, in which the land occupied by such tenant is situate, along with the founders of the village is to be deemed to have a right of occupancy in the land so occupied: whether the land was occupied from the time of first settlement or from a later date.

The reference in the record to the rate of rent throws no light upon the question: because the rate of rent shown in Khata No. 3 is the all-round rate of the village for all tenants, occupancy and non occupancy alike (one fifth of produce together with $2\frac{1}{4}$ seers per maund for expenses).

On the facts that were stated by the tenant and admitted by the landlord, the former was entitled to occupancy rights in the whole of the land in question. The only question in regard to which doubt arises is whether the tenant's statement that he is a non-occupancy tenant in a portion of that land constitutes an agreement waiving the occupancy status. It has been strongly urged before me that the mere fact that the statement is recorded in the Record of Rights makes it an agreement. But that is certainly not so. Both under section 2 of Act XXVIII of 1868, and under section 112 of Act XVI of 1887, certain entries are to be deemed to be agreements. If all entries were to be deemed to be agreements, merely because they are recorded in a Record of Rights, there would be no necessity for a provision of the law expressly declaring that some of them are to be deemed agreements. It is an inevitable

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inference that entries, other than entries specified in the second part of section 2 of Act XXVIII of 1868, and in section 112 of Act XVI of 1887, may or may not be agreements according to their tenor and to the circumstances under which they were recorded.

It is a very significant fact that each of the two clauses which I have just cited, while providing that entries made before a certain date in respect of certain matters shall be deemed to be agreements, establishes this rule in respect of those matters specified, and not in respect of others under the Tenancy Act. Chapter II of Act XXVIII of 1868 is excluded from the rule laid down in the second clause of section 2: and similarly there is no provision in section 112 of Act XVI of 1887 in respect to entries determining the status of a tenant as an occupancy tenant or a tenant-at-will. It seems plain that the Legislature had a deliberate intention of placing upon a special footing entries purporting to determine occupancy or non-occupancy status, and of declining to make the assumption that such entries were agreements, unless their character as agreements was otherwise established.

One of the rulings which has been cited, in order to show that the entry in this case is an agreement, is *Ghazi v. Juma Khan* (1). In that case landlord and tenant concurred in saying that the land had been given 20 years previously to the tenant in a cultivated state, that the tenant had effected no improvements, that the landlord could not evict the tenant at pleasure, and that the tenant agreed to pay a stated cash *malikana* to the landlord in addition to the revenue. Here obviously was an agreement made by way of compromise: but it was an agreement, not in virtue of a general rule of law causing all entries to be viewed as agreements, but in virtue of the arrangements which it embodied and upon which the landlord and tenant had agreed to compromise their differences.

Similarly, the findings in *Kadar Din v. Nur* (2) arrive at the conclusion that the entries in a particular case amount to an agreement under the second part of section 2 of Act XXVIII of 1868, but they do not exclude from discussion the question whether

another set of entries in a different case do or do not amount to such an agreement.

Rahim Bakhsh v. Rahim Bakhsh (3), on the other hand, definitely lays down the principle that the mere entry in the Record of Rights does not necessarily amount to an agreement; and, in particular, that a mere voluntary admission by a tenant, even though recorded in the Record of Rights, will not operate to deprive him of his right.

The question, therefore, in the present case remains, so far as previous rulings go, entirely an open one. It is whether the record which I have translated at the beginning of this order is an agreement. There is no general rule of law which determines it to be such.

I think that it is plainly not an agreement. The officer who recorded it misunderstood the law, as has already been pointed out. Notwithstanding this fact—a fact which would tend in many cases to cause a particular statement to be put into the mouth of a deponent—it is possible that the tenant volunteered the statement that he was a tenant-at-will in certain land. But in doing so he was merely expressing his view of the law. He had already stated facts which, on a correct interpretation of the law, showed him to be entitled to occupancy rights; and the fact that he (like the presiding officer) misunderstood the legal position does not amount to an agreement to waive his rights.

The entry, though not an agreement, is, in respect to the facts stated by the tenant and admitted to be correct by the landlord, a valuable piece of evidence, and a presumption of truth arises in respect to those facts. It has been urged before me that this presumption of truth applies to the tenant's inferences from the facts, and, therefore, to his statement that he is merely a tenant-at-will. But, of course, a presumption that a fact is correct is an entirely different thing from a presumption that an inference is justified.

The conditions of section 5 (1) (c) of Act XVI of 1887 are satisfied in respect to the land in issue in the present application. I accept the application, and cancel the notice of ejectment on the ground that the applicant is a tenant under section 5 (1) (c). This order applies to present field numbers 816 min, 817, 818, 819, 820; making 23 *bighas*, 12 *biswas* in all.

Revision accepted.

(3) 10 P. R. 1901 Rev; 44 P. L. R. 1901.

(1) 18 P. R. 1882.

(2) 24 P. R. 1883.

KHANTAR POTDAR v. PUNNI NADDAF.

PATNA HIGH COURT.

CIVIL REVISION No. 227 OF 1919.

December 20, 1919.

Present:—Mr. Justice Adami.

KHANTAR POTDAR—PETITIONER

versus

PUNNI NADDAF—OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), s. 17—Ex parte decree, application to set aside—Security or deposit, whether condition precedent.

Under section 17 of the Provincial Small Cause Courts Act it is a condition precedent to the granting of a new trial that the applicant should, at the time of presenting his application, deposit in Court the decretal amount or tender security for payment of the same.

Civil revision from a decision of the Subordinate Judge, Darbhanga.

Mr. Bimla Ch. Sinha, for the Petitioner.

JUDGMENT.—The petitioner obtained an *ex parte* decree on the 13th January 1918 and applied for execution. In execution the judgment-debtor was arrested on the 12th March 1918 and was placed before the Court on the 14th March. He undertook to apply to have the *ex parte* decree which had been obtained against him set aside under Order IX, rule 13. He made the application on the 14th April 1919, but did not deposit any security such as is required under section 17 of the Provincial Small Cause Courts Act. The decree-holder, the present petitioner, objected that the application was time-barred and that no security having been given, the application should not be entertained.

On the 12th July 1919 the decree-holder applied for summonses for his witnesses and there was an adjournment to the 26th July. On the 26th July none of the petitioner's witnesses were present because the summonses had not been served. The decree-holder applied for an adjournment which was refused, and the case was heard *ex parte* and the *ex parte* decree was set aside.

The grounds taken by the learned Vakil for the petitioner are that as the opposite party came to know of the decree passed against him on the 12th March when he was arrested, his application made on the 14th April was four days late and that, therefore, it was barred by limitation under Article 164 and so the Court had no

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jurisdiction to entertain it. This ground seems good. There is nothing on the record to show that the Court satisfied itself that there were reasonable grounds for the delay in filing the application.

The next ground taken is that under section 17 of the Provincial Small Cause Courts Act the application could not be heard unless security had been deposited as required by that section. In *Jogir Ahir v. Bishen Dayal Singh* (1) it was decided that it is a condition precedent to the granting of a new trial that, in accordance with the provisions of section 17 of the Provincial Small Cause Courts Act, an applicant should, at the time of presenting his application for a new trial, deposit in Court the decretal amount, or tender security for payment of the same. It is true, it seems that on the 29th April a security bond was filed but the security offered was found to be insufficient. I am of opinion that under the circumstances the Court had no jurisdiction to hear the application and the order passed thereon must be set aside.

The opposite party is not represented.

Order set aside.

(1) 18 C. 83.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1913 OF 1919.

December 19, 1919.

Present:—Mr. Justice Abdul Raoof.

ILAHÍ BAKHSH AND ANOTHER—

DEFENDANTS—APPELLANTS

versus

JAWINDA MAL AND ANOTHER, MAJORS,
AND KARMUN MAL, MINOR, THROUGH
JAWINDA MAL—PLAINTIFFS—

RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, rr. 22, 23—Cross-objection against defendant not party to appeal, whether can be urged—Failure of litigant to avail himself of ordinary remedy—Court, whether can give him relief.

Plaintiffs sued two defendants for recovery of a certain sum alleged to be due on book accounts

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and obtained a decree against defendant No. 2 alone, who appealed impleading the plaintiffs alone as respondents. The plaintiffs filed cross-objections and in their memorandum of objections impleaded defendant No. 1 also among the respondents. No notice was, however, issued to him. The Appellate Court passed a decree making the defendant No. 1 jointly liable with defendant No. 2. Against his decree defendant No. 1 preferred a second appeal to the High Court:

Held, that as defendant No. 1 was no party to the appeal, no cross-objection under Order XLI, rule 22, of the Civil Procedure Code could be entertained against him and the lower Appellate Court was not justified in passing a decree against him. [p. 972, col. 2; p. 973, cols. 1 & 2.]

Bakshi Bindeswari Prasad v. Dheninder Das, 39 Ind. Cas. 662; 2 P. L. J. 162; *Nga Tin v. Nga Saw*, 29 Ind. Cas. 610; 2 U. B. R. (1915) 58, followed.

The powers given by Order XLI, rule 33, of the Civil Procedure Code are discretionary and no Court would be justified in making use of that rule to pass a decree in favour of a litigant who has failed to avail himself of the ordinary remedy by way of appeal. [p. 974, col. 2.]

Second appeal from the decree of the District Judge, Multan, dated the 6th March 1919, varying that of the Subordinate Judge, Multan, dated the 26th April 1918, dismissing the plaintiff's suit with costs against defendant No. 1 and decreeing Rs. 1,157 with proportionate costs in plaintiffs' favour against defendant No. 2.

Malak Muhammad Hussain, for the Appellants.

Lala Har Gopal, for the Respondents.

JUDGMENT.—The plaintiffs in this case brought a suit on *bahi* account against (1) *Ilahi Bakhsh*, and (2) *Qadar Bakhsh* on the following allegations:—

A balance for Rs. 615 was struck in 1911 which was signed both by defendant No. 1 and defendant No. 2. Again in 1915 a balance of Rs. 1,100 was struck and was signed by defendant No. 2 alone. Adding to it certain other items the total amount claimed was Rs. 1,469. In defence the defendant No. 1 pleaded that the account in reality concerned defendant No. 2 alone and that he had put down his signature only as a witness. The Court of first instance after a review of the evidence held that the defendant No. 1 was not liable and that the debt was due from the defendant No. 2 alone. Objections were taken to some of the items in the account by the defendant No. 2 which were partially allowed, and eventually a decree was passed in favour of the plaintiff-

iffs against the defendant No. 2 for the sum of Rs. 1,157. Against this decree the defendant No. 2 preferred an appeal impleading the plaintiffs alone as the respondents in the case. The plaintiffs-respondents then filed objections under Order XLI, rule 22, of the Code of Civil Procedure relating to a sum of Rs. 312 with respect to which the claim had been disallowed by the Court of first instance. In the memorandum of objection *Qadar Bakhsh*, the defendant No. 2, is mentioned as the defendant-appellant and among the respondents are mentioned the plaintiffs and also *Ilahi Bakhsh*, the defendant No. 1. On this petition of objections notice was ordered to go to the appellant. No notice was ever given to the defendant No. 1. This fact was admitted by the learned *Vakil* who appeared in this Court for the plaintiffs. The lower Appellate Court after considering the appeal and the objections came to the conclusion that *Ilahi Bakhsh* and *Qadar Bakhsh* were jointly indebted to the extent of Rs. 615-7-9. The decree was passed in the following terms:—"It is ordered that *Ilahi Bakhsh* and *Qadar Bakhsh* are jointly indebted to the extent of Rs. 615-7-9. *Qadar Bakhsh* is indebted to the extent of Rs. 782 [Rs. 1,469 deducting Rs. 36 *Jholi* (after balance of Rs. 1,100), Rs. 200 profit on wheat, Rs. 110 interest, Rs. 212-8-0 disallowed, Rs. 92 *Jholi* items (after balance of Rs. 615 but before balance of Rs. 1,100), Rs. 36 miscalculation] plus interest Rs. 66 thereon from the date of the second balance to the date of the institution of this suit at six per cent. per annum. The decree will, therefore, be against *Qadar Bakhsh* for this sum and may be executed against *Ilahi Bakhsh* to the extent of Rs. 615, the decree being joint against both the defendants to this extent. But before the plaintiffs can execute the decree against *Ilahi Bakhsh*, they must pay full Court-fee on their cross-objection which prays for relief to the extent of Rs. 1,469 10. The parties to pay their own costs in appeal."

Against this decree *Ilahi Bakhsh*, defendant No. 1, has preferred the present second appeal to this Court, and it has been contended on his behalf that having regard to the fact that he was no party

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to the appeal no objection under Order XLI, rule 22, could be entertained against him and that the lower Appellate Court was not justified in passing a decree against him. In support of this contention Mr. Muhammad Hussain, the learned Vakild for the appellants, has relied on the case of *Bakshi Bindeswari Prasad v. Dheninder Das* (1) decided by the Patna High Court and reported in 39 Indian Cases 662. In the head-note attached to the report the law on the point is stated thus :—

"In an appeal by one of two defendants the respondent is not entitled to raise a cross-objection which is directed against the defendant who is not a party to the appeal."

The judgment reported is very brief, but it does appear that the learned Judges intended to lay down the rule stated above. The cross-objection was raised in an appeal in execution proceedings. There were two judgment-debtors and against an order made in execution proceedings one of them appealed and the decree-holder filed a cross-objection, and the learned Judges made the following remark which is the basis for the head-note:—

"The decree-holder filed a cross-objection in which he challenges the decision of the Court with regard to the liability of Harihar, but as Bindeswari is the appellant a cross-objection which is directed against Harihar is not admissible. Harihar is not a party to this appeal."

He has also relied upon the decision in the case of *Nga Tin v. Nga Saw* (2) given by Mr. Saunders, A. J. C. of the Upper Burma Judicial Commissioner's Court and reported at page 610 of the 29th Volume of the Indian Cases. The facts of that case were very similar to the facts of the present case. In that case the plaintiff sued two defendants to recover Rs. 124, the balance of a sum advanced for the purchase of plantains, and obtained a decree against the second defendant. The second defendant appealed. The plaintiff in the Appellate Court filed cross objections in which

he claimed a decree against the first defendant and the lower Appellate Court gave plaintiff a decree against him. It was objected in that case that the plaintiff was not entitled to be heard under Order XLI, rule 22, of the Code of Civil Procedure. The learned Judge at page 611 made the following observation:—

"It seems clear that if it had been intended that Order XLI, rule 22, should give a respondent an opportunity to take a cross-objection to the decree not only as against the appellant but as against all the other respondents, this intention would have been expressed unequivocally. But in the present case the applicant was not even a respondent in the appeal. He had successfully contested plaintiff's claim in the first Court and had not been made a party to the appeal until the plaintiff attempted to make him a party by filing a cross-objection. It is clearly unreasonable in a case where a plaintiff had sued two defendants who had no common ground of defence and has been successful against one only, and where that defendant appeals, that the plaintiff should be heard in the same appeal to prove his case against the other defendant."

These observations fully apply to the facts of the present case. The ground of defence by the two defendants in the present case was in no sense common and it cannot be contended that on the hearing of the appeal of the defendant No. 2 any question could have arisen for a decision between the co-defendants. The defendant No. 1 had totally denied his liability and the defendant No. 2 had acknowledged his sole liability. No question of equity between the two defendants, therefore, could have arisen. The learned Vakild for the plaintiffs-respondents has argued that a reference to the provisions of Order XLI, rule 22, clause (3) and clause (4), would show that the Legislature intended to allow an objection to be taken against any party to the suit, whether he was a party to the appeal or not. I do not think the clauses Nos. 3 and 4 are capable of such an interpretation. The learned Vakild has also relied on the new provisions of Order XLI, rule 33, relating to the power of a Court of Appeal

(1) 39 Ind. Cas. 662; 2 P. L. J. 162.

(2) 29 Ind. Cas. 610; 2 U. B. R. (1915) 58.

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and has argued that the lower Appellate Court was authorised under the law to pass a decree against the defendant No. 1 under the provisions of this rule. The illustration appended to the rule appears to be against this contention. It was held by the Calcutta High Court in the case of *Kshum Ohand Bhuturia v. Ghane Muhammad Saha* (3):—

"That rule 33 of Order XLI is very widely expressed but it should not be applied so as to enable a party litigant to ignore the other provisions of the Code or the provisions of Statutes like those which relate to limitation or payment of Court-fees."

Even if the rule 33 be applicable to a case of this nature, which is very doubtful, the powers given under it are of a discretionary character and no Court would be justified in making use of that rule to pass a decree in favour of a litigant who has failed to avail himself of the ordinary remedy by way of an appeal. The plaintiffs could have filed an appeal within the statutory period of limitation. They did not choose to do so and they filed their cross-objections on the 1st of October 1918 long after the period for appealing had expired. The learned Vakil for the plaintiffs then argued that it was open to the lower Appellate Court to have added the defendant No. 1 as a party to the appeal and in order to enable the plaintiffs to urge their objections the lower Appellate Court ought to have made him a party. In my opinion there is no force in this contention. He has relied on *Bishun Churn Roy Chowdhry v. Jogendra Nath Roy* (4), *Fatima Bibi v. Ram Narain Sahu* (5) and *Abdul Ghani v. Muhammad Fasih* (6), but none of the cases has any bearing on the facts of this case. I must, therefore, accept this appeal and set aside the decree of the lower Appellate Court as against the defendant No. 1, the appellant before me, and I order accordingly. The appellant will be entitled to his costs.

The appeal on behalf of the defendant

(3) 38 Ind. Cas. 361.

(4) 26 O. 114.

(5) 51 Ind. Cas. 646; 16 A. L. J. 587; 40 A. 536.

(6) 28 A. 95; A. W. N. (1905) 200; 2 A. L. J. 667.

No. 2 challenges findings of fact recorded by the lower Appellate Court with which I am unable to interfere. I accordingly dismiss the appeal of the defendant No. 2 with costs.

Order accordingly

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 83 OF 1917.

January 6, 1920.

Present:—Sir Grimwood Mears, Kt., Chief Justice, and Justice Sir P. C. Banerji, Kt.

HARBANS AND OTHERS—DEFENDANTS
—APPELLANTS

versus

RAM KUMAR NAIK AND OTHERS —
PLAINTIFFS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 11—
Res judicata—Co-defendants, issue between, decision of, when operates as res judicata.*

A decision on an issue arising between co-defendants has the effect of *res judicata* if it is necessary that the issue should be determined for the purpose of granting relief to the plaintiff. Where such an issue is determined adversely to a defendant, it is not open to him in a subsequent suit between himself and the other co-defendants to raise the question already decided by the finding on that issue. [p. 875, cols. 1 & 2.]

First appeal from a decree of the Subordinate Judge, Basti, dated the 20th of December 1916.

Mr. N. C. Vaish and the Hon'ble Dr. Tej Bahadur Sapru, for the Appellants.

The Hon'ble Mr. Moti Lal Nehru, for the Respondents.

JUDGMENT.—The only question in this appeal is whether the judgment in a prior suit operates as *res judicata* between the parties so as to preclude the defendants from raising the pleas which they have raised in this suit. The present suit is one for foreclosure of two mortgages, dated respectively the 1st of April 1902 and the 14th of November 1903, executed by Misri Naik in favour of one of the plaintiffs and the predecessors-in-title of the other plaintiffs. The original mortgagor is dead. The defendants to the suit were the three sons and three grandsons of the mortgagor, and the widow of a predeceased son. The defendants Nos. 1—7,

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who are the principal defendants in this case, raised various pleas, denying the mortgages, denying payment of consideration and denying the existence of family necessity for the execution of the mortgages. The Court below has held that by reason of the decision in a previous suit it is no longer open to the defendants to raise these pleas. The previous suit to which reference has been made in the judgment of the Court below was a suit brought in 1909 by one Jia Lal, a subsequent mortgagee of the property comprised in the mortgages now in suit. In that suit the defendants were the present plaintiffs or their predecessors-in-title, and the legal representatives of the mortgagor. Jia Lal asserted that the property was free from the two prior mortgages in favour of the present plaintiff, first, because the mortgages had been discharged. He next urged that the property was free from those mortgages because the mortgages were fictitious and without consideration. We find from the decree made in the previous suit that he claimed an alternative relief to the effect that in the event of the prior mortgages being held to be valid and subsisting mortgages, he might be allowed to redeem them and bring the mortgaged property to sale for realisation of the amount due under the prior mortgages as well as the amount due upon his own mortgage. In that suit the legal representatives of the mortgagor contended that the prior mortgages held by the present plaintiffs, or their predecessors-in-title, were fictitious and were not subsisting mortgages, capable of enforcement. The Court framed an issue on the point and it decided it in favour of the present plaintiffs or their predecessors-in-title who were in that suit defendants Nos. 12—15. This decision, it is contended, has the effect of *res judicata* in the present suit in which the same plea has been raised by the defendants as in the former suit. It is urged on behalf of the plaintiffs-appellants that the decision of the Court below on the question of *res judicata* is erroneous inasmuch as the parties to the present suit were arrayed on the same side in the previous suit. It is true that a decision on an issue arising between co-defendants cannot have the effect of *res judicata* unless it was necessary that the issue should have been determined for the purpose of granting relief to the plaintiff. In the previous suit the plaintiff to that suit

raised the contention, as we have said above, that the mortgages in favour of the present plaintiffs did not subsist because the amount of the mortgages had been discharged or because they were fictitious. The first ground taken by them for their allegation that the mortgages did not subsist was abandoned; but the second ground which was also the ground raised by the legal representatives of the mortgagor was pressed and an issue was framed on that point. The finding on that issue was not sufficient for the disposal of the case, because there was the alternative prayer for redemption to which we have referred above. For the determination of that part of the claim and for granting or refusing to the then plaintiff the relief claimed under the alternative prayer which was added by an amendment of the plaint allowed by the Court, the question of the validity and reality of the mortgages now in suit was a substantial and essential question, which had to be determined between the two sets of defendants to the suit in order to grant to the plaintiff the alternative relief which he asked for. The effect of the decision in the suit, if that part of the relief had been granted, would have been to make a decree against the mortgagors for sale of their property not only for the realisation of the amount of the mortgage held by Jia Lal, the plaintiff to that suit, but also the amount of the two mortgages now in dispute. As a matter of fact the Court did go into that question and in its decree provided that if the amount of the mortgage held by the plaintiff to that suit was not paid by the mortgagors, the mortgaged property should be sold and out of the proceeds of the sale the mortgages held by the present plaintiffs should be first satisfied. This being so, there was in the previous suit an issue between the co-defendants which it was necessary to determine in order to grant relief to the plaintiff. That issue having been decided adversely to the present defendants, it is no longer open to them to raise the question already decided by the finding on that issue. The Court below has in our opinion rightly held that the matter is *res judicata* and this appeal must fail. We dismiss the appeal with costs, including fees in this Court on the higher scale. We extend the time for payment for six months from this date.

Appeal dismissed.

MELA RAM v. BRIJ LAL.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 3148 OF 1918.

March 4, 1919.

Present:—Mr. Justice Broadway.

MELA RAM—DEFENDANT—APPELLANT

versus

BRIJ LAL AND OTHERS—PLAINTIFFS—

RESPONDENTS.

Stamp Act (II of 1898), s. 12—Cancellation of stamp, what constitutes—Negotiable Instruments Act (XXVI of 1881, s. 4—Promissory note payable through another person, validity of.

The question whether or not a stamp has been effectually cancelled is one purely of fact to be decided by an examination of the stamp itself.

The cancellation of a stamp by drawing diagonal lines across its face is sufficient within the meaning of section 12 of the Stamp Act.

The undertaking in a promissory note to pay the money through another person does not make the promise conditional and does not take the document out of the purview of section 4 of the Negotiable Instruments Act.

Second appeal from the decree of the District Judge, Sialkot, dated the 6th May 1918.

Mr. M. L. Puri, for the Appellant.

Mr. Jagan Nath, for the Respondents.

JUDGMENT.—The suit out of which this appeal arises was for the recovery of Rs. 668 on a promissory note. The trial Court having decreed the claim and the learned District Judge having upheld the said decree, the defendant has come up to this Court on second appeal through Mr. Mukand Lal Puri. I have heard Mr. Jagan Nath for the respondents.

Mr. Mukand Lal raised two points. First, he contended that the document described as a pro-note was inadmissible in evidence inasmuch as it had not been properly cancelled under section 12 of the Stamp Act, and secondly, that the said document did not come within the definition of a promissory note as contained in section 4 of the Negotiable Instruments Act.

With regard to the first contention it was argued that the Legislature contemplated the cancellation of a stamp which would render it impossible for use a second time. It seems to me that the question whether or not a stamp has been effectually cancelled is one purely of fact to be decided by an examination of the stamp itself.

In the present case the stamp has been cancelled by drawing diagonal lines right across it, their ends extending on to the paper. An examination of the stamp leaves no room for doubt that it was affixed for the first time on this document. It seems to me, therefore, that it has been effectually cancelled. A cancellation by drawing lines across a stamp has been considered sufficient in *Mohammad Amir v. Kedar Nath* (1), in which case the dictum contained in *Piran Ditta v. Mangal Singh* (2) was approved of. I accordingly hold that the stamp has been effectually cancelled within the meaning of section 12 of the Stamp Act.

With regard to the second point the document in question is to the effect that the drawer undertakes to pay the sum therein mentioned to the plaintiff or order "*maarfah Budha Singh*." It seems to me that the undertaking to pay is an unconditional one and that the words "*maarfah Budha Singh*" do not take the document out of the purview of section 4 of the Negotiable Instruments Act. (Budha Singh was the plaintiffs' agent and it seems to me that the insertion of these words in the body of the document does not render the document anything other than a promissory note. This being the case, the onus to prove want of consideration was rightly placed on the defendant-appellant, and I accordingly dismiss this appeal with costs.

Appeal dismissed.

(1) 15 Ind. Cas. 202; 15 O. C. 58.

(2) 108 P. R. 1908; 207 P. W. R. 1908.

DOMAN MAHTO v. EMPEROR.

PATNA HIGH COURT.

CRIMINAL REVISION No. 419 of 1919.

December 19, 1919.

Present:—Mr. Justice Adami.

DOMAN MAHTO AND ANOTHER—

PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 186—Warrant, resistance to execution of—Warrant addressed to nazir personally—Nazir, whether can delegate execution to naib-nazir.

Although it is improper for a nazir to depute one of his assistants to execute a warrant for the delivery of possession which is directed to the nazir himself, yet the assistant is sufficiently clothed with authority to execute the warrant, and any person offering resistance or obstruction to its execution is guilty of an offence under section 186, Penal Code. [p. 981, col. 2; p. 982, col. 1.]

Application to set aside the conviction of petitioners under section 186 and section 147 of the Indian Penal Code.

FACTS.—In a certain execution case *Basdeo Mahto* decree-holder v. *Doman Mahto* judgment debtor) the 1st Munsif of Chapra issued a writ (Exhibit 1) for the delivery of possession of certain plots of land to the aforesaid decree-holder. The writ contained the direction "*Waziah rahe ki Nazir khud ja kar kabza delave*" i.e., "Be it noted that the Nazir himself should go and give delivery of possession." The Nazir deputed the Naib Nazir of the Civil Court to go and deliver possession of the land in question. The Naib Nazir accordingly, accompanied by two peons, a drummer, the decree-holder and an identifier, went to the spot, explained to the judgment-debtors (petitioners) the contents of the writ and asked them to allow possession to be given as directed by the writ. On this opposition was offered by Doman, and his partisans, who were already armed with *lathis*. Thereupon the Naib Nazir and his peons asked to the accused and their partisans not to interfere with the Court's order. Upon this there was remonstrance between the decree-holder and judgment-debtor's parties. Doman and Mohit and their partisans made preparations for assaulting Basdeo, the decree-holder, and his uncle, and certain persons on the side of the accused assaulted the decree-holder and other men on his side with *lathis*. The

District Judge directed the prosecution of the petitioners under section 476, Criminal Procedure Code, on receiving a report from the Naib Nazir, and the accused were put upon their trial for offences under sections 147 and 186, Indian Penal Code, resulting in their conviction and sentence. Before this the decree-holder Basdeo had instituted a criminal case for assault under section 323 against the petitioner Doman and others, which was compounded before the termination of the present case.

Further facts appear from the judgment of the Sessions Judge which was as follows:—

"The record of this case has come back from remand.

I have already described the alleged facts of the case in my judgment remanding it for further evidence, hence it is unnecessary to repeat them here. The defence is that the case is a false one and has been brought by Basdeo Mahto in collusion with the Naib Nazir. It is also alleged on behalf of the accused that the true facts of the case are disclosed in a counter complaint lodged by Bhawani Mahto, a son of Doman (appellant), to the effect that there was a dispute between Doman and Dukhan (P. W. No. 5), the uncle of Basdeo Babu, about the ownership of the tiles which were removed from the house by the Naib Nazir's orders and that Basdeo struck Bhawani (son of Basdeo) on the head with a *lathi* and then the Naib Nazir left the place. In addition to this different version of the facts a number of law points have been raised on behalf of the defence which I shall deal with presently.

In my opinion there can be no doubt that the version of the facts given by the prosecution is correct and has been satisfactorily established by the evidence of the Naib Nazir and other eye-witnesses, namely Ramzan Ali and Ram Singhasan Lal, Civil Court peons, and also Basdeo, the decree holder, and his uncle Dukhan and Sheoraj Nonia, the labourer who was removing the tiles, and Surat Ali Daffadar, who accompanied the Nazir to the spot.

I see no sufficient reason to hold that the Naib Nazir has given an incorrect

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account of the affair and I am satisfied with his evidence.

Two witnesses have been examined in support of the defence version. However, they appear to have concealed the real facts and I am unable to rely on them.

Thus I agree with the learned Magistrate in finding that the prosecution story has been proved.

I shall now deal with the legal points raised on behalf of the defence. It was urged that inasmuch as the complaint case brought by Basdeo against Doman and others for assault had been compromised, hence the charge of rioting could not stand, for by the compromise the accused persons have been acquitted of the charge of assault which constituted the part of the essence of the charge of rioting.

In my opinion this contention is not sound. I have looked into the record of the complaint case concerned. I find that Basdeo Mahto filed complaint against the two present appellants and seven other persons, accusing them of interfering with the Nazir in delivering possession and of assaulting Basdeo and Dukhan with *lathis*. Four of the accused named in the complaint were summoned under section 323 and 323/34, Indian Penal Code, viz., Nandu, Phekan, Bhawani and Doman. Evidence was gone into and a charge was framed under section 323, Indian Penal Code. Eventually the case was compromised and these four persons were acquitted. Now obviously this previous acquittal does not affect in any way the present case against Mohit, for he was not summoned in the complaint case and hence the fact that that case ended in acquittal after compromise cannot benefit him.

As regards Doman Mahto also it seems to me that this previous acquittal makes no difference. The only charge then against him was one under section 323 and that was compounded. No charge was framed under section 147 and hence the fact that Doman was acquitted on compromise cannot have any effect on the present charge of rioting, which as a matter of fact is not compoundable.

In my opinion the case comes under section 403, clause (2), and it is quite clear that the present charge of rioting

is in no way affected by Doman's previous acquittal in respect of the charge under section 323. Still less is the present charge under section 186 affected thereby, for the charge under section 186 was not before the Court which disposed of the complaint case, and in fact this charge could not proceed without sanction under section 195, Criminal Procedure Code, or order under section 476, Criminal Procedure Code, and Basdeo had not obtained any sanction. Thus the present charge under section 186, which has been brought in accordance with the order of the Munsif passed under section 476, Criminal Procedure Code, is in no way affected by the previous compromise.

It is also argued that inasmuch as the property of which the possession was to be delivered consisted of 2 *dhurs* of land out of a larger plot, it was quite possible that the Naib Nazir in delivering possession might have encroached beyond these 2 *dhurs* and hence the accused Doman was justified in resisting him. However, I am unable to accept this view. No doubt it would have been better in a case of this kind if the Civil Court Amin or some survey-knowing Commissioner had been appointed to deliver possession after making an accurate survey. However, at the same time I am unable to hold on the evidence that the Naib Nazir in delivering possession actually encroached on any land not included in his order. In fact the accused in their written statement do not suggest any such encroachment.

The defence appears to be that there was a dispute as regards the ownership of the tiles which were removed from the house that had to be demolished. It is clear that the accused Doman was entitled to these tiles, and his case is that the decree-holder Basdeo wanted to take them away altogether and he objected to this. But he says he raised no objection to the tiles being taken down from the portion of the house that was being removed. Thus it is not really the accused's case that there was any encroachment beyond the 2 *dhurs* to which the decree-holder was entitled, and thus there does not seem to me to be any force in this point.

Another point raised was that as the writ of delivery of possession was addressed

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to the bailiff of the Court, the Naib Nazir was not authorised to execute it inasmuch as he was not the bailiff. It is urged on the strength of the following rulings, *Suleh Ali v. Emperor* (1) and *Mohini Mohan Banerji v. Emperor* (2), that the peons and not the Nazir or Naib Nazir were really the bailiffs. Certainly in the rulings mentioned this interpretation of the word bailiff is given. However, there seems to be no doubt that in certain cases the word 'bailiff' means the Nazir or the Naib Nazir. For instance the warrant of sale under Order XXI, rule 66, Civil Procedure Code, is addressed to the bailiff of the Court and this officer is directed to sell the attached property by auction in execution of the decree concerned. Now it is the universal practice in all Courts in every district, as far as I am aware, that the Nazir (or possibly in some cases the Naib Nazir) conducts execution sales. I have never come across any case in which these sales are held by peons. Thus it seems to me clear that the words 'bailiff of the Court,' though they may in some instances refer to peons, also include the Nazir and the Naib Nazir. Hence there is certainly no force in this objection. Moreover, in this particular case there was an order of the Court on the warrant that it should be executed by the Nazir himself. Hence clearly no peon would have had any authority to execute it. In fact this point was not very seriously urged before me on appeal.

It was, however, further urged that inasmuch as on the warrant for delivery of possession (Exhibit 1) there was an order that the Nazir himself should execute it, the Nazir had no authority to delegate his power to the Naib Nazir and the latter officer, Mohammad Kasim Ali, had no authority to execute it.

When the case first came up before me on appeal, the Nazir had not been examined as a witness and hence it was not clear how he had come to delegate his power. I, therefore, remanded the case to have his deposition taken. From his evidence it seems that the Nazir,

having received the order of the Court to execute the warrant, first delegated this duty to one Naib Nazir Gupteswer Prosad and afterwards (as Gupteswer Prosad had been transferred) he re-issued the warrant to Muhammad Kasim Ali, P. W. No. 1, for service. He did not obtain any order of the Court for this delegation. There is no doubt that ordinarily the Nazir has a general power of delegation of his duties to his subordinates, including both Naib Nazirs and peons [*vide Dharam Chand Lal v. Queen-Empress* (3) and *Sheo Prakash Tewari v. Bhoop Narain Prosad Pathak* (4)]. However, the question remains whether the special order of the Court in this case, that the Nazir himself should execute the warrant, deprived him of his usual power of delegation and rendered the action of the Naib Nazir in executing the warrant *ultra vires*. In my opinion, strictly speaking, in this particular case the Nazir should have obtained the orders of the Court before delegating his power to the Naib Nazir, for the Court's order on the warrant is quite explicit that the Nazir himself should execute it. It was urged for the Crown that the order-sheet of the execution case (Exhibit 3) shows that the Court acquiesced in the service of the notice by the Naib Nazir, inasmuch as it extended the time for service on the application of the Naib Nazir. However, the order-sheet does not bear out this contention, for it refers to an application for time by the Nazir. The actual application is not on the record, and it may be that it was submitted by the Naib Nazir through the Nazir and thus the Court may not have been aware that it was the Naib Nazir who executed the process. Hence there is nothing on the record to show that the Court acquiesced in the Nazir's delegation of his power to the Naib Nazir.

Under these circumstances it seems to me that the Naib Nazir was not strictly justified by law in executing the process. However, even taking this to be the case I do not consider that the appellants were justified in resisting the delivery of the possession. It seems to me that the case comes clearly under section 99 of the Indian Penal Code, for obviously the

(1) 19 Ind. Cas. 706; 40 C. 849; 17 C. W. N. 941; 14 Cr. L. J. 274.

(2) 36 Ind. Cas. 871; 1 P. L. J. 550; 18 Cr. L. J. 93; 3 P. L. W. 64.

(3) 22 C. 596.

(4) 22 C. 759.

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Naib Nazir was a public servant acting in good faith under colour of the office and hence there was no right of private defence against his action. Thus the irregularity in the proceedings is no sufficient justification for the conduct of the appellants.

Another point urged was that the warrant for delivery of possession was not signed by the Munsif but it was only initialled. However, this is a mere irregularity and does not render the warrant illegal (*vide* section 537, Criminal Procedure Code, illustration).

In conclusion after considering the evidence in this case and the points raised on behalf of the defence I am of opinion that the prosecution has succeeded in proving beyond doubt that the two appellants Doman and Mohit, aided by seven other persons not now on trial, resisted the Naib Nazir in the execution of a process for delivery of possession in connection with the decree obtained by Basdeo P. W. No. 4 against Doman appellant and that the companions of Doman and Mohit assaulted Basdeo and his uncle in the course of this resistance. Also I hold that these appellants had no right of private defence against the action of the Naib Nazir. Hence they are clearly guilty of offences under section 147 and 186, Indian Penal Code. I, therefore, uphold the convictions.

As regards the sentences, however, I think that some reduction is necessary. It must be borne in mind that compensation has already been paid for the assault upon Basdeo and his uncle in connection with the complaint case in which Doman and some other persons were put on their trial. Bearing this in mind, I do not think it necessary that separate sentences of imprisonment should be imposed in this case for the offences under sections 147 and 186, Indian Penal Code.

In conclusion, therefore, while upholding the conviction I reduce the sentence of Doman and Mohit to two months' rigorous imprisonment under section 186, Indian Penal Code. I impose no separate sentence under section 147, Indian Penal Code. The fines, if any, must be refunded."

The accused thereupon applied to the High Court in revision.

Mr. S. P. Varma, for the Petitioners.— A bailiff is a distinct person, i.e., a peon, and not the Nazir, therefore, the Nazir could not execute the warrant. Cites *Mohini Mohan Banerji v. Emperor* (2) and *Subed Ali v. Emperor* (1).

The warrant (Exhibit 1) distinctly directed the Nazir to execute and give delivery of possession himself and, therefore, delegation to the Naib Nazir was not justified in law and the petitioners were entitled to resist an illegal delivery of possession. Relies on the same two cases.

The common object of the assembly is alleged to be to resist by force the delivery of possession. This cannot stand, inasmuch as the element of force is no longer an offence because a charge under section 323, Indian Penal Code, had been compounded by the parties.

Mr. Manohar Lall (Assistant Government Advocate), for the Crown.—A bailiff is any person who is directed to execute a process of the Civil Court, i.e., a peon, a Naib Nazir, a Nazir. Much confusion has arisen in not keeping this distinction in view. The two cases cited are distinguishable on the facts of the present case. Here the Court itself directed the Nazir to go and deliver. Therefore, he derived his authority direct from the Court. In *Mohini Mohan Banerji's case* (2) the Nazir was not directed to do so. I rely upon an elaborate discussion of this in *Dharam Chand Lal v. Queen-Empress* (3).

The Nazir had full authority to delegate his duties to the Naib Nazir. It is the common practice. It is supported by high authority. Cites *Abdul Karim v. Bullen* (5). The very name Naib Nazir shows that he is an assistant to the Nazir and, therefore, must assist him in discharge of his duties, otherwise the work of the offices will not be carried on. Relies on *Dharam Chand Lal v. Queen-Empress* (3).

In any case section 99, Indian Penal Code, is a clear answer to the contention of the other side.

Regarding section 147, Indian Penal Code, the point raised is not of much importance inasmuch as no separate sentence is passed thereunder. The common

(5) 6 A. 385; A. W. N. (1884) 133.

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object was to resist the execution of the warrant, and this could not be compounded and has not been compounded. What was compounded was the force used in prosecution of the common object. In any case section 143, Indian Penal Code, would completely cover the facts.

JUDGMENT.—This is an application to set aside the conviction of the petitioners under section 186 and section 147, Indian Penal Code, and the sentence of two months' rigorous imprisonment passed under the former section.

It is only necessary to state that, in execution of a decree, the Naib Nazir proceeded to the judgment-debtor's property and started taking off the tiles through his peons from a part of the house which had been declared to have been encroaching on the decree-holder's property. The judgment-debtors and their men resisted the taking of these tiles and assaulted the decree-holder's party. The decree-holder brought a complaint against the petitioners and others under section 323. The complaint case ended in a compromise and the petitioners were acquitted. Thereafter, on a report of the Naib Nazir to the Munsif, sanction was given for the prosecution of the petitioners under sections 186 and 147 and they were tried and convicted as above mentioned.

The chief point taken by Mr. Varma for the petitioners is that the writ for delivery of possession was endorsed by the Court to be executed by the Nazir himself. The Nazir, however, delegated the execution to the Naib Nazir.

It is contended that in the first place the Nazir had no power to delegate his duty to the Naib Nazir and in the second place that the petitioners, in resisting the delivery of possession by the Naib Nazir, were not committing any illegality. The learned Counsel relies on the case of *Mohini Mohan Banerji v. Emperor* (2), where it was ruled that the word 'bailiff', which is printed on the writ of delivery, means the peon, and that being so, the Nazir had no power to execute a process which has been endorsed on the bailiff. He also cites *Subed Ali v. Emperor* (1), where it was held that the Nazir and the bailiff were not the same person in the circumstances of that case. The first of these two cases is distinguishable. There the warrant was endorsed to the peon and the Nazir executed it. In

this case we have the warrant endorsed to the Nazir himself, and I have no doubt in my mind that the Nazir then became the bailiff for the purpose of carrying out the duty of executing the warrant. A bailiff is any person who is directed to go and execute a process, and so it was held in the second of the two cases cited above. There the peon executed the process and so became the bailiff, and so derived his authority direct from the Court and was not bound by a limitation of the period for service prescribed by the Nazir.

It is next argued that if the Nazir was a bailiff according to the endorsement on the process, he was bound to execute it himself as it was made over "to the Nazir Khud" and that he had no authority to make it over to the Naib Nazir.

The case of *Dharam Ohand Lal v. Queen-Empress* (3) is a very clear authority for the power of a Nazir to delegate the execution of a warrant to those who are subordinate to him, namely, Naib Nazirs and peons. In that judgment the history of the powers of the Nazir is given very fully, and it is shown that the Nazir has been recognised as the proper officer of the Court for the purpose of executing its processes from the earliest times and that the Nazir has the power to delegate his duties, and that the Naib Nazir is one of the persons subordinate to him to whom the execution may be entrusted. The case of *Abdul Karim v. Bullen* (5) is to the same effect. It was there held that when the Nazir endorses the warrant to a subordinate, that subordinate is sufficiently clothed with authority to entitle him to arrest the person against whom the warrant of arrest is directed. It was there said: "There is nothing in the Code that we are aware of to prohibit a Nazir from authorising a deputy to execute a warrant of arrest for him; and we know that it has been for years the recognised and sanctioned practice for him to do so; indeed under existing arrangements, it is impossible it should be otherwise."

The real question here is whether the warrant having been addressed "to the Nazir Khud," he could delegate his duties. I am of opinion that the Nazir acted wrongly in deputing the Naib Nazir to carry out the execution. However, the Naib Nazir, knowing that he was subordinate to the Nazir and as a rule carried out the duties delegated to him by the Nazir, could not be held, when obeying

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the order, to have been acting dishonestly or knowingly carrying out an illegal order. He went to the place of execution acting in good faith and under colour of his office and the petitioners resisted him when he was so acting. Under section 59, Indian Penal Code, the petitioners would have no right of private defence against his acts. I, therefore, hold that on the facts found they were rightly convicted under section 186.

The next point taken is that the conviction under section 147 cannot be supported because the common object of the unlawful assembly was to resist by force the delivery of possession, and that the element of force in the charge has been taken away by the facts that the parties to the case under section 323 had compromised it and all would be equally acquitted of the offence. This is a somewhat doubtful point. It is certain that the parties met together with the common object of resisting the execution by the use of force and they used force, but they have been acquitted of the offence of using such force. Under the circumstances I am of opinion that the conviction should have been under section 143 and not under section 147, Indian Penal Code. The matter is not very important since the petitioners were not separately sentenced under section 147. I think that the proper order I should make on this application is that the conviction and sentence passed against the petitioners under section 186 must be upheld and the conviction under section 147 be changed to a conviction under section 143, and I order accordingly.

Conviction partly altered.

LAHORE HIGH COURT.

MISCELLANEOUS CIVIL PETITION No. 173
OF 1919.

May 10, 1919.

Present:—Mr. Justice Bevan-Petman.

In the matter of THE LEGAL PRACTITIONERS ACT, 1879, AND OF THE INVESTIGATION INTO THE CONDUCT OF Mian BELI RAM, PLEADER, HOSHIARPUR.

Legal Practitioners Act (XVIII of 1879), ss. 13, 14, scope of—"Charged", meaning of—Professional misconduct—"For any other reasonable cause," enquiry as to—District Judge, whether has power to make enquiry.

The natural construction of section 14 of the Legal Practitioners Act is that it includes clause (f) just as much as any other clause of section 13. [p. 982, col. 2.]

The word "charged" in section 14 of the Act should be construed as meaning "is accused" or that an allegation is made to that effect. [p. 983, col. 2.]

A District Judge is legally competent to take action under section 14 of the Act in cases which come under clause (f) of section 13. [p. 983, col. 1.]

District Judge of Kistna v. Hanumanulu, 32 Ind. Cas. 326; 39 M. 1045; 18 M. L. T. 549; (1915) M. W. N. 1050; 17 Cr. L. J. 38, followed.

Petition, under sections 13 and 14 of the Legal Practitioners Act, praying that the enquiry to be held against the petitioner be held in any district other than the district of Hoshiarpur.

The Hon'ble Pandit Sheo Narain, for the Petitioner.

ORDER.—For the petitioner Pandit Sheo Narain contends that a subordinate Court is not legally competent to take proceedings under section 14 of the Legal Practitioners Act in cases which come under clause (f) of section 13, "for any other reasonable cause," and is confined to cases falling under clauses (a) and (b). He relies on a judgment of the Chief Court, Punjab, reported as *Amolak Ram v. Emperor* (1), *Southekal Krishna Rao, In the matter of* (2) and *Purna Ohunder Pal, In the matter of* (3). At the same time he candidly admits that the judgment in *District Judge of Kistna v. Hanumanulu* (4) and other recent decisions are against his contention.

In the decision of the Chief Court clause (f) of section 13 was not directly under discussion and it is admitted that this decision supports the contention only by implication. It appears to me that the natural construction of section 14 is that it includes clause (f) just as much as any other clause of section 13. But the matter is, in my opinion, concluded by the judgment of the Full Bench of the Madras High Court referred to above. In that judgment the learned Judges point out that there had been some ground for the view now urged on behalf of the petitioner, under the corre-

(1) 4 Ind. Cas. 1022; 31 P. W. R. 1409 Cr.; 11 Cr. L. J. 148.

(2) 15 C. 152; 14 I. A. 154 5 Sar. P. C. J. 96.

(3) 27 C. 1023; 4 C. W. N. 389.

(4) 32 Ind. Cas. 326; 39 M. 1045; 18 M. L. T. 549; (1915) M. W. N. 1050; 17 Cr. L. J. 38.]

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sponding sections 15 and 16 of Act XX of 1865, as the former section gave a power of suspension or dismissal for fraudulent or other grossly improper conduct in the discharge of his professional duty or for any other reasonable cause while the subordinate Court was only empowered to investigate charges of "such conduct as aforesaid," and that accordingly it was held in *Golab Khan, In the matter of the petition of* (5) that cases which did not come under fraudulent or other grossly improper conduct in the exercise of professional duty but under any other reasonable cause were not covered by section 16 of that Act. The learned Judges explain that, following this decision Hill, J., in *Purna Ohunder Pal, In the matter of* (3) now relied on by the petitioner, expressed the opinion that the words in section 14 "taking instructions except as aforesaid" referred to clause (a) of section 13 and that the words "any such misconduct as aforesaid" referred to clause (b) and that a subordinate Court had no power to take action in cases falling within clauses (c), (d), (e) and (f) of that section. They also point out that this restrictive construction is not supported by the judgment of their Lordships of the Judicial Committee in *Southekal Krishna Rao, In the matter of* (2), also relied on by the petitioner, and to which Hill, J., referred, as in that case no question as to clause (f) of section 13 arose or was considered. After referring to two other decisions the learned Judges held that "there is no good reason why charges under these clauses should not be investigated in the first instance by the subordinate Court, and it would be very inconvenient if they could not. Their introduction into section 13 of the Act without any amendment of section 14 goes rather to show.....that section 14 as it stood was deemed wide enough to cover them." It is, in my opinion, unnecessary to refer to other judgments in which the same view was held. I hold, therefore, that the District Judge was legally competent to take action under section 14 of the Act.

For the petitioner it was also pointed out that since the institution of this High Court the petitioner has become a Vakil

and that, under the Letters Patent, this Court alone has the power to initiate proceedings against a Vakil, but, in my opinion, this fact makes no difference. The charge against the petitioner relates to his conduct as a Pleader and prior to the creation of this High Court, and his present status, if he has been enrolled as a Vakil of this Court, is beside the point.

Reference is also made to the word "charged" in section 14 of the Act, but this word should, in this section, be construed as meaning "is accused" or that an allegation is being made to that effect, and this is indicated in the judgment of the Chief Court relied on by the petitioner on the first contention.

The petitioner has to-day tendered a written explanation of the transaction which concludes with the words: "I now realize that my action was a piece of indiscretion which I now deeply regret. I most humbly crave the Hon'ble Court's forgiveness." The petitioner's Advocate, therefore, pleads that the explanation may be accepted and if considered necessary, a censure by this Court would meet the merits of the case.

I am unable to accede to this request. Even if the explanation of the petitioner be accepted, the matter cannot be treated lightly and calls for an enquiry and final disposal by a Division Bench of this Court. It is urged that Mr. Kennaway might be prejudiced by exaggerated or other information received by him, but Mr. Kennaway is no longer the District Judge of Hoshiarpur. It is uncertain when Mr. Kennaway may be released from his present duties and resume his former position. I, therefore, transfer the proceedings to the Court of the District Judge at Jullundur to avoid any possibility of complaint.

Proceedings transferred.

BEHARI GIR v. BHUBANESWARI KOER.

PATNA HIGH COURT.

CRIMINAL REVISION No. 432 OF 1919.

January 16, 1920.

Present :—Mr. Justice Sultan Ahmed,
BEHARI GIR—PETITIONER

versus

Rani BHUBANESWARI KOER AND
OTHERS—OPPOSITE PARTIES.

Criminal Procedure Code (Act V of 1898), s. 145, proceedings under—Civil Procedure Code (Act V of 1908), O. XXI, r. 35 (1), possession under, nature of—Dispute between judgment-debtor and decree-holder—Possession delivered by Civil Court in execution of decree—Criminal proceedings, legality of.

Where in execution of a decree possession of property is delivered to the decree-holder under Order XXI, rule 35 (1), of the Civil Procedure Code, the property cannot form the subject of proceedings under section 145 of the Criminal Procedure Code at the instance of the judgment-debtor, inasmuch as the dispute between the parties has been adjudged, and a Magistrate, who starts such proceedings, acts illegally and without jurisdiction. [p. 985, col. 1.]

Possession delivered under Order XXI, rule 35 (1), of the Civil Procedure Code, is actual possession and not symbolical or formal possession. [p. 985, col. 2.]

Application against the order of the Sub-Divisional Officer, Sadar Gaya, dated the 3rd December 1919.

FACTS appear sufficiently from the judgment.

Mr. Hasan Imam (with him Messrs. Nand. keolyar, S. N. Palit and Kailashpati), for the Petitioner, argued that possession was delivered to his client, the decree-holder, under Order XXI, rule 35. It was a direct delivery of possession. All that could be done by the Civil Court has been done. The order of the Magistrate, if allowed to stand, would mean that I must go back to the Civil Court, obtain a similar decree, a similar delivery of possession and then again be sent back to the Civil Court by a similar order under section 145, Criminal Procedure Code. The rightful owner would be kept out of his property for ever. This could never be the intention of the Legislature. Cites *Doulat Koer v. Rameswari Koeri* (1), *Kunja Behari Das v. Khetra Pal Singh* (2), *Atul Hazra v. Uma Charan Ohangdar* (3). The Magistrate must uphold the recent order of the Civil Court.

(1) 26 C. 65; 2 C. W. N. 461.

(2) 29 C. 28; 6 C. W. N. 38.

(3) 33 Ind. Cas. 822; 20 C. W. N. 796; 17 Cr. L. J. 82; 23 C. L. J. 555.

Mr. P. K. Sen (with him Messrs. G. D. Singh and S. N. Rai), for the Opposite Party, submitted that the Magistrate having found that the opposite party were in possession on the date of the proceedings notwithstanding the delivery of possession by the Civil Court, the High Court could not interfere. It was not a question of jurisdiction. The finding of the Magistrate may be erroneous. He may have taken even an erroneous view of law, Cites *Parmessar Singh v. Kailaspati* (4).

[SULTAN AHMED, J.—If your contention is correct, there could never be a finality to this litigation between the decree-holder and the judgment-debtors. That surely is not the intention of the Legislature.]

The Magistrate acts under this section simply with a view to prevent a breach of the peace.

[SULTAN AHMED, J.—But the Civil Court had recently determined those very rights of the parties which the Magistrate has no jurisdiction to determine once more.]

Mr. Hasan Imam was not called upon to reply.

JUDGMENT.—The petitioner Behari Gir, Chela of Mahant Krishnadayal Gir, has made this petition for setting aside an order passed by the Sub-Divisional Officer of Sadar Gaya, drawing up proceedings under section 145, Criminal Procedure Code. The facts may be shortly stated.

The petitioner is a Chela of the Mahant and the opposite party, who are 44 in number, consist of the Rani of the seven annas Tikari Raj and her servants and the tenants of Manza Mahabodh. It appears that the Mahant had a mortgage-decree against opposite party Nos. 9 to 44 and in execution of that decree he purchased the holdings of these tenants. On the 10th and 11th of July 1919 delivery of possession was given to the Mahant. On the 19th November 1919 on the application of the petitioner notices, under section 144, Criminal Procedure Code, were issued by the Sub-Divisional Officer on the tenants opposite party Nos. 9 to 44. On the 1st of December on the return of the service of these notices the parties were heard by the Magistrate. The Magistrate thereupon on the 3rd December 1919 passed the order which is now assailed in this Court.

(4) 35 Ind. Cas. 851; 1 P. L. J. 336; 17 Cr. L. J. 369; 1 P. L. W. 95; (1917) Pat. 1.

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The main ground upon which the learned Counsel for the petitioner attacks the order of the Magistrate is that the Mahant having got a decree against these tenants in execution of which decree delivery of possession was given to him, the Magistrate has acted without jurisdiction in not upholding that decree and the delivery of possession. In my opinion the contention is sound. Order XXI, rule 35, clause 1, provides that "where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and if necessary, by removing any person bound by the decree who refuses to vacate the property." So all that had to be done by the Court to complete the possession of the petitioner's master, the Mahant, in pursuance of the decree that he had obtained against the opposite party Nos. 9 to 44 had been done. There was nothing left for the Court to do to complete the execution of the decree.

It is absolutely clear that under these circumstances the Magistrate acted not only illegally but, in my opinion, without jurisdiction in starting the proceedings under section 145, inasmuch as the dispute between the parties had been adjudged in the Civil Court and possession had already been delivered to the Mahant. I am confirmed in the view that I take in this case by the decisions in the case of *Doulat Koer v. Ramswari Koeri* (1), *Kunja Behari Das v. Khetra Pal Singh* (2) and *Atul Hazra v. Uma Charan Changdar* (3). Indeed if a Magistrate could be permitted to start proceedings under section 145, under the circumstances which I find in this case, I cannot conceive any finality of dispute between the decree holder and the judgment debtors. I cannot conceive that the Legislature ever intended multiplicity of fruitless actions which must result if an order of this character is upheld. If, however, there had been, as has been pointed out by the learned Counsel appearing on behalf of the petitioner, an intermediate holder between the decree holder and the tenants, the question would still have to be decided as to who was in actual possession but where I do not find any intervener between the tenants and the decree holder, I think the question of formal

possession or otherwise does not arise. The Magistrate is under the impression that the possession that was delivered to the Mahant was symbolical possession and, therefore, he could still proceed under section 145, Criminal Procedure Code, and determine actual possession. In my opinion this is an erroneous view of law. It is conceded that possession was delivered under Order XXI, rule 35, and where possession is delivered under that rule, it is not, in my opinion, symbolical or formal possession but it is actual possession that is delivered. It is only when possession is delivered under Order XXI, rule 36, that it is symbolical, and provided that the other ingredients of section 145, Criminal Procedure Code, are present, the Magistrate's jurisdiction under that section can be attracted in spite of delivery of such possession.

I hold, therefore, that the Magistrate acted without jurisdiction in instituting proceedings under section 145, Criminal Procedure Code, when the Mahant had already obtained a decree against the opposite party and had also obtained delivery of possession under Order XXI, rule 35, of the Civil Procedure Code. The result is that the order of the Sub-Divisional Officer, Sadar Gaya, is set aside.

Order set aside.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1307 OF 1918.

April 11, 1919.

Present:—Mr. Justice Abdul Raoof.
SURAJ BHAN AND ANOTHER—ACCUSED
— PETITIONERS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 344, whether applicable to appeals—Adjournment of appeal—Costs, whether can be awarded.

Section 344 of the Criminal Procedure Code is not applicable to appeals. Costs cannot, therefore be awarded on the adjournment of an appeal [p. 986, col. 2.]

Revision from the order of the Sessions Judge, Karrai, dated the 21st August 1918.

Mr. Ganpat Rai, for the Petitioners,

BALMAKUND DAS v. EMPEROR.

JUDGMENT.—Suraj Bhan, petitioner, was convicted on the 24th June 1918 under sections 471/114 and 420/114 by H. Harcourt, Esquire, District Magistrate, Rohtak. Against this conviction he filed an appeal to the Court of the Sessions Judge at Karnal. On the 12th July 1918 the learned Sessions Judge adjourned the hearing of the appeal to the 2nd August 1918, as the Counsel for the Crown could not appear. On the 2nd August the hearing was again adjourned to the 21st August 1918 on the same ground. On the 21st August the Advocate for the accused applied to the Court to send for certain papers which were necessary for the support of the appeal and prayed that the hearing of the appeal might be adjourned for that purpose. The learned Judge made an order in the following words:—"The Advocate for the accused wishes to have some papers sent for. If the agent for the accused pays Rs. 100 to-day, the case should be postponed. In default of payment I will hear the case. The case should come off on the 18th October 1918." On the same day the learned Sessions Judge added a P. S. to his order to this effect: "The Advocate for the accused has paid in Rs. 100. The case to be postponed and to come off on the 18th October 1918. The money to be credited under the head 'Law and Justice.' The parties to be informed of the date of hearing."

The present application has been made for the revision of this order, and it is argued in the first instance that the learned Sessions Judge had no power to make such an order and in the second place it is argued that under the circumstances of this particular case such an order ought not to have been made. The only section of the Code of Criminal Procedure under which such an order could have been made is section 344, which enables the Court to postpone the commencement of or adjourn any enquiry or trial. The appeal before the learned Sessions Judge cannot strictly be said to be an enquiry or trial. It is, therefore, contended that section 344 did not empower the learned Sessions Judge to make the order under revision. In the case of *Sew Prosad Lodder v. Corporation of Calcutta* (1) it

was held that a Court had power to call upon a party to pay costs of the day under section 344, but that was a case which did not relate to an appeal. In *Mathura Prasad v. Basant Lal* (2) a similar view was taken by the learned Chief Justice of the Allahabad High Court. In his opinion the Court had power to allot costs. At page 208, however, referring to the case of *King-Emperor v. Chhabraj Singh* (3), the learned Chief Justice observed:—"In that case Mr. Justice Blair set aside an order awarding costs of an adjournment against the Government. The attention of the learned Judge does not appear to have been called to the terms of section 344 of the Code of Criminal Procedure, and furthermore the case does not seem to have been argued and the award of costs was against the Government. It also appears that the adjournment was not the adjournment of the trial in the strict sense of the word, but of an appeal."

Evidently the learned Chief Justice was of opinion that section 344 was not applicable to an appeal. In my opinion the plea taken on behalf of the petitioner in this case must prevail.

I, therefore, set aside the order of the learned Sessions Judge and direct that the amount paid by the petitioner should be refunded to him.

Revision accepted.

(2) 28 A. 207; 2 A. L. J. 831; A. W. N. (1905) 256; 2 Cr. L. J. 803.

(3) A. W. N. (1902) 59.

PATNA HIGH COURT.
CRIMINAL MISCELLANEOUS CASE No. 69 OF
1919.

December 12, 1919.

Present:—Mr. Justice Adami.

BALMAKUND DAS—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 203, 213, 436—Case triable by Court of Session—Accused discharged by Magistrate—Commitment to Sessions ordered by District Magistrate—Duty of Magistrate making inquiry.

(1) 9 C. W. N. 18; 2 Cr. L. J. 1.

BALMAKUND DAS V. EMPEROR.

When a Magistrate holding an inquiry into a case triable by a Court of Session has certain evidence put forward by witnesses which would make out a *prima facie* case, it is his duty to make an order of commitment. It is not open to him, in commenting upon the truth or otherwise of the depositions made to him, to discuss the probabilities of the evidence being true. [p. 932, col. 1]

Where in such a case the accused is discharged by the Magistrate, the District Magistrate has power to examine the evidence and if he finds a *prima facie* case established against the accused, to make an order of commitment to the Court of Session. [p. 988, col. 1]

Criminal revision against the order of the District Magistrate, Darbhanga, directing the commitment of the petitioner to take his trial before the Court of Session under charges under sections 467 and 468 of the Penal Code.

FACTS appear from the judgment.

Mr. S. P. Varma, (with him Mr. J. N. Sen Gupta), for the Petitioner.—The evidence against the petitioner is not sufficient to warrant his conviction. The evidence was fairly and fully discussed by the Deputy Magistrate and simply because the District Magistrate takes another view of the evidence, assuming that he had the power to look into the evidence, he was not justified to set aside the order of the discharge [relies on *Srikrishen Lal v. Emperor* (1)]. The District Magistrate had no power to go into the evidence in a case of this kind. All the evidence available to the prosecution had been received by the Magistrate and discussed by him in his order of discharge.

Mr. G. O. Pal, for the Opposite Party.—The order of the District Magistrate was strictly justified by the Code. When he found that the Deputy Magistrate had exceeded his powers and assumed the functions of the Sessions Court, the District Magistrate was right in looking into the evidence with a view to see if there was a *prima facie* case against the petitioner and having found that, he gave his reasons for differing from the order of the Deputy Magistrate and, therefore, was bound to set it aside.

It was a case of extreme gravity: records filed in public Court had been tampered with, and your Lordship will not interfere with the discretion of the District Magistrate which he was entitled to exercise in strict conformity with the law.

(1) 35 Ind. Cas. 506; 1 P. L. J. 97; 17 Cr. L. J. 330; 8 P. L. W. 87.

Srikrishen Lal's case (1) is distinguishable because there the District Magistrate gave no reasons for setting aside the order of discharge, nor did he state that a *prima facie* case was made out. Here full reasons are given and the District Magistrate finds that a *prima facie* case has been made out against the petitioner.

JUDGMENT.—This is an application to set aside an order of the District Magistrate of Darbhanga, whereby he directed the commitment of the petitioner to take his trial before the Court of Session under charges under sections 467 and 468 of the Penal Code.

The proceedings against the petitioner were the result of a long course of litigation. Shortly stated, one Musammatt Sukhdai instituted a suit against Rai Mahamaya Prasad Bahadur, claiming that her mother-in-law had left to her a sum of about six lakhs. In that suit she depended upon certain entries in Khesra Bahis of her father-in-law, Rai Gunga Prasad Bahadur, who is dead. In the civil suit before the Subordinate Judge it was found that these entries in the Khesra Bahis were forgeries and that pages had been torn out and other pages substituted for the purpose of proving the gift of the money to Musammatt Sukhdai.

Rai Mahamaya Prasad Bahadur moved the District Magistrate to have an enquiry made by the Criminal Investigation Department during the course of the civil suit. Those proceedings were stayed until the suit should be decided. Then fresh proceedings were started on the complaint of the servant of Mahamaya Prasad with the result that the complaint was dismissed. Against the order of dismissal Amirul Hussain moved the High Court, which directed the petitioner to apply to the Sessions Judge who, when moved, ordered further enquiry. The Deputy Magistrate of Darbhanga held an enquiry and discharged the petitioner. The District Magistrate was moved against this order of discharge under section 209, and has disagreed with the order and directed that the petitioner should be committed to take his trial in the Court of Session.

The chief ground put forward in this petition is that the evidence against the present petitioner is not sufficient to warrant

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his commitment. It is pointed out that the two chief witnesses are Kunj Behari, a Mokhtear, and Gokul Chand, that while Kunj Behari's evidence makes no mention of Balmakund's participation in the forgery, and in fact it does not mention his name at all, the witness Gokul Chand only deposes that the writing on the papers alleged to be forged is similar to the writing of the petitioner.

As to these papers being forged there is no doubt; the forgery has been found by the Civil Court as well as by the High Court. One Jadu Das turned approver, and, while incriminating himself, deposed that the petitioner had taken part in the forgery.

Kunj Behari is a Mokhtear who corroborates a certain part of Jadu's story, although he does not reach the point where Balmakund is said to have participated in the forgery. Gokul Chand's evidence also corroborates that of Jadu Das in so far as it goes. These are not the only two witnesses; there are other witnesses who corroborate Jadu Das.

The Committing Magistrate, while finding that the papers were forged, commented on the evidence of Kunj Behari and other witnesses and also of Jadu Das, the approver, and in commenting on the truth or otherwise of their depositions, discussed the probabilities of their evidence being true. In my opinion, without expressing any opinion on the merits of the case, his order went too far in discussing the probabilities where he had certain evidence put forward by the witnesses which would make out a *prima facie* case.

The learned District Magistrate discussed the reasons for which the Committing Magistrate said he disbelieved the witnesses and showed that the reasons given were not conclusive. The District Magistrate certainly had the power to look into the evidence, and in his order he has given his reasons for finding that the probabilities relied on by the Committing Magistrate were not altogether reasonable. The District Magistrate further has found that a *prima facie* case has been made out against the petitioner.

The learned Counsel for the petitioner has cited the case of *Srikishen Lal v. Emperor* (1) in support of his contention that the District Magistrate's order was not sufficient.

In that case, however, the District Magistrate merely stated his opinion that the case was eminently one which should be tried by the Sessions Court and that the evidence was of a character which required very great experience of judicial work for a proper appreciation. No reasons were given, nor was it stated that a *prima facie* case was made out. Whether the evidence of Gokul Chand as to the handwriting was sufficient and whether the evidence of the approver is sufficiently corroborated are questions which are to be settled by the Court of Session. The Magistrate has exercised his discretion and given his reasons and I see no reason to interfere with his order. The application is rejected.

Application rejected.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 64 of 1918.

July 15, 1918.

Present:—Mr. Mittra, A. J. C.

LOCAL GOVERNMENT—APPELLANT

versus

KHAIRAT ALI—ACCUSED—RESPONDENT.

Railways Act (IX of 1890), ss. 47, 101 (c) — Rules under s. 47, rr. 87, 87(a)—Accident—Message by guard for assistance—Driver, duty of, to ascertain nature of message—Endangering safety of persons by rash and negligent act.

Where, under rules 87 and 87 (a) of the rules framed under the Railways Act, the guard of a train sends a message asking for assistance, it is the duty of the driver to ascertain the terms of the message, and his omission to do so would make him liable under section 101 (c) of the Act, if such omission results in endangering the safety of any person.

Criminal appeal against the order of acquittal passed by the Sessions Judge, Chhindwara, in Criminal Appeal No. 46 of 1917.

The Hon'ble Mr. G. P. Dick, Standing Counsel, for the Appellant.

Messrs. P. S. Kotwal and Erakshah, for the Respondent.

JUDGMENT.—This is an appeal by the Local Government against the appellate order of acquittal passed by the Sessions Judge, Chhindawara.

The facts are fully stated in the judgments of the Courts below. The respondent Khairatali,

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was driver and George O'Connor, who has been tried in a separate case, was guard of passenger train No. 143 on the 23rd July 1917. The train left Ghansore for the next station Pindrai. After travelling about three miles it was stopped by a gang Mukaddam, who reported that the permanent way had been breached in two places. Khairatali, the driver, proceeded to make temporary repairs with the assistance of some coolies and passengers. Meanwhile, the guard sent through a coolie the following message (Exhibit P-5) to the Station Master, Ghansore:—

"The banks with ballast have been washed away at miles 713/3 and 712/25. 143 is unable to proceed. Do needful. Driver with few coolies are packing line. Arrange ballast train."

This was signed by the guard but not by the driver.

Before the receipt of this message the Station Master, Ghansore, was orally informed by a coolie about the breach. He then sent the following telegram to the District Traffic Superintendent, Jubbulpore, the Permanent Way Inspector, and the Assistant Engineer and Station Master of Nainpur:—

"Nidhani gang coolie reports that mile 713 about two telegraph posts length water flooded and bank underneath line washed off after telegraph post. No. 143 detained."

A similar intimation was sent by the Station Master, Ghansore, reciting the terms of the guard's message above referred to.

On receipt of the coolie's report the Assistant Engineer at Nainpur decided to go in a light engine at least as far as Pindrai, if not upto the point where the breach is reported to have occurred. When the telegram reproducing the guard's memo. was received at Nainpur, it was decided to attach a couple of vehicles to the engine with some coolies. The relief train reached Pindrai at 6.10 and left again 6.15.

In the meanwhile the passenger train was able to pass over the breach after temporary repairs were effected. The work of repairs took less than three hours. The train then proceeded towards Pindrai. About 6.40 a collision between the passenger train and the relief train took place, when the relief train was running

at about 10 miles an hour, up a gradient of 1 in 86, and rounding a curve with a radius of 953 feet, which prevented a clear view being obtained. The result was that 20 persons were killed and 54 were injured.

The guard and the driver were convicted by the Sub Divisional Magistrate of offences punishable under section 101 (a) of the Indian Railways Act and section 304A of the Indian Penal Code and sentenced to two years' rigorous imprisonment. There was also a charge against the driver and a conviction under section 101 (c) of the Indian Railways Act.

On appeal the Sessions Judge has reduced the sentence passed on the guard to one of three months' rigorous imprisonment, upholding the conviction. The driver has been acquitted.

The view taken by the Sessions Judge is that the guard sent a memo. asking for assistance within the meaning of rule 87 of the General Rules made by the Railway Board under section 47 of the Indian Railways Act, 1890. He, however, finds that the driver did not know that the guard had sent an advice under rule 87 asking for assistance, and is consequently not guilty of a breach of that rule. The learned Sessions Judge also finds that though the relief train ran faster than the rules permit, the passenger train was not running at a speed exceeding that prescribed by special instructions for normal running over this section, a finding with which I agree, as the evidence to the contrary is not reliable. The reason for reducing the sentence passed upon the guard is that there was contributory negligence on the part of persons other than the guard and driver which caused the accident.

It is necessary to examine the terms of rule 87 and 87 (a), and I reproduce them below:

"87 *Sending advice of accident or breakdown.*—If the engine is for any reason unable to proceed, the guard in charge of the train shall send advice to the nearest station, stating the nature and cause of the accident, and if assistance has been asked for, he shall not allow the engine or any portion of his train to be moved until such assistance arrives, provided that

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if the train is subsequently able to move it may do so at walking pace, but not unless a man has been sent with hand signals and detonators to protect the train, such man keeping at least a quarter of a mile in advance of the train, the other end of the train being protected in a similar manner.

"87(a.) The advice to the nearest station should be written by the guard and signed by both driver and guard. In the case of an Indian driver who cannot read or write, the memorandum should be explained to the driver by the guard."

The contention that rule 87 applies only to a failure of the engine does not merit serious attention. The rule applies if the engine is for any reason unable to proceed from any cause. Damage to the line of such a nature as to render it unsafe for the passage of trains or probably cause serious delay to trains is treated as an accident in the working instructions issued by the Bengal Nagpur Railway. Here there was an obstruction which caused a detention of two to three hours. It was, therefore, the duty of the guard to send an advice stating the nature and cause of the accident or breakdown. The advice should be signed by both driver and guard, and this holds good whether assistance has been asked for or not.

Now the Sessions Judge has held that the guard's message asked for assistance. This is challenged before me. The guard O'Connor, who has been examined in the driver's case as witness No. 5 for the prosecution, says that the message as originally written by him after reciting the cause of accident ran as follows:

"143 is unable to proceed. Do needful."

I have no doubt that this was a call for assistance. O'Connor, however, says that when he read out the message to the driver the following words were added at the latter's instance:

"Driver with coolies packing the line. Arrange ballast train."

The witness adds that the driver explained to him that packing would take some time and that by giving the authorities intimation to arrange for a ballast train, it would save detention to other trains.

This explanatory statement, which forms part of the defence argument in this Court, appears to have been accepted by the learned Sessions Judge so far as the driver is concerned. The opinion of the Court below seems to be that the guard is responsible for the wording of the message and the driver is not, as he probably understood it in a different sense.

It is argued that the words "driver is packing the line" amount to an intimation that the train would proceed and this argument has been accepted by the lower Court. At best, it merely hints by implication a possibility, seeing that the sentence "the train is unable to proceed" was allowed to remain in the message. The Assistant Engineer understood from the message that the driver was "packing" to save the engine from sinking.

The explanation regarding the ballast train is ingenious but not convincing. The cause of the accident having been already stated, the Engineering Department would know that any "packing" by the driver would not be sufficient to prevent detention to other trains. Unless a ballast train was required by way of assistance, any reference to such a train in the terms used was superfluous. I have come to the conclusion that the message, read as a whole and reasonably interpreted, was a call for help with an intimation of the possibility of the train being able to move. But the rule required that when any assistance has been asked for, the precautions laid down should be taken when subsequently moving the train. These admittedly were not taken.

The Sessions Judge says:—

"I think that the evidence suffices to prove that the driver knew that the guard had sent a written message to Ghansore. No witness, however, says that the driver read what the guard had written."

I do not see why the guard P. W. No. 5 should be disbelieved. The Sessions Judge does not say that he disbelieves him. It is entirely in accordance with probabilities that the message would be sent in consultation with the driver, especially as the guard was an inexperienced man and the driver had considerable experience. I also believe that the last two sentences were

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added on the suggestion of the driver, though they may not have reproduced the exact words used by him. The original document (Exhibit P-5) clearly shows that these two sentences are an interpolation partly written under the signature. The rest of the evidence tends to show that there was some talk between the driver and the guard at the time when the message was sent. But this evidence does not help us in finding out what the talk was about, as the witnesses did not know English and the conversation between the guard and the driver was partly in English and partly in Hindustani.

Khairatali has denied all throughout any knowledge of any message being sent by the guard. His learned Counsel's suggestion that the words "arrange ballast train" were meant for permanent repairs comes with a bad grace now.

Khairatali has never said that he understood the message in this sense. If, as I hold, he was a party to this message, it should be interpreted as a call for assistance, as it was understood at Nainpur. It may be noted that the Station Master, Ghansore, now says that he does not think it to be a requisition for assistance, but he seems to have acted as if it was one.

I find from the evidence of the Station Master, Nainpur, P. W. No. 13, that it takes three to four hours in an urgent case to get a ballast train ready. The accused probably thought that the train would be able to reach Pindrai long before the ballast train could come from Nainpur to Pindrai.

Rule 87 applies when assistance has been asked for. It is for the higher authorities to decide what sort of assistance is suitable and available. It unfortunately turned out that a relief train was decided upon, which was able to leave Pindrai before the time anticipated by the accused.

It is urged that Khairatali had a right to assume that no requisition for assistance has been made as he had not signed the memo. I have already stated that advice, whether asking for assistance or not, has to be signed both by the driver and the guard. The driver knew, as found by the Sessions Judge, that a message was sent to Ghansore. He can read and write English. It was his duty to have signed the

message and to make himself acquainted with its terms.

This leads me to another aspect of the case which has not been considered by the Sessions Judge. Assuming that the driver did not know that the guard had asked for assistance, was he justified in running at the maximum prescribed speed without ascertaining the terms of the advice which it was the duty of the guard and the driver to have sent? If he did not exceed the speed limit as suggested by the prosecution witnesses, he was certainly running up to the full speed of fourteen miles an hour. I should note here that this section of the Bengal Nagpur Railway is worked on a single line. Prudence dictates a more cautious driving in such a case where a clear view cannot be obtained, if not the walking pace enjoined by rule 87. His explanation that he did not know of any message at all has not been accepted even by the Sessions Judge. Before starting the train it was, therefore, his duty to have found out what advice had been sent. His case would come even upon the Sessions Judge's finding under section 101, clause (c) of the Indian Railways Act. This would be a case of negligently endangering the safety of the passengers by an omission to ascertain whether assistance has been asked for.

There was an argument founded upon an endorsement on the telegram (Exhibits F-19) as to the time when it was received. The time shown is 18 47 and it is urged that the guard's message was not received at Nainpur (the train ordering station) till after the collision. The telegraph signaller (P. W. No. 8) is not sure whether this was the time when the telegram was received, or copied. He admits that this might be a mistake. I am not, therefore, prepared to attach much weight to the endorsement. The evidence clearly shows that two vehicles were attached to the engine upon receipt of the guard's message.

I have noticed nearly all the points urged before me. The Sessions Judge seems to think that Khairatali knew that the train would be able to proceed and that the repairs could be effected by him. The driver seems to have been more sanguine than the guard, but he could not have been certain of it at the stage when the

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guard's message left. There is, therefore, nothing improbable in his asking for a ballast train expected to arrive if his own efforts turned out to be fruitless.

It is not disputed that if the driver knew that assistance had been asked for, then his conviction by the Magistrate was correct. I am also of opinion that if he did not care to ascertain what message was sent, he is guilty of an offence under section 101 (c) of the Indian Railways Act.

The message, though badly drafted, would reasonably be understood as a message asking for assistance and was so understood. What the guard and the driver meant can only be inferred from the words used, unless they are satisfactorily explained.

The theory of a misunderstanding on the part of the driver has been rejected by me mainly because he does not put it forward himself, having totally denied all knowledge of the message. The alleged misunderstanding was a matter within his own knowledge, and it was for him to prove it. I find he has failed to prove it, the guard's evidence about the driver's explanatory statement having the appearance of an afterthought. I hold that Khairatali is responsible for the message sent with his knowledge, though he has not signed it. I, therefore, restore the order of conviction.

As regards the sentence, I am of opinion that the respondent has had the charge pending against him since about a year. The Sessions Judge has also pointed out certain contributory causes of the accident. The guard, who is primarily responsible for the message and under whose orders the driver was, has been given three months and I have found it difficult in his case to enhance the sentence in revision after such a lapse of time. A sentence of three months' rigorous imprisonment now will suffice as the respondent is being sent back to jail after an acquittal.

I restore the finding of the Sub-Divisional Magistrate but reduce the sentence to one of three months' rigorous imprisonment. Khairatali is ordered to surrender himself before the District Magistrate.

Appeal allowed.

PATNA HIGH COURT.

CRIMINAL REVISION No. 360 of 1919.

October 22, 1919.

Present:—Mr. Justice Das.

AJODHYA NATH PARHI AND ANOTHER—
PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

*Penal Code (Act XLV of 1860), ss. 23, 24, 380—
Theft—Constituents of offence—Dishonest taking, what amounts to—Claim of right, bona fide, investigation into.*

In order to constitute the offence of theft the prosecution must establish (a) that there was dishonest intention to take property (b) that the property was moveable property, (c) that it was taken out of the possession of another, (d) that it was taken without the consent of that other, and (e) that there was removal of the property in order to accomplish the taking of it. [p. 993, cols. 1 & 2.]

A person is said to take dishonestly when he takes with the intention to cause wrongful loss to another person, that is to say, with the intention that such person should be wrongfully kept out of the property. [p. 993, col. 2.]

In prosecutions for theft, whenever there is an assertion of a claim of right, it is the bounden duty of the Court to enquire into the question whether that claim is a *bona fide* claim or is a mere pretence. If, when that claim is actually put forward, the Court fails to decide the question whether the claim is a *bona fide* claim or a mere pretence, the conviction cannot be sustained. [p. 994, col. 1.]

Criminal revision against the order of the Sessions Judge, Cuttack, dated the 20th of September 1919, affirming that of the Magistrate, Balasore, dated the 3rd of September 1919.

Messrs. C. C. Das and G. C. Pal, for the Petitioners.

Messrs. Asghar and Gajendra Prasad Das, for the Opposite Party.

JUDGMENT.—The petitioner has been convicted under section 380, Indian Penal Code, and has been sentenced to three months' rigorous imprisonment and a fine of Rs. 50 each.

It is necessary to state the facts very briefly. It appears that the parties are distant relatives and co-sharer landlords. There seems to have been a partition between them. On the 3rd of March 1918 possession in terms of partition was awarded. Under the terms of partition the land on which the Kutchery stood fell into the share of the petitioners. So far as the Kutchery is concerned, the petitioners were in possession of the eastern portion and the complainant's master was in

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possession of the western portion. There seems to be some dispute between the parties as to whether rent is due to the petitioners from the complainant's master for the occupation of the western portion of the Kutchery.

It is alleged by the complainant that on the evening of the 29th December the petitioners broke through a partition wall between the western and eastern portions, entered upon that portion of the Kutchery house which was in the occupation of the complainant's party and took away various articles, including furniture and jewellery.

There is no doubt that the Court of first instance which heard the evidence in the case has not accepted a portion of the prosecution story, but it has undoubtedly believed that there was a taking away of the property by the petitioners within the meaning of section 379, Indian Penal Code, and accordingly convicted the petitioners under that section.

It was argued by Mr. Das on behalf of the petitioners that there is no finding of dishonest intention in the judgment of the Appellate Court and that, therefore, the conviction under section 380 cannot stand.

Now, what are the findings? The findings are first that Baroda was in possession of the western portion of the Kutchery. Secondly, that he had a considerable quantity of furniture and other property in that portion of the Kutchery. Thirdly, the petitioners were seen in the act of removing papers and other property from the Kutchery, and, fourthly, the story of theft spoken to by the prosecution was not untrue. The question is, upon these findings, was the Court entitled to convict the petitioners under section 380, Indian Penal Code? It is strongly contended by Mr. Das that there is absolutely no finding of dishonest intention and that, therefore, a conviction under section 380 cannot stand.

Now, I propose to examine this argument. It seems to me that in order to constitute theft it is necessary for the prosecution to establish (1) that there was dishonest intention to take property, (2) that the property is moveable property, (3) that it was taken out of possession of another person, (4) that it was taken without the consent of the person, and (5) that there

was removal of the property in order to accomplish the taking of it.

There is no doubt on the findings of the Courts below that the property is moveable property, that it was taken out of the possession of another person and that it was taken without the consent of that person. The only point that remains for consideration is, was there a dishonest intention to take the property? The solution of this problem depends and must depend upon the meaning which the Legislature has given to the word 'dishonestly'. That definition will be found in section 24, Indian Penal Code: "Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person is said to do that thing dishonestly." That is the meaning which the Legislature has given to the word "dishonestly". It may be that in this case there was no intention of causing wrongful gain to the petitioners but was there an intention of causing wrongful loss to the complainant? If there was an intention to cause wrongful loss to the complainant, then in my view, upon the definition given to the word "dishonestly" by the Legislature, it is not admissible to argue that there was no dishonest intention in this case.

I have, therefore, to consider whether there was an intention to cause a wrongful loss to another person. That again depends upon the meaning which the Legislature has attached to the word "wrongful loss" under section 23, Indian Penal Code. The Legislature says that "a person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property." Therefore, reading section 379 with section 24 and section 23 it appears to me that a person must be said to take dishonestly whenever he takes with the intention to cause wrongful loss to another person, that is to say with the intention that such person should be wrongfully kept out of the property. That is what the Legislature has said and in my view, it is impossible to escape from the clear words which have been employed by the Legislature.

Now there cannot be any doubt upon the findings of the Court that there was

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an intention to wrongfully keep the complainant out of the property. It has been held in the case of *Nabi Bakish v. Queen-Empress* (1) that even if the owner is kept out of possession with the object of depriving him of the benefit arising from the possession temporarily, the case will come within the definition.

Now in dealing with this case I do not intend to throw any doubt at all on the class of cases which has been decided with reference to a *bona fide* claim of right. For instance, in the case of *Hari Bhumali v. Emperor* (2), Woodroffe, J., said as follows:—"In Criminal Law what is generally understood by theft and its kindred offences are such acts as those of the pickpocket, the shop-lifter, the house breaker, the dacoit and so forth—acts in fact of a truly criminal nature in which no claim of title is made. No doubt an accused cannot escape the penalty of crime by the mere pretence of a *bona fide* claim which has clearly no foundation. But I think that the Criminal Courts should not convict of theft any person who asserts a claim of right, unless it is in a position to say that that claim is a mere pretence."

With this view of law, I entirely agree. But the essential condition is that there must be an assertion of a claim of right. Whenever there is such an assertion, that is to say an assertion of claim of right, it is the bounden duty of the Court to enquire into the question whether that claim is a *bona fide* claim or is a mere pretence. If when that claim is actually put forward, the Court fails to decide the question whether the claim is a *bona fide* claim or is a mere pretence, the conviction cannot be sustained. But in this case, no such claim has been put forward. Therefore, the question of *bona fide* right does not arise at all. The case depends upon the definition of the offence in section 380, Indian Penal Code. In my view, upon the findings of the Courts below it is proved that that offence has been committed by the petitioners.

The next question is the question of sentence. Although there was no claim put forward in the Courts below, I have no

(1) 25 C. 416; 2 C. W. N. 347.

(2) 9 C. W. N. 974; 2 Cr. L. J. 836.

doubt at all reading the judgments very carefully that there were disputes between the parties of a civil nature and that probably the occurrence took place as a result of those civil disputes. That being so, I cannot send the petitioners to jail as common thieves. I, therefore, maintain the conviction, but reduce the sentence to the term of imprisonment already undergone by them. They must in addition pay the fines.

Sentence reduced.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 94 of 1919.

May 8, 1919.

Present :—Mr. Justice Scott-Smith and
Mr. Justice Martineau.

EMPEROR—PROSECUTOR

versus

MULTAN SINGH—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 87, 89, 439—Absconder—Forfeiture of property—Application to set aside forfeiture—Proclamation, validity of, whether can be questioned—Failure to specify date of proclamation, effect of—Proclamation allowing less than thirty days for appearance, validity of—Revision—High Court, power of, extent of.

A person applying under section 89 of the Criminal Procedure Code to set aside an order of forfeiture of his property cannot contest the legality of the proclamation under that section, but there is nothing to prevent the High Court from considering it in the exercise of its revisional jurisdiction. [p. 996, col. 2.]

An order under section 87 (3) of the Criminal Procedure Code, stating that the proclamation was duly published but omitting to specify the date of the publication, cannot be considered as conclusive evidence that the requirements of section 87 have been complied with. [p. 997, col. 1.]

Where a proclamation under section 87 of the Criminal Procedure Code does not give thirty days for the appearance of the accused, the proclamation is invalid and the subsequent proceedings following upon it are liable to be set aside. [p. 997, col. 1.]

Case reported by the Sessions Judge, Ambala, with his No. 54 G. of 10th January 1919.

FACTS.—On the 20th March 1917 a complaint (dated 15th March 1917) was presented to the Sub-Divisional Officer, Rupar, who recorded the complainant's statement and sent the proceedings to an Honorary Magistrate of Kharar for disposal.

On 23rd March 1917 the Honorary Magistrate issued summons under section 498, Indian Penal Code, to Multan Singh

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and others. On 30th March 1917 the complainant applied to the Honorary Magistrate to the effect that Multan Singh had gone with the woman concerned in the case to some other place (i. e., was keeping out of the way) and a bailable warrant issued for 10th April 1917. (It is important here to note that Multan Singh before the District Magistrate filed an identity certificate, with a view to showing that on the 9th April 1917, he appeared under his alleged second name, "Gharib," before the Calcutta Police; the photograph on that certificate is unquestionably that of Multan Singh).

A fresh warrant was issued by the Honorary Magistrate for 19th April 1917; and on that date it was noted on the record that the warrant had not been returned and a date was fixed, 8th May 1917.

On 8th May 1917 it was noted that the appellant could not be found; and the Honorary Magistrate ordered a proclamation to issue under section 87, Criminal Procedure Code—fixing 11th June 1917 for hearing (i. e., more than the 30 days required under section 87).

It is here important to note that on 11th June 1917 the appellant did not appear; and the Honorary Magistrate then passed a *validating order* to the effect that publication of the proclamation had taken place as required by law under section 87 and the Tahsildar was directed to prepare a list of attachable property.

On 7th July 1917 the Court ordered certain property to be attached and a report was received in September 1917. Meanwhile certain objections had been raised by one Laiq Ram (that the property was ancestral) and by Multan Singh's wife and mother (that certain property should be released for their maintenance). These objections failed before the Honorary Magistrate on 24th November 1917, before the Sessions Judge on 19th December 1917, and before the Chief Court on 19th April 1918.

The property of the accused was attached and seized by Khan Bahadur Sayad Bashir Husain, Honorary Magistrate, exercising the powers of a Magistrate of the 1st Class in the Ambala District, by order, dated 7th July 1917, under section 88 of the Criminal Procedure Code, and an application to the Dis-

trict Magistrate, asking him for the return of the sale price of his moveable property and for the release from attachment of certain land attached by that Court and still under attachment, was rejected on 23rd September 1918.

GROUND.—I am unable to agree entirely with the District Magistrate's view expressed in paragraph 2 of his order of 23rd September 1918, now under appeal, for though section 88, Criminal Procedure Code, empowers the Court issuing the proclamation to attach "at any time," it seems to me quite clear that the proclamation under section 87 was really a nullity and for the following reasons:—

Section 87 (2) prescribes the mode of publication, a, b, c. In respect of the proclamation there is nothing whatever to show that it was publicly read anywhere; and though it was affixed to appellant Multan Singh's ordinary place of residence on the 15th May 1917, no duplicate was affixed to a "conspicuous part of the Court house." A duplicate was apparently affixed to the door of the Police Station. The provisions of section 87 (2) (a), (b) and (c) are *mandatory*, and consequently it seems quite clear that the proclamation was really a nullity.

However, there comes this difficulty—section 87 (3)—since we find that on the 11th June 1917 the Honorary Magistrate did actually pass a *validating order*—which must be accepted as "conclusive evidence" that the requirements of section 87 have been complied with.

This certainly seems an extraordinary provision of law; but there can be no doubt of its existence. I have been unable to find Punjab authority on the point; but I have seen *Queen-Empress v. Subbarayar* (1), *Mian Jan v. Abdul* (2) and *Abdullah v. Jitu* (3). In the first of these reported cases it was found that the proclamation was affixed to the Court house on November 6th, 1893, requiring a person to appear on December 11th, 1893, but was not published in the village until November 15th, 1893, and it was held that there was no legal proclamation under section

(1) 19 M. 3; 2 Weir 40.

(2) 27 A. 572; A. W. N. (1905) 102; 2 A. L. J. 348; 2 Cr. L. J. 247.

(3) 22 A. 216; A. W. N. (1900) 28.

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87, and the order was set aside and the attachment declared void.

In the 2nd ruling it was held that the proclamation was "an absolute necessity" but there had apparently been no *validating* order under section 87 (3), Criminal Procedure Code.

However, the ruling to which I wish to draw special attention is *Abdullah v. Jitu* (3) [at page 218, the last 10 lines—and 219 (1) middle, beginning at "It has been objected"].

According to my view—though the proclamation in the present case was a nullity, Multan Singh cannot now take exception to it, because of the Honorary Magistrate's *validating* order.

Multan Singh, however, has certain rights under section 89, Criminal Procedure Code—and I think it is clear that evidence to prove that the appellant was absconding as well his evidence in exculpation must be heard *in his presence*, and a judicial determination on the point must be come to.

The District Magistrate does not appear to have heard any evidence. Multan Singh have wished to prove (a) that on April 9th, 1917, he was in Calcutta, (b) that his second name is "Gharib"; (c) that he was not absconding, and that he went to Penang—and his Counsel produced before me 3 registered envelopes in proof of his client's visit to Penang.

Whatever the truth of the matter may be, it seems to me clear that Multan Singh must have an opportunity of proving his assertion.

I cannot myself direct further enquiry into this matter: section 437, Criminal Procedure Code, and I accordingly forward this report under section 438, Criminal Procedure Code, for the orders of the Chief Court of the Punjab.

Since the above order was written, appellant's Counsel has applied verbally to this Court, putting forward that, since this is an appeal, this Court could itself take action under section 428, Criminal Procedure Code. However, apart from the fact that this is asking this Court to review its own order, and also, that it seems desirable to obtain (if possible) the Chief Court's view of the correct interpretation of section 87 (3), Criminal

Procedure Code, I doubt if section 428, Criminal Procedure Code, can apply here. That section distinctly refers to the taking of "*additional evidence*" whereas, in the present case, it does not appear that *any evidence* was taken at all by the District Magistrate. My order of 16th December 1918, will, therefore, stand.

Mr. Shamir Chand, for the Accused.

ORDER.—The facts of this case are given in the referring order of the Sessions Judge, Ambala, dated the 16th December 1918. The District Magistrate having passed an order rejecting the petitioner's application for restoration of the property attached under section 89, Criminal Procedure Code, an appeal was filed in the Court of the Sessions Judge, and such an appeal was competent under section 45, Criminal Procedure Code. At the same time we agree with the dictum of Blair, J. in *Abdullah v. Jitu* (3) "that section 89 prescribes a remedy where there is a good and legal publication, but offers no facility for the contesting of the legality of the proclamation." The petitioner, therefore, could not contest the legality of the proclamation in his application under section 89, Criminal Procedure Code; but there is nothing to prevent this Court from considering it in exercise of its revisional jurisdiction, as was done in the case reported as *Queen Empress v. Subbarayar*. (1). The learned Sessions Judge is of opinion that the legality of the proclamation proceedings cannot be questioned having regard to the fact that the Magistrate who held those proceedings recorded an order under section 87 (3), Criminal Procedure Code, to the effect that the proclamation had been duly published. It is contended before us that this validating order is defective. Section 87 (3) runs as follows:—

"A statement in writing by the Court issuing the proclamation to the effect that the proclamation was duly published on a specified day shall be conclusive evidence that the requirements of this section have been complied with, and that the proclamation was published on such day."

Now, in the so called validating order, the Magistrate stated as follows:—*Aj yeh mist pesh hui, report ishtihar zer dafa 87 sabita faujdari bad tamil hasb sabita shamil mist ho*

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chuki hai. This may be taken to mean that the proclamation under section 87 has been duly published; but it is nowhere stated that the proclamation was duly published on a specified day. The words "on a specified day" are important, because section 87 (1) lays down that the proclamation must require the person against whom a warrant has been issued to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation. It is, therefore, clear to us that the so-called validating order is defective and the statement in writing by the Court referred to above cannot, under the circumstances, be considered conclusive evidence that the requirements of section 87 have been complied with.

Now, turning to the proclamation proceedings we find that as stated by the learned Sessions Judge, the requirements as to publication contained in section 87 (2) (a) and (c) were not complied with. Moreover, such publication as there was took place on the 15th of May which was less than thirty days from the 1st of June, the date fixed for the appearance of the petitioner. It is, therefore, clear that the publication of the proclamation was not in accordance with law, and the subsequent proceedings are, therefore, also invalid. In *Queen Empress v. Subbarayar* (1) it was held that there was no legal proclamation under section 87, Criminal Procedure Code, and the High Court set the order of attachment aside.

We, therefore, accept the revision and setting aside the attachment of the petitioner's property as invalid direct that so much of the property, moveable or immovable, as has not yet been sold be restored to him and that the proceeds of the sale of any property which has taken place be refunded to him.

Revision accepted.

PATNA HIGH COURT.

CRIMINAL REVISIONS Nos. 2 AND 30 OF 1920.

January 20, 1920.

Present:—Mr. Justice Sultan Ahmed.

IN CR. R. No. 2 OF 1920.

RAGHUNATH DASS *alias* AMIR BABU—
PETITIONER*versus*

EMPEROR—OPPOSITE PARTY.

CR. R. No 30 OF 1920.

BHARTHU LAL—PETITIONER

versus

EMPEROR OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 79, 107 (1)—
Act done in good faith—Mistake of fact, subsequent,
whether protected—Instigation, advice, whether amounts
to.

Where a person does a thing in good faith but subsequently commits a mistake of fact, he is entitled to the protection afforded by section 79 of the Penal Code. [p 1004, col. 1.]

Instigation necessarily indicates some active suggestion, or support or stimulation to the commission of the act itself, and advice can become an instigation only if it is found that it was an advice which was meant actively to suggest or stimulate the commission of an offence. [p 1003, col. 1.]

The fact that a person advises another to do a thing, does not necessarily mean that he "instigates" that other to do that thing within the meaning of section 107 (1) of the Penal Code. [p. 1003, col. 1.]

Criminal revisions against the orders of the Sessions Judge, Patna, dated the 10th November 1919, refusing to make a reference to the High Court against the order of the Sub Divisional Officer, Barha, dated the 24th September 1919.

FACTS appear from the judgment of the Sub Divisional Officer, which was as follows:—

"The last two of the accused were discharged on the conclusion of the prosecution evidence. The others have been charged as described above. This case arises out of an unfortunate affair which took place early in May between some of the local Police and the townspeople. As to the way in which the row arose (i.e., excluding the culmination of it which is the subject of this case), I will give first the defence version, as it seems to me so palpably the true one in substance. That version is that a constable, Awadh Behari Singh, went to borrow a frying pan from accused Lala Halwai. Because (P. 2) Lala refused to lend it until he had finished with it, they quarrelled and finally Awadh Behari Singh pulled

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the Halwai out of his shop and caned him, and again chased him into his shop and caned him. Shiva Prasad Singh, another constable, was present and took the part of Awadh Behari Singh. Some people interfered on behalf of the Halwai. Awadh Behari Singh fled. Shiva Prasad Singh, however, remained, and what was done to him is the subject of the present case. The prosecution version of the above events is that Awadh Behari Singh went to buy sweets; and because he refused to take the bad ones offered by the Halwai, and the Halwai refused to give back his money, they had a quarrel, and the Halwai and his friends began to beat Awadh Behari Singh, who fled when the crowd turned on Shiva Prasad Singh for having taken the part of Awadh Behari Singh. This prosecution version appears to me quite ridiculous. The Halwai bore the marks of a caning, and further it is absurd to suppose that a puny man like him would dare to "beat" a big man like the constable Awadh Behari, nor would he or his friends have dared to try and bring another constable before the Court at once, had Awadh Behari Singh not been the aggressor. The events so far described were the subject of a complaint case, in which Awadh Behari Singh was fined Rs. 50 and Shiva Prasad Singh Re. 1. I now come to the present case. The prosecution say that when Awadh Behari fled, the other accused, instigated by Amir Baboo, Bharathu Lal and Kali Chaudhary, seized Shiva Prasad Singh, being incensed at his having supported Awadh Behari Singh, and started to drag him to the Magistrate's Court; and it is for this alleged wrongful confinement and rioting that they are on trial. It is to be noted that although the defence now allege that Shiva Prasad willingly consented to come, saying he had nothing to fear as the Magistrate would not hurt him, this was not what they said at any previous stage of the case, in fact it was not alleged until the last day or so of defence. For example Lala Sahu in his original complaint before the Sub Deputy Magistrate said: "This man Shiva Prasad was being brought in custody to Court." Again, while the procession, or crowd, or whatever it be, was on its

way to Court, several constables came up from the Thana (*vide* the statement of P. W. No. 1 Shiva Prasad Singh) and on their arrival Shiva Prasad was released. Now some of those constables were prosecuted for having dispersed the crowd by force on the complaint of Hira Khatik, and two of the constables were convicted. In that complaint Hira Khatik said, talking about the original assault, "the assailant of Lala fled away, while a comrade of the assailant was caught by the people assembled." A certified copy of this complaint has been filed as an exhibit by the prosecution as also the complaint of Lala Sahu. In the course of that trial, which was summary, Hira Khatik said "we arrested him: (Shiva Prasad) to bring him to the Magistrate." The original file of that case is upon the record, by my order. Lala Sahu in that case also talked about the "rescue" by the constables from the Thana. It is thus clear that never until the time came for the defence of the present case was it ever suggested that Shiva Prasad came willingly. Further, a significant fact is that admittedly the accused brought Shiva Prasad by a roundabout road, passing about 100 yards from the Thana instead of immediately by the Thana. When asked why they did this, Hira Khatik after some hesitation said it was because they were afraid the Police would rescue the constable (as they eventually did) and beat the other party. But if Shiva Prasad Singh was coming willingly, why should his captors be afraid of being attacked by the Police. Lastly, Hira Khatik's written statement, filed before entering into defence, says in about the 9th line: "*Police apna nam nahin batlate the. Tab main Hira Khatik constable ko bandegan huzur ke pas le jane laga. Wo chand log sath gae. Jab Municipal Market ke pas pahunche tab mudai ne qasid bhagne ka kia. Tab main Hira Khatik wo chand logon ne majboori se pakra is par bhi bahut zor kia.*" There is no suggestion in this that Shiva Prasad even pretended to be willing to go to the Magistrate at any time; the words "*le jane laga*" do not imply this; and if he was unwilling to give his name he certainly would not be willing

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to go straight to Court with all his accusers. I, therefore, consider this portion of the defence entirely disproved by the evidence. On the other hand I do not feel convinced that he had the Gumcha tied round his neck as suggested by the prosecution. The marks noted by the Doctor do not appear to indicate anything like a Gumcha tied right round the neck, for the marks did not completely encircle the neck; and the explanation given of the fact that Shiva Prosad Singh was not examined in the Hospital is extremely unsatisfactory. The occurrence took place about 9, the *saneha* was timed 9.45 A. M., and Shiva Prosad says he went at once to the Hospital but was told the Doctor was asleep. In this he is given the lie by the Doctor himself, who says he was never asleep at that time, and the story sounds unlikely. I think it is quite within the bounds of possibility that the marks were manufactured between 9 and 3; though I think it is equally likely that the story of the Gumcha is true and that the marks were only manufactured to make more convincing evidence. However, this is an unimportant point, the point is that accused or somebody undoubtedly did restrain and confine the constable, either by some sort of physical force or threat of physical force. The question of the Gumcha only affects the degree of indignity to which they subjected him.

The question now arises, was the confinement lawful or unlawful, *i.e.*, Had Shiva Prosad Singh committed before their eyes a non bailable offence? If so, his arrest was lawful under section 59, Criminal Procedure Code. In the case against him he was convicted under section 323/114, *vide* the certified copy filed by the defence. For the purposes of the present case, however, that judgment is not final. It was never suggested, until the argument of the present case, that Shiva Prosad abetted, by his encouragement, Awadh Behari in an offence under section 452, Indian Penal Code, or section 327, Indian Penal Code, non-bailable offences; the former is house trespass having made preparation for causing hurt and the other is causing hurt for the purpose of extortion. From an examination of the record of this case, I find it has never

been suggested that Shiva Prosad Singh took any step to help Awadh Behari to get the frying pan, and only one witness (D. W. No. 19 in XXa) has even suggested that Shiva Prosad ever told Awadh Behari to pull Lala Halwai out of the shop, and this statement has no corroboration anywhere that I can find. All the other evidence amounts to this, that Shiva Prosad Singh encouraged the other constable in the beating. In the other case it was held that Shiva Prosad Singh was little more than a passive spectator, supporting Awadh Behari more as a comrade than anything else. I do not think that Shiva Prosad wished to encourage Awadh Behari to extort the frying pan at all; there is no evidence that he gave him any help in this at all. I think any encouragement he gave was more to encourage Awadh Behari to chastise the shop man for the abuse which had admittedly been given. No doubt, Awadh Behari was the aggressor, and the shop man was justified in calling him names; but I do not think Shiva Prosad can be held to have committed either of the above-mentioned non-bailable offences, which alone could justify his arrest. There is no evidence even that he broke through the crowd, or went any nearer than the lamp post, which is a few paces off. I take it that he merely gave support to the other constable seeing that the crowd was hostile, and that then the crowd's anger turned on him; had he done more, he also would probably have fled at the same time as Awadh Behari. I do not think it can be held that Shiva Prosad instigated Awadh Behari to commit a non-bailable offence, or that any non bailable offence was committed as a natural consequence of such encouragement or support as Shiva Prosad did give. I, therefore, hold that the arrest was not strictly justified, by law; in any case even had it been justified the arresting people were bound under section 59, Criminal Procedure Code, to take Shiva Prosad Singh to the nearest Police station; whereas they admittedly were taking him not to a Police station but to the Magistrate, a mile and a quarter further on. This is undoubtedly only a technical error, because up to a point the accused's action was

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quite "*bona fide*". But Shiva Prosad Singh and the prosecution would be entitled to the benefit of this technicality, even if I had held that Shiva Prosad Singh had technically committed a non bailable offence. The accused may say they were afraid to go to the Thana, but the law gives them no other right. If they were afraid to go there, they would have done better to go to an Honorary Magistrate who lives in the town; he at least would have been a useful witness to them later on; and it is difficult to see what they had to gain by taking the constable to a Court nearly two miles away, when they had plenty of witnesses who could have identified him later, even if allowed to go free. Finding then that the arrest and the subsequent confinement of the constable were illegal, I have to decide two more points, viz., which of the accused took part, and what is the degree of their guilt. I will take the question of guilt and punishment last. It is clear all through the record that Lala Sahu and Hira Khatik at any rate took an active part in the conducting of Shiva Prosad through the streets. It is natural that Lala should have been one of the ringleaders; and Hira Khatik has practically admitted in his written statement that he also took part. His original complaint also shows this. As regards the other people who have been charged as principals, I do not think it would be safe to hold that they were more than spectators; they might have been active participants; on the other hand it is possible, the *saneha* having been written and the F. I. R. recorded in the heat of the moment, that many people who were merely following the procession were named as having actually assisted in the confinement; they may have been and probably were a disorderly rabble, but this does not make them guilty under section 342, Indian Penal Code, nor can it be said that they are guilty under section 147, unless they also partook of the common object. Only Lala and Hira, therefore, are guilty, and, under section 342, Indian Penal Code. I now come to the first three accused.

The prosecution allege that it was these three who encouraged the crowd to arrest Shiva Prosad Singh. Amir Baboo and Bharthu Lal allege that they have been

implicated because they have given up giving tips or "Christmas boxes" to the constables on holy days, and other petty grudges; e.g., Amir Baboo alleges that the Inspector was annoyed with him because he would not give him any Bhussa for his cow, nor allow the cow to stray among his grass in his *diara*. I think it is *prima facie* clear that something must have happened to strengthen the crowd and encourage them to take action, between the flight of Awadh Behari and the arrest of Shiva Prosad, otherwise why should they allow the chief man to escape and then arrest the other? I think that clearly some more influential man or men than these Halwais and petty shopkeepers must have advised them what to do. Amir Babu's shop is hardly 10 paces from the scene of occurrence. The defence allege that he was there, but did not go even to the front of his shop to see what was happening. I cannot believe this for a moment. No ordinary person, however busy, would have gone calmly on with his work while all this was happening outside. Besides, Amir Babu was cited as a witness in the original complaint of Lala Halwai; but apart from this, ordinary probabilities, combined with the weight of prosecution evidence, go to show that Amir Baboo must have advised the arrest of Shiva Prosad. Next comes Bharthu Lal; his shop is 120 to 150 yards down the street, and the defence made a great deal of the fact that the Chowraha, the scene of occurrence, is invisible from there; but it is visible from the opposite side of the road. In any case it is quite likely that he might be attracted to the spot by the row, and this is what I believe in. The witnesses produced in defence depose that Bharthu Lal was in his shop all along. It is easy for a man to get such witnesses among his neighbours and servants and I do not think any sufficient grudge has been shown, to instigate the Police to implicate Bharthu Lal falsely. Other people have deposed that they also have refused to give donations and tips, just like Bharthu Lal, yet they have not been implicated. I find, therefore, that Bharthu also advised the accused to take the steps they did. The third is Kali, Chaudhari;

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he says that he went up and rescued Lala Halwai from the constable (vide his written statement). There is no evidence rebutting the statement of the prosecution that he also gave the advice to arrest Shiva Prosad Singh. I, therefore, find Amir Baboo, Bharthu Lal and Kali Chaudhari guilty under section 342/109 (they might have been charged under section 114, since they were present). Lala and Hira are convicted under section 342, Indian Penal Code. All the other accused are acquitted.

Lastly comes the question of degree of guilt. I consider that both parties in this case have acted in an *undignified* manner. Fortunately the constables when they did what they did were not in uniform. That being the case, the local officers would have been wiser had they been less hasty in pouring on the accused with a full fledged Police prosecution. Efforts were made by the defence to show that a lot of the Police evidence was concocted and only put together after it was known, about 3 P. M., that Lala and Hira had lodged complaints. Apart from the obvious prevarication that Awadh Behari and Shiva Prosad made, as to their not meeting when they returned to the Thana, and also about the time of examination by the Doctor, there is nothing to show fabricated evidence. But I am at a loss to understand why it should have been expected (if indeed it was expected) that a Magistrate should believe some of the palpable absurdities put forward in the Police case. It would have been far wiser also had both the cases been compromised at the beginning of Lala's case, as suggested; the constables (accused therein) did not agree and the cases had to proceed. It would have been far better for all the parties had they agreed to compromise. On the other hand, if the defence in the present case had only had a little courage and straightforwardness, they would have frankly admitted the whole thing, and claimed lenient treatment on the ground that their action was *bona fide* and due to a little hastiness and ignorance of the law. In that case nothing more than an absolutely nominal punishment could have been inflicted. I cannot understand why they were not advised to do this. Instead of that they

have incurred an expenditure of certainly more than Rs. 2,000 at a moderate estimate, with many adjournments, two applications for transfer, and sixty defence witnesses summoned, only to come out with less credit than they would have had if they had boldly and straightforwardly stated exactly what they did. However, the case which has aroused apparently a great deal of local excitement is now over, and it is to be hoped that this will be the last that will be heard of the ill-feeling which has been aroused. As the constables were undoubtedly in the wrong to start with, I consider that the action of the accused, though technically an offence, had some moral justification. This cannot be treated as if they had in any way obstructed or treated with disrespect the forces of law and order, as the constables were not in uniform nor were they acting in the exercise of their lawful authority, and from the subsequent action of the Police it is clear that the townsmen had some justification in supposing they would not get impartial dealing if they went straight to the Thana. The constables Shiva Prosad and Awadh Behari have been dealt with in the former case as if they were private people and not as members of the Police force abusing their position, for at the time they were acting as private individuals. The accused must, therefore, be dealt with in this case as if they had wrongfully arrested a private individual, and not a public servant, a representative of the Police force. Their action was more hasty and misguided than criminal, especially as they clearly intended to come straight to the Magistrate, evidently thinking that they had a real grievance. At the same time the fact must not be obscured that Shiva Prosad Singh was not the real offender. I fine Amir Baboo, Bharthu Lal and Kali Chaudhari Rs. 2 (two only) each under section 342/109 and Hira Khatik and Lala Sahu a like amount under section 342. In default they will undergo simple imprisonment for two days. They are acquitted of the other charge, and the other accused are acquitted of all charges. Rs. 10 (ten) will be paid to Shiva Prosad Singh as compensation.

Both parties to this case have be-

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trayed a desire for litigation which is quite unintelligible to me. They would have done better to make a straightforward admission of the facts in the beginning. This would have saved a great deal of the time and a great deal of false evidence. A hope was expressed in the argument for the defence that the accused would not be punished for the fact that one of them had made two applications for transfer. But every Magistrate knows that an application for transfer, whether *bona fide* or not, is considered an ordinary manoeuvre among litigants, and the fact that anybody should consider it necessary to express a hope that this would not prejudice the judgment, in my opinion, betrays in him an ignorance of the considerations which influence a Magistrate who has any respect for his position. If it has any effect at all, it must make him, if anything, more careful than ever to come to a right conclusion."

Messrs. *Manuk, Akbari and Mathura Nath Singh*, for the Petitioner in Cr. R. No. 2 of 1920.

Messrs. *Agarwala and Ragho Prasad*, for the Petitioner in Cr. R. No. 30 of 1920.

The Government Advocate, for the Crown in both.

JUDGMENT.

IN CR. R. NO. 2 OF 1920.

The small town of Barh was the scene of a great stir on the 3rd of May 1919. The excitement began when a couple of constables, named Awadh Behari and Shiva Prosad, went to a Halwai's shop, and culminated in the arrest of Shiva Prosad by the neighbours of the Halwai which is the subject-matter of the present charge.

In order to appreciate the judgment of the learned Magistrate on the question whether the accused is guilty or not, it would be necessary to state all the incidents that happened on that day.

It appears that Lala Halwai complained to the Sub-Deputy Magistrate against the two constables above named, alleging that Awadh Behari went to his shop and asked him to give him a frying pan and Shiva Prosad was with him. Lala Halwai asked the constables to wait for a short time, on which there seems to have been an altercation between the Halwai and Awadh Behari. Awadh Behari there-

upon is said to have twisted Lala Halwai's hand, dragged him and caned him. The case was instituted, as I have said, before the Sub-Deputy Magistrate, but the Sub-Divisional Officer very properly withdrew the case to his own file.

Awadh Behari and Shiva Prosad were tried summarily, and both of them were convicted. Awadh was convicted under section 323, Indian Penal Code, and fined Rs. 50, the other constable was convicted under section 323/114, Indian Penal Code, and sentenced to a fine of Re. 1. That is the first incident on that day, the 3rd of May 1919.

The second is the subject-matter of the present charge, but I shall deal with it after I have dealt with the third incident.

It appears that when Lala Halwai was being caned, the neighbours flocked to the place. Awadh Behari thereupon fled away, but Shiva Prosad was caught and it was considered necessary to take him to the Magistrate. While they were taking him to the Magistrate, he was rescued by some other constables of the Thana; and while these constables tried to rescue Shiva Prosad, they used force to the crowd. The result was a complaint against them by one Hira Kathik, which ultimately ended in the conviction of two constables by the Sub-Divisional Officer under section 342, Indian Penal Code, and sentence of a fine of Rs. 15 each. The intermediate incident, as I have said, is the subject-matter of the present charge, and I propose now to deal with it. The prosecution case is that when Awadh Behari fled away, Shiva Prosad was caught hold of by some neighbours who were instigated by the accused Amir Baboo, who is a respectable citizen living near the scene of occurrence; that this arrest was illegal and the subsequent taking of Shiva Prosad by the neighbours was an offence within the meaning of section 342, Indian Penal Code, and the accused is, therefore, guilty of an offence under section 342 read with section 109.

The Magistrate, after hearing the evidence in the case, came to the conclusion that the accused was guilty under section 342/109 and convicted him under that section and sentenced him to a fine of Rs. 2. The accused thereupon moved the Sessions

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Judge of Patna for a reference to this Court against the conviction and sentence. His prayer having been rejected by the Sessions Judge, an application has now been filed in this Court for the setting aside of the order of conviction and sentence.

The Crown was not originally represented in this case, but at my request, the learned Government Advocate has very kindly appeared and given me every assistance that could be rendered on behalf of the Crown.

The learned Magistrate has found, and indeed after the conviction of Awadh Behari and Shiva Prosad in the other case he could not do otherwise, that nine-tenths of the prosecution case is unacceptable; in fact, he has characterised the prosecution story up to a certain stage as "ridiculous;" not only that, but he has described "the version of the defence as a palpably true one." He has disbelieved Shiva Prosad altogether, with the little exception that he thinks that he was certainly detained by some people. So far as the complicity of the accused is concerned, his finding, on a consideration of the whole evidence, is as follows. He says—"I find that an influential man like the accused *must have advised* them what to do." Later on he says that "Amir Baboo *must have advised* the arrest of Shiva Prosad." I have first of all to consider whether the learned Magistrate could convict the accused at all on the bare finding that the accused "*must have advised*" the arrest of the constable Shiva Prosad. In my opinion, he could not. Section 107, clause (1), of the Indian Penal Code runs thus:—"A person abets the doing of a thing, who instigates any person to do that thing." The other clauses, it is conceded, do not apply. I have then to consider whether the finding "*must have advised*" necessarily means "*must have instigated*." Instigation necessarily indicates some active suggestion, or support or stimulation to the commission of the act itself, and advice can become an instigation only if it is found that it was an advice which was meant actively to suggest or stimulate the commission of an offence. Advice *per se* cannot necessarily be instigation within the meaning of section 107, clause (1).

The learned Magistrate has not described the circumstances which would justify any

Court to construe advice as instigation. On that ground alone I think the conviction should be set aside. But there are various other difficulties in the way of the prosecution.

To begin with, it is necessary to consider whether the finding of the learned Magistrate that the arrest of Shiva Prosad was illegal, is at all justified under the law. On the findings, it is perfectly clear that Awadh Behari went to the shop of Lala Halwai, with Shiva Prosad. Shiva Prosad did not go inside the shop but Awadh Behari did and Awadh Behari demanded the *karai*, which was refused. On that there was an altercation, and in consequence a beating of Lala Halwai by Awadh Behari. It is not contended before me that such acts, if committed by Awadh Behari, would not amount to an offence of extortion. It is suggested that Shiva Prosad was not in the least a party to that offence, and at the highest, he committed the offence of instigating Awadh Behari to commit the offence of beating. But Mr. Manuk, appearing on behalf of the accused, has drawn my attention to the finding of the learned Magistrate, where it is distinctly held that Shiva Prosad was present throughout and shouting "*maro, maro*", that is, from the time the *karai* was demanded till the time Awadh Behari fled away. Therefore, any encouragement by Shiva Prosad to Awadh Behari would be an encouragement to commit the offence or offences which Awadh Behari committed. It would be impossible to contend that, though the beating was an ingredient of the offence of extortion, Shiva Prosad was abetting the beating only and not the commission of the whole offence. I, therefore, hold, on the findings arrived at by the learned Magistrate, that the abetment was not only of the offence of beating but the whole offence of extortion, if that offence was committed by Awadh Behari. That being my finding, it is clear that the arrest was legal and justified under the provisions of section 59 of the Criminal Procedure Code. Therefore, on that ground also the conviction of the accused must fail.

The third ground upon which, in my opinion, the conviction must be set aside is that on the findings of the Magistrate section 79 is a complete answer to the prosecution case. Section 79 of the Penal

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Code, so far as it is relevant to the present charge, may be stated as follows:—"Nothing is an offence which is done by any person who, by reason of a mistake of fact, in good faith believes himself to be justified by law in doing it." The learned Magistrate has found that, I am using his own language, "up to a point the accused's action was quite *bona fide*." Before that he says: "in any case even had it been justified, the arresting people were bound under section 59 of the Criminal Procedure Code to take Shiva Prosad to the nearest Police station, whereas they were taking him not to a Police station but to the Magistrate, a mile and a quarter further on." Therefore, the finding is that the arrest was illegal, but that the action of the accused up to a point was quite *bona fide*. It is necessary to know what was that point, up to which the learned Magistrate thought that the action of the accused was *bona fide*? On a fair reading of the judgment it appears to me that all that he finds is this: that the arrest was illegal, but the carrying away of Shiva Prosad by the neighbours was, though *bona fide*, still contrary to the provisions of section 59 of the Criminal Procedure Code. If the action of the neighbours in arresting the constable Shiva Prosad was *bona fide*, they could not be held guilty of any offence and would be protected under the provisions of section 79, Indian Penal Code. If they thought that a non bailable offence had been committed by Shiva Prosad, which, as a matter of fact, had not been committed, it would be simply a question of mistake of fact. Good faith having been found in favour of the people who arrested Shiva Prosad, and a mistake of fact having been committed by them, the application of section 79, Indian Penal Code, to the facts of the case, in my opinion, is complete. The result is that I set aside the conviction of and sentence on the accused. The fine, if paid, must be refunded.

IN CR. R. No. 30 of 1920.

The order that I have passed in Criminal Revision No. 2 of 1920 will govern this case also. The conviction and sentence of Bharthu Lal are set aside and the fine, if paid, must be refunded.

Rules made absolute.

PATNA HIGH COURT.

CRIMINAL REVISION No. 400 of 1919.

December 12, 1919.

Present:—Mr. Justice Adami.

Sheikh ABDUL KHALIQUE

—PETITIONER

versus

SURJA SINGH—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), ss. 202
204—Cognisance of case—Complaint—Magistrate,
power of, to issue summons—Enquiry, whether neces-
sary.*

A Magistrate has full power, upon receipt of a complaint, to issue a summons to the person accused, if he believes in the truth of the complaint. If he finds there are good grounds for proceeding, it is not necessary for him to call for an inquiry beforehand. [p. 1007, col. 1.]

Criminal revision against the order of the Sessions Judge, Purneah, dated 31st October 1919, refusing to make a reference to the High Court to quash the proceedings started against the petitioner by the Sub-Divisional Magistrate, Kishen Gunj, dated the 2nd August 1919.

FACTS appear from the following order of the learned Sessions Judge:—

"This is an application in which this Court was asked, in revision, to send for the record of the case No. 736 of 1919 (Sarju Singha complainant *versus* Abdul Khalique and Aulad Ali) and after perusing the same and hearing the petitioner's Vakil to recommend to the Honourable High Court to quash the proceeding, or pass such other order as it might deem fit and proper. The facts of the case material for the purpose of this application are these:—

Aulad Ali (accused No. 2), who does not join in the present application, lodged an information with the Police of Kishen Gunj Thana that Sarju Singha complainant and others committed dacoity in his house on a certain night in the month of July last. The Police after full investigation submitted its final report to the Sub-Divisional Magistrate at Kishen Ganj, who was empowered to take cognisance of the offence on the Police report, to the effect "True section 458 against 4 unknown persons." On receipt of this report the Magistrate ordered: "Enter true section 458, Indian Penal Code." On the 31st July, Sarju Singha who was named as one of the persons

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taking part in the alleged dacoity, filed a petition of complaint before the Sub-Divisional Officer of Kishen Gunj charging Abdul Khalique, the petitioner before us, and Anlad Ali for having falsely accused him and his co-Barqundazes in the above dacoity case knowing that there was no just or lawful ground for such an accusation. The complainant Sarju Singha further alleged in the petition that Abdul Khalique, who is in close intimacy with Anlad Ali, had caused the latter to implicate him in the above dacoity case. The Magistrate took down the initial statement of the complainant on the same day on the back of the petition of complaint and ordered thereunder thus: "C. S. I. Put up record of the case referred to." On the 2nd August he passed an order summoning both the accused, i.e., Abdul Khalique and Anlad Ali, under sections 500/211, Indian Penal Code, for 8th August 1919. In the meantime the petitioner moved this Court and got further proceeding stayed pending the disposal of the present application. The grounds upon which the proceeding of the case is sought to be quashed are:-

(a) That the learned Magistrate had no jurisdiction to take cognisance of the case except in consonance with the provisions of section 195 or section 476, Criminal Procedure Code.

(b) That there were absolutely no materials justifying the Magistrate to issue process against the petitioner.

(c) That the learned Magistrate erred in law in issuing process simultaneously under section 500 and 211, Indian Penal Code.

I heard the petitioner's Pleader and the Public Prosecutor at great length. I propose to consider the above grounds in the light of the arguments advanced in the order stated above.

(a) It was urged on behalf of the petitioner that the Sub-Divisional Magistrate, after having taken cognisance of the original case upon the Police report, had no jurisdiction to take cognisance of the complaint under section 211 without sanction under section 195 or without proceeding under section 476, Criminal Procedure Code. Upon a careful consideration of the arguments of both sides, I am of opinion that this ground of objection is not well founded and cannot be sustained. Section

195, clause (b), Criminal Procedure Code, in so far as it is applicable to the present purpose, provides that no Court shall take cognisance of any offence punishable under section 211, Penal Code when such offence is committed in, or in relation to any proceeding in any Court, except with the previous sanction or on the complaint of such Court, or some other Court to which such Court is subordinate. It follows from this provision that the false complaint must have been made in a Court, or in relation to any proceeding in a Court. In the case before us the false complaint was made not in the Court, but before the Police. It is too much for the petitioner to say that the fact of the Magistrate having passed an order "Enter true section 458, Indian Penal Code," on the Police report, amounted to a proceeding in relation to which the false charge was committed. The offence of false charge, if any, was completed before the Police, it cannot be said that the same offence was committed in the Court of the Magistrate for the simple reason that he took cognisance of the case on Police report under section 190, clause (b), of the Criminal Procedure Code, and passed an order "enter true section 458, Penal Code." The matter would have been different if the informant had filed a petition for judicial enquiry impugning the Police report, and the Magistrate had proceeded to enquire into the complaint. The offence of false charge, if any, not having been committed in a Court or in relation to any proceeding in a Court, I think no sanction was at all necessary as contemplated by section 195, Criminal Procedure Code. In support of this view the rulings reported as *Putiram Ruidas v. Mahomed Kasem* (1) and *Dharmadas Kavar v. Emperor* (2) may be referred to. Section 476 must be read subject to the restrictions contained in section 195 (a) of the Criminal Procedure Code, and hence the Magistrate had no power to direct a prosecution for making a false charge before the Police. In my opinion the provisions of section 195 or 476, Criminal Procedure Code, do not apply to the case before us. Moreover, the petitioner not being a party to any proceeding cannot take this objection.

(1) 3 C. W. N. 33.

(2) 12 C. W. N. 575; 7 C. L. J. 373; 7 Cr. L. J. 340.

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(b) This ground also fails. It was contended for the petitioner that the Magistrate, after recording the initial statement of the complainant, had some hesitation in issuing process as appears from the delay of some 2 days when he made up his mind to summon the petitioner. I think there is nothing in the record to support this contention. There is no suggestion at what time the Magistrate examined the complainant. There is no provision in the law that a Magistrate after examining the complainant must at once proceed either under section 202 or section 204, Criminal Procedure Code; if the Magistrate took a few days' time to consider whether or not he ought to issue process, that does not necessarily mean that he did not believe the complainant's statement. The Magistrate had no business to proceed under section 202 if he was satisfied that there was a *prima facie* case to justify him to issue process. The Magistrate seems to have proceeded under section 204, Criminal Procedure Code, and that is a discretion which no Court can interfere with at this stage. The complainant stated on oath that Aulad Ali was tutored by Abdul Khalique, petitioner, to lodge a false case before the Police. He took the responsibility on his own shoulders by making the above statement, and thus rendered himself liable to the consequences thereof. If the Magistrate's discretion in issuing process against accused persons be interfered with on the mere allegation that there was no material for issuing such process, then there will be a flood of motions which the existing judiciary shall be unable to cope with. In my opinion, therefore, this ground must also fail.

(c) It is too early for the petitioner to say at this stage that the Magistrate should have issued process under section 211 only and not under section 500, Indian Penal Code. It is seen that an accused is charged under one section and convicted under another section. Mere summoning the petitioner under section 500/211, Indian Penal Code, constitutes no such illegality as to justify a reference to quash the whole proceedings.

From what has been stated above it will be seen that there is no ground to justify a reference as prayed. I, therefore, decline to interfere. The application is dismissed and the Rule is discharged. The record shall

be forthwith sent back to the lower Court for proceeding with the case."

Mr. M. Haque (with him Mr. Muhammad Tahir), for the Petitioner, argued that there having been a previous investigation by the Police into this matter and the Police having found the *factum* of dacoity being true, the Magistrate should at least have ordered an inquiry into this matter before issuing summons. Under the circumstances there were no materials before the Magistrate justifying him in issuing summons. Secondly, the Magistrate should not have summoned the petitioner to answer a charge under section 500, Indian Penal Code. There are no materials whatsoever for this charge.

I concede that sanction is not necessary under section 195 or 476, Criminal Procedure Code.

Mr. S. A. A. Asghur (Government Advocate) (with him Mr. Manohar Lall, Assistant Government Advocate), for the Crown, submitted that it is entirely within the discretion of the Magistrate to hold an enquiry or not before issuing summons. If he is satisfied on a perusal of the complaint and the examination of the complainant he has jurisdiction to issue summons.

As to the summons under section 500, Indian Penal Code, that is not final. The charge is framed after the evidence of the prosecution has been led and if my learned friend's client is able to satisfy the Magistrate that the evidence of the prosecution discloses no materials for an offence under section 500, Indian Penal Code, the Magistrate will no doubt consider that objection. It is premature to move your Lordship at this stage. The proceedings are perfectly in order.

JUDGMENT.—One Aulad Ali lodged information at the Kishen Ganj Thana that a dacoity had been committed in his house on a certain night and he mentioned that he suspected Sarju Singh and four others. The Police enquired into the matter and reported to the Sub-Divisional Magistrate that there had been a dacoity, but that it was not true that Sarju Singh had been present, and the four other participants had not been recognised. On this report the Sub-Divisional Magistrate made an entry "enter true section 458, Indian Penal Code." On the 31st July 1919 Sarju Singh put

BINDRA RAN V. EMPEROR.

in a complaint before the Sub-Divisional Magistrate against Aulad Ali and the present petitioner, Sheikh Abdul Khalique; he asked that summonses might be issued against them under section 211 and section 500, Indian Penal Code, on the ground that Aulad Ali had instituted a false case against him and had defamed him, and that Abdul Khalique had instigated the false information which had been given to the Police and had also defamed him. The Magistrate recorded the complaint of Sarju and a few days afterwards ordered summonses against the two persons complained against under sections 500 and 211, Indian Penal Code. It is against this order that the present application is now made.

The grounds taken by Mr. Haque are that the Sub-Divisional Magistrate had no material before him whereon to decide whether a summons should issue against Abdul Khalique, the petitioner, who had not been named in the information to the Police and against whom there was so far nothing on the record. It is also urged that some enquiry should have been held before issuing summons. It is admitted that neither under section 195 nor under section 476, Criminal Procedure Code, any sanction was necessary for the complaint. I can see nothing irregular in the procedure followed by the Sub-Divisional Magistrate. Sarju lodged a complaint and was duly examined. The Magistrate had full power, if he believed that there was truth in the complaint, to issue summons straightway. It was not necessary for him to call for an enquiry beforehand if he was satisfied that there were good grounds for proceeding against the persons accused in the complaint. As to whether the offence under section 211, Indian Penal Code, has been made out by the complainant or an offence under section 500, remains to be settled after the hearing of the case when witnesses have been examined. At the time that the charge is framed the Magistrate will decide what offences, if any, have been proved. The mere act that there had been an investigation by the Police beforehand and the case had been entered true does not affect the matter at all. The entry of the case as true referred to the fact that it was found that the dacoity was

true; it did not refer to the fact that the persons charged in the information had in fact committed the offence. I can see no ground for interference at this stage. The application is rejected.

Application rejected.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 723 OF 1919.

September 22, 1919.

Present:—Mr. Justice Broadway.

BINDRA BAN—CONVICT—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 367, 424—Appellate Court, duty of, to write judgment in accordance with law.

The provisions of section 367 of the Criminal Procedure Code have been made applicable to appellate judgments by section 424 of the Code, and it is the duty of an Appellate Court to decide the points raised in appeal and to write a judgment in accordance with law.

Petition under section 439, Criminal Procedure Code, for revision of the order of the District Magistrate, Jullundur, dated the 17th April 1919, affirming that of an Honorary Magistrate, 2nd Class, Jullundur, dated the 27th February 1919, convicting the petitioner.

Lala Fakir Ohind, for the Petitioner.

JUDGMENT.—There was an appeal to the District Magistrate who should have recorded a judgment, in accordance with law. Points were raised in the appeal which were of importance and which should have been decided. The District Magistrate has apparently lost sight of the provisions of section 367, Criminal Procedure Code, which have been made applicable to appellate judgments by section 424, Criminal Procedure Code. The District Magistrate has not even expressed his opinion as to the guilt of the petitioner. I accept this petition and setting aside the order of the District Magistrate return

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the case to him for a re-hearing of the appeal and for the recording of a judgment in accordance with law.

Revision accepted.

PATNA HIGH COURT.
CRIMINAL REVISION No. 341 OF 1919.
October 5, 1919.

Present:—Mr. Justice Das.
JOGESWAR DAS—PETITIONER
versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 145, order under, form of—Joint possession of disputed properties—Criminal proceedings, validity of.

An order under section 145 of the Criminal Procedure Code should merely declare whom the Magistrate finds to be in actual possession of the property in dispute, regarding which proceedings have been taken to prevent a breach of the peace.

Where parties are in joint possession of property in dispute, a Magistrate has no jurisdiction to take action under section 145 of the Criminal Procedure Code.

Criminal revision against an order of the Magistrate, 1st Class, Chaibassa, dated the 4th July 1919.

Mr. Atul Krishna Roy, for the Petitioner.

JUDGMENT.—The petitioner in this case challenges the propriety of an order passed under section 145 of the Code of Criminal Procedure. The finding of the learned Magistrate is as follows: "Having regard to all these circumstances I find that the first party is in possession of nearly one-third of

the disputed land, viz., half of plot No. 13, one Khet of plot No. 18, 1/3rd of plots Nos. 22, 38, 55, 93 and 65, and the entire plot No. 68, and that the second party is in possession of the remaining portion of the disputed land, the plot numbers having reference to Khewat No. 3/1 in the name of Maheswar Das in Mauza Kusmi which has been marked Exhibit 1 in these proceedings." It seems to me that this finding has, to adopt the words of Prinsep and Stanley, JJ., in the case of *Taruja Bibee v. Asamuddi Bepari* (1), "the appearance rather of a decree in a civil suit adjudicating the rights of contending parties, whereas an order under section 145 should be merely to declare whom the Magistrate finds to be in actual possession of the property in dispute regarding which proceedings have been taken to prevent a breach of the peace." It is clear to my mind, reading the judgment of the learned Magistrate, that although partition has taken place between them and although they may be in exclusive possession of certain joint family properties, so far as these properties are concerned, they are in joint possession thereof although they hold specific shares therein. In my view, on these findings the learned Magistrate had no jurisdiction to deal with the case under section 145 at all. If authority is needed for this proposition, it will be found in the case which I have just cited.

I would, therefore, allow this application and discharge the order passed by the learned Magistrate under section 145.

Application allowed.

(1) 4 C. W. N. 426.

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The sinking of a well on premises in the *abadi* occupied by an agriculturist is not necessarily inconsistent with the purpose for which the land was granted, especially where there is no indication of any injury to the interests of the landlord. **N RAMDAYAL V. JAGRANI** 304

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Agra Tenancy Act (II of 1901), ss. 4 (5), 11—Occupancy rights, accrual of—Ejectment of tenant—Lease to third person for one year—Ejected tenant continuing in occupation and paying rent—Occupation, whether continuous.

A landholder ejected a tenant in due course of law and immediately gave a lease of the land to a caste-fellow of the latter for one year only; the ejected tenant, however, continued in occupation, paid the rent due and was re-admitted on expiry of the lease:

Held, per Ferard, S. M.—That as the person liable for the rent under the definition of section 4 (5) of the Agra Tenancy Act was the tenant, and as the tenant in this case was the person in whose favour the lease had been executed, there was not a continuous occupation by the ejected tenant as a tenant for the purpose of section 11 of the Act.

Per Hopkins, J. M.—That there was a continuous occupation by the original tenant.

The letting of land to a person who does not cul-

Agra Tenancy Act—contd.

tivate, and allowing the original tenant to remain in cultivating possession, does not constitute the former a legal tenant under the definition in section 4 (5) of the Agra Tenancy Act. A tenant is a person by whom rent is payable, and rent is what is paid by a tenant for land held by him. **UPBR** MUHAMMAD NABI v. UMEDI, 1 U. P. L. R. (B. R.) 37 **309**

— **s. 11**—U. P. Land Revenue Act (III of 1901), s. 131—Partition, when comes into effect—Khudkasht holding allotted to mahal in which holder is not proprietor—Tenancy, commencement of—Occupancy rights, accrual of.

Under section 131 of the U. P. Land Revenue Act, a partition takes effect on the 1st of July, following the date of confirmation of the partition. Consequently, where a mahal is partitioned and the land of a khudkasht holder is allotted to a new mahal in which he is not a proprietor, such holder can only count occupation from that date towards the accrual of occupancy rights. **UPBR** DWARKA PRASAD v. SHRI KANT PANDEY, 1 U. P. L. R. (B. R.) 35 **278**

— **s. 13 (b)**—"Year," meaning of—Tenant re-admitted within one calendar year, whether holds continuously.

The "year" referred to in section 13 (b) of the Agra Tenancy Act is a "calendar year." Consequently, where a tenant was ejected on the 21st August 1913 and was re-admitted on the 1st July 1914, he was held to have been re-admitted within one year from the date of his ejectment, within the meaning of section 13 (b) of the Agra Tenancy Act. **UPBR** BISMILLAH BEGAM v. CHUTTAN, 1 U. P. L. R. (B. R.) 34 **299**

— **ss. 18 (c), 22 (b)**—Occupancy holding—Surrender by widow, effect of.

The surrender by a widow of an occupancy holding which she has inherited from her husband under section 22 (b) of the Agra Tenancy Act has the effect of completely extinguishing the occupancy right, and no rights, present or future, remain to persons who might otherwise have had a contingent right, if she had retained the holding till her death or re-marriage. **UPBR** RAM GOPAL v. BHOORAJ SINGH, 1 U. P. L. R. (B. R.) 41 **567**

— **ss. 18 (c), 22 (b), (e)**—Occupancy holding—Surrender by widow, effect of—Reversioner, whether can revive holding.

A tenant under section 22 (b) of the Agra Tenancy Act is entitled to surrender her occupancy holding and this surrender absolutely extinguishes the occupancy rights. Possible reversioners under section 22 (e) of the Act cannot revive it later when the lady who has surrendered it dies or re-marries. **UPBR** GOVIND PANDEY v. DIPKA KOREI, 1 U. P. L. R. (B. R.) 47 **572**

— **s. 20 (2)**—Execution of decree—Trees on ex-proprietary holding, whether liable to attachment and sale.

Trees existing on an ex-proprietary holding are appurtenant to the holding and are not liable to attachment and sale in execution of a decree, in view of the provisions of section 20 (b) of the Agra Tenancy Act. **A PHAKKI LAL v. BRIJ MOHAN** **805**

— **s. 22**—"Sharing in cultivation," what is—

Agra Tenancy Act—conold.

Boy of 8 or 10 doing petty work for relative, whether sharer in cultivation.

A boy aged between 8 to 10 or 11 years, who lives with an agricultural relative and does such petty work as is usually done by boys of that age, cannot be said to be "sharing in cultivation" with his relative within the meaning of section 22 of the Agra Tenancy Act. **U P B R** BANSI RAM v. KUNJ BEHARI, 1 U. P. L. R. (B. R.) 36 **285**

ss. 34, 58—Grove, whether altered to agricultural holding by sowing fodder—Ejectment.

The character of a recorded grove is not altered to that of an agricultural holding by the mere fact of a fodder crop being sown among the trees so as to render the occupier liable to ejectment under section 53 read with section 34 of the Agra Tenancy Act. **U P B R** NIAZ HUSAIN v. TIKARAM, 1 U. P. L. R. (B. R.) 48 **626**

s. 79—Mortgage of fixed rate tenancy—Dispossession of mortgagee—Mortgagor, right of suit of—Cause of action, accrual of, date of.

When the mortgagee of a fixed rate tenancy is dispossessed otherwise than in accordance with the provisions of the Agra Tenancy Act, the mortgagor's cause of action against the land-holder under section 79 of that Act arises, not from the date on which he may redeem the mortgage, but from the date of the dispossession of the mortgagee. **U P B R** RAM NARAIN v. MUHAMMAD HASHIM ALI KHAN, 1 U. P. L. R. (B. R.) 33 **293**

s. 202—Jurisdiction of Civil and Revenue Courts—Ejectment of trespasser, suit for, whether cognisable by Civil Court—Tenancy, plea of—Procedure.

A suit in which the plaintiff seeks to eject the defendant on the ground that he is a trespasser and not a tenant, is cognisable by a Civil Court and not by a Revenue Court. If in such a suit the defendant pleads that he is a tenant of the plaintiff, the procedure laid down in section 202 of the Agra Tenancy Act should be followed. **A** RAGHUNATH v. GANESH, 18 A. L. J. 214; 2 U. P. L. R. (H. C.) 79 **381**

Amendment of decree, order directing, not appealable. See CIVIL PROCEDURE CODE, s. 152 **387**

Amendment of plaint, when to be permitted. See CIVIL PROCEDURE CODE, s. 66 **726**

Animals—Damages, suit for—Injury to animal—Contributory negligence, effect of.

In removing an animal from premises in order to prevent its causing damage no more injury should be inflicted than is reasonably necessary for the purpose. The infliction of excessive injuries will render the person inflicting them liable in an action for damages. **C** MALIRAM KALITA v. PURNANANDA ADICHAR **761**

Appeal—(Civil)—Final hearing—Court, whether can go into whole case—Gift to wife by member of firm heavily indebted, validity of—Intention to delay or defeat creditors—Pleadings, inconsistent, when permissible.

At the stage of the final hearing of an appeal the entire appeal is open for consideration, including an investigation of the issues remitted for trial, where such investigation is essential for the proper

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determination of the matter directly in controversy between the parties.

A gift to his wife by a member of a firm heavily involved in debt, which is deliberately kept secret till the firm is adjudged bankrupt and the plain object of which is to delay, if not to defeat, creditors, and under which possession is not obtained by the donee, nor is any convincing explanation given to justify the transaction, is a fictitious gift and confers no title on the donee to the properties dealt with thereby.

Either party to a litigation may in a proper case include in his pleadings two or more inconsistent sets of material facts and claim relief thereunder in the alternative, but whenever such alternative cases are alleged, the facts belonging to them respectively should not be mixed up but should be stated separately so as to show on what facts each alternative relief is claimed.

The plaintiff, who avails himself of the right to place inconsistent cases before the Court and endeavours to establish both the alternatives by contradictory oral testimony, is in a state of inextricable difficulty evidence adduced in support of both the cases can hardly be expected to secure confidence. **C** OFFICIAL ASSIGNEE OF THE CALCUTTA HIGH COURT v. BIDYASUNDARI DAS, 30 C. L. J. 428, 21 C. W. N. 145 **700**

Finding of fact, when can be disturbed. See BENGAL PUTNI TALUKS REGULATION, s. 8 **736**

, fresh case, whether can be advanced in. See PLEADINGS **645**

heard after death of respondent—Remedy. See CIVIL PROCEDURE CODE, s. 151 **284**

, misjoinder of parties and causes of action, whether can be made ground of. See CIVIL PROCEDURE CODE, s. 99 **512**

practice of admitting, when time-barred, condemned. See LIMITATION ACT, s. 3 **36**

Review—Decree appealed from set aside during pendency of appeal—Appeal, whether can be heard.

Where during the pendency of an appeal by one defendant the decree under appeal is set aside on review at the instance of another defendant, the decree ceases to exist and the appeal cannot, therefore, be heard. **L** BASHESHAIR NATH v. RAM KISHEN DAS, 140 P. R. 919 **966**

Suit for redemption or foreclosure for adjudged sum—Court-fee payable. See COURT FEES ACT, s. 7 IX **733**

(Criminal), maintainability of, against order of commitment to Sessions. See CRIMINAL PROCEDURE CODE, s. 215 **172**

(Second)—Discretion of Court, exercise of, interference with, when permissible.

Where two Courts fully acquainted with the circumstances of a case, and before whom evidence could be, but was not, led, exercise a discretion, the High Court will not interfere with the exercise of such discretion.

In the course of the trial of a suit the case for the plaintiff was closed and the case of the defendant was reached late in the afternoon on a certain date. The junior Pleader for the defendant was absent at the time and the senior Pleader expressed his inability to go on with the case. The defendant

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was thereupon told that he should examine his own witnesses, which he declined to do. Upon this the Munsif declared the evidence closed and fixed the next morning for arguments. The next morning the Munsif was asked to vary his order of the previous day and record the defendant's evidence. He refused the application and proceeded to adjudicate on the case. The lower Appellate Court upheld the view taken by the first Court:

Held, that under the circumstances of the case, the High Court would not interfere with the discretion of the two lower Courts, who knew the circumstances of the case and before whom evidence could be given as to the Pleader's inability to go on with the defendant's case. **C SWORUP MANDAL v. AYAN RAI KOWRA** 731

Finding of fact, interference with—Abandonment of occupancy tenancy and adverse possession, whether questions of fact—Punjab Tenancy Act (XVI of 1887), s. 38—Abandonment of occupancy tenancy, what constitutes—Adverse possession by landlord.

A finding of fact based on no evidence or against express *prima facie* reliable evidence is liable to be set aside on second appeal.

Neither the question of abandonment by an occupancy tenant nor the question of adverse possession of the holding by the landlord is necessarily a question of fact.

Where it was found that an occupancy tenant had not for a large number of years either cultivated the land by himself or by others, that there was no sufficient cause for his not having done so, and that he did not arrange for payment of the rent:

Held, that the tenancy must be taken to have been abandoned within the meaning of section 38 of the Punjab Tenancy Act.

Where a holding abandoned by an occupancy tenant is given by the landlords to their tenants-at-will, this is sufficient to constitute adverse possession as against the occupancy tenant. **L MUHAMMED UMAR KHAN v. RAZI KHAN**, 170 P. R. 1919 873

High Court, power of, to determine issue of fact. See CIVIL PROCEDURE CODE, s. 103 353

Appeal to Privy Council—Refusal to allow deficiency of Court-fees to be made up, whether question of law. See CIVIL PROCEDURE CODE, s. 110 400

Appellate Court, consideration of evidence by. See CIVIL PROCEDURE CODE, s. 103 353

dismissal of suit by, without adjudicating on merits—Appeal, second, whether lies. See MADRAS ESTATES LAND ACT, s. 77 749

power of, to interfere in Jury trial where Jury has acted on circumstantial evidence. See CRIMINAL PROCEDURE CODE, s. 506 56

refusal of, to hear appeal—Revision. See CIVIL PROCEDURE CODE, s. 5 655

Arbitration—Award not signed by all arbitrators, validity of.

An award to be binding and enforceable must be signed by all the arbitrators concurring.

Where an uneven number of arbitrators are appointed there is no presumption that the parties

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contract that a majority award shall be binding. **M AYYASAWMI MUDALIAR v. APPANDAI NYNAN**, 3 M. L. J. 145 912

Compromise approved by arbitrator, whether award. See CIVIL PROCEDURE CODE, O VII, R 18 (2) 311

Dispute, existence of, whether necessary—Interest, award of, whether invalidates award—Contract Act (IX of 1872), s. 62—Settlement contract, whether discharges original contract.

It is an essential condition for an arbitrator's jurisdiction that when his arbitration is demanded there shall be in existence a dispute between the parties.

On 27th April petitioner agreed to sell to the respondent a certain quantity of Hessian cloth at Rs. 30. Delivery of one-half was to be made in May and of the other half in June. Delivery not having been made in May and not being proposed to be made in June, two settlement contracts were entered into on the 3rd May and the 11th June respectively and the same goods were re-sold by the respondent to the petitioner at Rs. 35. The respondent duly sent in bills but the petitioner, although admitting liability for the amount of respondent's bills, withheld payment by claiming to set it off against a larger sum than would be due to the petitioner from the respondent on other accounts. According to the terms of the contracts between the parties the respondent referred the dispute to arbitration and the arbitrators, appointed by the Bengal Chamber of Commerce, gave their award in favour of the respondent and allowed interest on the claim. On an application by the petitioner to set aside the award:

Held, (1) that as the petitioner was withholding payment under a claim of right to do so, there was a 'dispute' between the parties, and this gave the arbitrators jurisdiction in the matter;

(2) that after the settlement contract was made the original contract was not utterly discharged by virtue of section 62 of the Contract Act;

(3) that the award was not bad because it awarded interest as it was for the arbitrators to decide this, and they had jurisdiction to decide it.

When a settlement contract is made re-selling the goods back again from the original buyer, the intention is not that after the settlement contract the first contract should be discharged; the intention is that the two contracts should stand together. **C UTTAM CHAND SALIG RAM v. MAHMOOD JEWAMAMOOJI**, 23 O. W. N. 704; 46 O. 534 285

Arbitration Act (IX of 1899), ss. 12, 13—Arbitration—Award—Court, whether has power to extend time for making award.

A Court has power, under section 12 of the Arbitration Act, to extend the time for making an award, even though there has been an order of remission and the award has in fact been made, and this power is not limited by section 13 of the Act. **C TEJPAL JAMUNADAS v. B. NATHMULL AND CO.**, 46 C. 1059 663

Archaka, rights and duties of. See RELIGIOUS ENDOWMENTS ACT, s. 12 281

Assam Land and Revenue Regulation (I of 1886), s. 12—Rules framed by Chief Commissioner under s. 12, r 57—Settlement of land—Previous settlement holder, rights of—Collector, power of, to exclude previous holder Jurisdiction of Civil Court to see whether rule has been complied with—Civil Court, whether has power to pronounce on sufficiency of reasons for exclusion.

Under rule 57 of the rules made by the Chief Commissioner of Assam under section 1 of the Assam Land and Revenue Regulation, a Collector has power to settle land with any person whom he thinks fit, but preference should ordinarily be given to the previous settlement holder.

A Civil Court has jurisdiction to decide whether there has been a compliance with the provisions of the foregoing rule, and if, in a case coming under the third paragraph of that rule, it finds that there was no compliance therewith, it may pass a decree as between the parties to the suit. It is not open, in such cases, to the Civil Court to go into the correctness or sufficiency of the reasons for excluding the previous holder and if it appears that the Revenue Authorities took into consideration the fact that preference should be given to the settlement holder, they have a discretion in the matter. **C** JOY GOBINDA *v* HAZIKA BIBI, 24 C. W. N. 149 **307**

Attachment, illegal—Goods attached in custody of Court—Damage to goods—Creditor, liability of.

Where goods are illegally attached and remain in the custody of the Court or of a Receiver, the creditor at whose instance the attachment is made is liable for any injury to, or depreciation owing to climatic conditions in, the goods. **A** ABDUR RAHIM *v* SITAL PRASAD, 17 A. L. J. 800; 1 U. P. L. R. (H. C.) 115; 41 A. 618 **792**

—, *wrongful*—Damages, suit for—Malice, proof of, whether necessary.

In order to sustain a claim for damages for wrongful attachment of property the plaintiff must establish not only want of reasonable and probable cause but also malice in fact on the part of the person attaching the property. **P** HUKAM CHAND *v* UMAR DIN, 20 P. L. R. 910 **827**

Benamidar, suit against—Decree, whether binding on beneficial owner—Mortgage suit against benamidar—Real owner of mortgaged property, whether necessary party.

A proceeding against a benamidar in its ultimate result is fully binding on the beneficial owner. In a suit on a benami mortgage, therefore, it is not necessary to add the real owner of the mortgaged property as a party. **C** ABDUL RAHAMAN *v* MOHENDRA GHOSH **633**

—, *suit by*—Beneficial owner impleaded as co-defendant—Decree, whether ought to be given—Presumption.

A suit by a benamidar to recover money should not be decreed where the beneficial owner of the money is before the Court as a co-defendant. The Court might, by making the beneficial owner a co-plaintiff, decree the suit, but in the absence of evidence that the money does not belong to the benamidar, the Court is bound to give effect to the legal presumption which arises. **C** KANAI LAL KHAN *v* TOOLSI MANJURI DASI **21**

Bengal Land Revenue Sales Act (XI of 1859), s. 37—Bengal Land Revenue Settlement Regulation (VI of 1822), s. 10 (2), (3), (4)—“Permanent Settlement,” meaning of—Permanent tenure-holder, when protected—Joint settlement—Default by sudar malguzar, effect of—Sale of tenure—Co-proprietors, shares of, whether affected.

The words “permanent settlement” in the first exception to section 37 of the Bengal Land Revenue Sales Act mean the Permanent Settlement of 1793, and not the permanent settlement of any particular mahal.

It is only under the first exception to section 37 of the Bengal Land Revenue Sales Act that a permanent tenure-holder at fixed rates can claim protection against annulment.

Where a joint settlement is made under clauses 2, 3 and 4 of section 10 of the Bengal Land Revenue Settlement Regulation of 1822, all the malguzars are jointly responsible for the payment of the Government revenue although the mahal is under the management of one of them as an agent or a sudar malguzar, and if default is made by the agent or manager or sudar malguzar, the entire tenure is liable to sale unless there is a provision to the contrary in the settlement. **PAT** LALJIT UPADHYAY *v* WAJIBUNNESSA BEGUM, 104 PAT. 149; P. L. J. 74 **658**

Bengal Land Revenue Settlement Regulation (VI of 1822), s. 10—Joint settlement—Default by sudar malguzar, effect of. See **BENGAL LAND REVENUE SALES ACT**, s. 37 **653**

Bengal Municipal Act (III B. C. of 1834), s. 85 (a)—Income derived from zemindari outside Municipality, whether “circumstances and property within the Municipality”.

Income derived by a person residing within the limits of a Municipality from zemindari property situate outside the Municipality is not “circumstances and property within the Municipality,” within the meaning of clause (a) of section 85 of the Bengal Municipal Act. **PAT** CHAIRMAN OF THE MUNICIPAL COMMISSIONERS OF THE MUNICIPALITY OF BIHAR *v* RAMDEO DAS, 4 P. L. J. 673; 1-20 PAT 20 **227**

s. 101, proviso 3—“Machinery,” meaning of—Overhead tank for storage of water, whether machinery.

Held, by a majority (Fletcher, J., dissenting), that an overhead steel tank constructed by a Municipal Corporation for the storage of water during the hours when the demand is comparatively small, and to supplement the supply when the demand is large, is not “machinery” for the purposes of section 10 of the Bengal Municipal Act, and is, therefore, not exempt from assessment as “machinery.”

Beachcroft, J.—It cannot be properly said that everything which is connected in a system comes within the description of machinery merely because mechanical contrivances are employed in the working of some parts of that system. The test to be applied with reference to any particular part of the system is whether it is essential to, or assists in the working of, the mechanical contrivance.

Per Greaves, J.—“Machinery” is an apparatus for applying mechanical power, consisting of a number of inter-related parts, each having a definite function and it is in this sense that the word is used in section 10 of the Bengal Municipal Act. **C** CHAIRMAN, COSSIPORE AND HITPORE MUNICIPALITY *v* CORPORATION OF CALCUTTA, 23 C. W. N. 727; 46 C. 910 **337**

Bengal Putni Taluks Regulation (VIII of 1819), ss. 8, 10, 13, 14—

"Day," meaning of—Putni sale—Payment to officer of zemindar before sale, effect of—Notice, defective—Sale, validity of—Purchaser, position and rights of—Purchaser, whether necessary party to suit—Possession, whether can be given on reversal of sale Appeal—Finding of fact, when can be disturbed.

A finding by a trial Court based solely on oral evidence adduced before it ought ordinarily not to be disturbed by a Court of Appeal.

The term "day" in the Putni Regulation, 1819, means a day reckoned in the manner prevalent in Bengal, that is, from sunrise to sunrise.

A payment to the officer of a zemindar of the full amount due for arrears of rent, made between 8 and 10 P. M. on the evening of the day antecedent to a sale under the Putni Regulation, is a valid payment and a sale held after such payment is made, is without jurisdiction.

A defective notice under section 8 of the Putni Regulation is fatal to the validity of the sale.

A notice which omits to specify the lots to be sold and does not set out the order in which the sale is to take place, is a defective notice.

Where the purchaser at a sale under the Putni Regulation is a stranger to the proceedings, he is entitled, on the sale being set aside, to be indemnified against all loss at the charge of the zemindar or other person at whose instance the sale may have been made, such loss being measured by costs of litigation and interest on the purchase-money.

Section 14 of the Putni Regulation contemplates that the purchaser is to be made a party to a suit to set aside a putni sale. If the purchaser has purchased on behalf of another or on behalf of himself and others, he must be deemed to represent all such persons and if it was he who took delivery of possession under section 15 of the Regulation, it is immaterial that a plaintiff asks not merely for reversal of the sale but also for restoration of Possession on such reversal. **C BEJOY KRISHNA MOOKERJEE v. LAKSHMI NARAIN JIU**, 30 C. L. J. 433 **736**

Bengal Tenancy Act (VIII B. C. of 1885), s. 7—Temporary settlement-holder, right of, to enhance rent. See CIVIL PROCEDURE CODE, s. 99 **850**

ss. 11, 18, 85—Raiyat at fixed rates, power of, to grant underlease, extent of.

Section 85 of the Bengal Tenancy Act, which restricts the power of raiyats to grant under-leases, must be read along with sections 11 and 18 of the same Act, and, therefore, it does not apply to the case of a raiyat holding at a fixed rate of rent. **C HOCHEN SARDAR v. PORESH NATH PAL** **647**

ss. 18, 20, 147A—Raiyat holding at fixed rent—Sub-lease, whether transfer—Sub-lessee, whether can acquire occupancy right—Compromise decree not in accordance with law, effect of.

The grant of a sub-lease by a raiyat holding at fixed rent is a transfer of an interest in the holding within the meaning of section 18 of the Bengal Tenancy Act.

A person holding under a raiyat at fixed rent is not debarred from acquiring a right of occupancy.

A tenant who has been in possession of a holding for a long time and has acquired a right of occupancy, cannot by any agreement contract himself

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out of that right, nor can a compromise decree not passed in accordance with the provisions of section 147A of the Bengal Tenancy Act have that effect.

C SHEIKH NASARAT v KALI DAS **750**
ss. 20, 48, 49, 50, 85, Sch. III,

Art. 3—Landlord and tenant—Tenant, dispossession of—Suit to recover possession of holding—Limitation applicable—Occupancy tenant, lease by, exceeding nine years, validity of—Kayami ryot, whether ryot at fixed rent—Under-ryot, heir of, whether entitled to gather crops—Non-occupancy ryot, interests of, whether heritable.

A suit by a tenant against his landlord for the recovery of possession of his holding, where the defendant did not dispossess the plaintiff in his capacity as landlord of the holding, is not governed by Article 3, Schedule III, of the Bengal Tenancy Act.

A document creating a lease by an occupancy ryot cannot be given in evidence if the lease is for more than 9 years and whether the document has been registered or not, the lease is void. The validity of such a lease can be questioned by the grantor or by a person claiming from him.

Where in a lease a lessor states that he is a kayami ryot, this does not necessarily imply that he is a ryot at a fixed rent.

Irrespective of custom or local usage the heir of an under-ryot under an annual holding is entitled on the death of the under-ryot to remain in possession of the land until the end of the then agricultural year for the purpose of tending and gathering in the crops standing on the land.

The right of a non-occupancy ryot is not heritable. **C NADIRAM CHANDRA SIL v. SRINATH CHAKRABARTI**, 21 C. W. N. 93 **906**

ss. 50 (2), 115—Tenant recorded as occupancy tenant, whether entitled to presumption under s. 50 (2).

A tenant who is recorded in the Record of Rights as an occupancy ryot is, by reason of the provision of section 115 of the Bengal Tenancy Act, not entitled to the benefit of the presumption arising under section 50 (2) of the Act. **PAT JAGDEO NARAIN SINGH v. BHAGWAN MAHTO**, 1 P. L. T. 27 **672**

s. 52 Landlord and tenant—Rent, abatement of Tenant, whether includes one of several tenants—One of several tenants, whether can claim abatement of rent—Appeal, abatement of.

It is not open to one of many tenants to claim abatement of rent without making all the joint landlords and his co-sharers in the tenancy parties to the suit.

The expression 'tenant' in section 52 of the Bengal Tenancy Act does not include the case of a mere co-sharer tenant who has only a fractional share in the tenure: it means the tenant of the tenure and not one of many tenants.

In a suit for rent by some co-sharer landlord, the tenant defendants claimed abatement of rents and their claim was allowed by the Court of first instance. On appeal by the landlords the lower Appellate Court reversed that decree and held that the defendants were not entitled to an abatement of rent as all the landlords were not parties to the suit. Against that decision the tenant defendants preferred a second appeal to the High Court.

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during the pendency of which one of the tenants died, and his legal representatives were not brought on the record:

Held, that in the absence of the legal representatives of the deceased tenant-appellant the remaining tenants were not entitled to claim abatement of rent, and that consequently the whole appeal abated. **C NARENDRA NATH KUTI v. SATYADHAN GHOSAL**, 30 C. L. J. 203 **396**

S. 66 (2)—Rent decree—"Date of decree," what is—Decree under appeal, effect of.

The period of 15 days allowed by section 66 (2) of the Bengal Tenancy Act for payment of arrears of rent in an ejectment suit should be reckoned from the date of the decree of the first Court. The fact that an appeal has been preferred against that decree would not affect the matter, as, so long as the appeal is pending, the only decree capable of execution is the decree under appeal. **C ABDUL RASHID MANDAL v. SHAHARALI MOLLA**, 46 C. 1032 **659**

S. 85 (2)—Sub-lease exceeding nine years, whether can be registered—Consent of landlord, effect of—Registration, validity of—Sub-lease, admissibility of.

Section 85 (2) of the Bengal Tenancy Act operates as a statutory bar to the registration of a sub-lease by a raiyat which creates a term exceeding nine years; the consent of the landlord cannot validate the registration and if such a lease is registered, it is inadmissible in evidence. **C MADAN MONDAL GOCHI v. TARINI CHANDRA BANERJEE** **625**

S. 86 (1)—Raiyat holding underlease, not for fixed period—Surrender of holding, validity of—Registered instrument, whether necessary—Suit to recover holding from persons to whom it has been let, maintainability of.

A raiyat holding under a lease which is not for a fixed period can surrender the holding under section 86 (1) of the Bengal Tenancy Act. Such surrender need not be by an instrument, even though the tenant held under a registered lease.

When a raiyat surrenders his holding and the surrender is accepted by the landlord who enters into possession, the tenant cannot sue to recover the holding from persons to whom the landlord has let it after the surrender. **C PORAN CHANDRA v. INDRA SENI**, 47 C. 129 **752**

S. 87, provisions of, whether exhaustive—Landlord and tenant—Abandonment of holding, what constitutes.—Transfer of whole of non-transferable raiyati holding, effect of—Ejectment of transferee—Proof of abandonment—Presumption.

The provisions of section 87 of the Bengal Tenancy Act are not exhaustive and do not prescribe the only mode in which a holding can be abandoned.

In order to entitle a landlord to eject a transferee of the whole of a non-transferable raiyati holding it is not necessary for him to prove as a fact that the raiyat has left the holding and disclaims any interest in it. This is a direct inference from the fact that he has sold the entire holding and given possession of it to the purchaser and distinct repudiation or refusal to pay rent need not be proved. **C ASAMULLA MOLLA v. SANKAR DAS SANYAL** **548**

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S. 87—Rent decree obtained by co-sharer landlord—Sale of holding in execution—Purchase by decree-holder—Co-sharer landlords, whether entitled to joint possession—Fair rent, right to.

Where a co-sharer landlord purchases a holding sold in execution of a decree obtained by himself for his share of the rent, his co-sharer landlords are entitled to joint possession to the extent of their shares in the Zemindari. But they would not be so entitled if the decree in execution of which the holding is sold is a decree under section 87 of the Bengal Tenancy Act. In such a case they would only be entitled to fair rent to the extent of their shares. **C BEPIN CHANDRA ROY v. PROFULLA NARAIN ROY** **787**

103B, 105, 105A, 107, 109—Record of Rights, entry in—Presumption of correctness—Declaration that entry in Record of Rights is erroneous, suit for—Decision of Settlement Officer—Jurisdiction of Civil Court, whether barred—Res judicata.

An entry in the Record of Rights under the provisions of section 103B of the Bengal Tenancy Act must be presumed to be correct until it is proved by evidence to be incorrect, and, therefore, in a proceeding under section 105 of that Act for settlement of fair and equitable rent, the Settlement Officer, in the absence of any evidence to the contrary, is not only justified but is bound to act upon such entry.

Where a question has in effect, though not in express terms, been necessarily decided between parties to a suit they cannot raise the same question as between themselves in any other suit in any other form.

Where a question is decided by necessary implication, the decision would operate as *res judicata*.

Section 105A of the Bengal Tenancy Act does not lay down that the "issues" referred to in the section can only be raised by an applicant; on the contrary, some of them from their very nature must be raised by the opposite party.

After the final publication of a Record of Rights the landlord applied for settlement of fair and equitable rent under the provisions of section 105A of the Bengal Tenancy Act. The tenant thereupon raised the objection that the land, being *lakheraj*, was not liable to assessment of rent. In consequence several issues were framed, one of them being whether the land was *niskar lakheraj* property of the tenant. The tenant, however, did not produce any evidence and the Settlement Officer by his judgment assessed certain rent upon the land. The tenant then brought a suit for a declaration that the entry in the Record of Rights stating that the land was liable to assessment was erroneous:

Held, (1) that the decision of the Settlement Officer under section 105A of the Bengal Tenancy Act was binding upon the tenant, having regard to the provisions of section 107 of the Bengal Tenancy Act;

(2) that apart from the provisions of section 107 the suit was not maintainable under section 109 of the Bengal Tenancy Act. **C APURBA KRISHNA ROY v. SYAMA CHARAN PRAMANIK**, 24 C. W. N. 223 **952**

S. 104H (4)—Settlement of fair rent by Court—Matters to be taken into consideration. In settling a fair rent under section 104H, sub,

Bengal Tenancy Act—conold.

section (4), of the Bengal Tenancy Act what the Court has to consider is the rent of other holdings of the same class comprised in the same settlement rent roll: the mere fact of the villages being neighbouring does not necessarily show that they are comprised in the same settlement rent roll. **C** MANMATHA NATH KAR v SECRETARY OF STATE 718
s. 120 (2a)—Recital in deed executed subsequent to 1883, admissibility of, to determine whether land is khudkasht—Khudkasht, meaning of.

A recital contained in a deed executed subsequent to 1883 that certain lands were the proprietor's private lands khudkasht cannot, in view of section 120 (2a) of the Bengal Tenancy Act, be received in evidence for the purpose of showing that the lands were of that character.

The term khudkasht does not conclusively connote proprietor's private land. **Pat** SUKAN SAO v. KARU MAHTON, 1 P. L. T. 13; 5 P. L. J. 87 652

s. 153 (a)—Rent suit of value below Rs 100—Appeal, second, whether lies—Civil Procedure Code (Act V of 1908), s. 115—Revision—Failure to decide plea, whether, refusal to exercise jurisdiction

Section 153 (a) of the Bengal Tenancy Act bars a second appeal in a suit for rent where the amount involved is below Rs 100, irrespective of whether the rent is payable in money or in kind, and whether the plaintiff is a co-sharer landlord and the other co-sharers are impleaded as pro forma defendants.

The failure of a District Judge to decide a plea amounts to a refusal to exercise jurisdiction, and his decision is liable to be set aside in revision. **Pat** MATHURA SINGH v RATAN BARHI 562

s. 167—Annulment of interest—Notice, proof of service of See PLEADINGS 797

Berar Land Revenue Code, s. 96—Record of rights, entry in—Presumption as to correctness, whether applies to trees standing on land—Suit for setting aside entry, presumption, whether can be relied upon in

Under section 96 (i) of the Berar Land Revenue Code an entry in the Record of Rights must be presumed to be true until the contrary is proved or a new entry is lawfully substituted therefor, and this presumption arises even in a suit brought to have the entry set aside, and extends to trees standing on land. **N** BULKI v. DAGDIA 334

Bihar and Orissa Excise Act (II of 1915), s. 47 (a)—Illegal possession of cocaine—Place accessible to several persons, effect of—Possession of accused

In order to convict a person of being in illegal possession of contraband goods, it is necessary to fix him with knowledge of their existence in the place where they were found. If the place is one in which several persons have an equal right of access, the goods cannot be said to be in the possession of any one of them. **Pat** RAM CHANDRA v EM. PEROR, 21 C.R. L. J. 172 780

Bombay Land Revenue Code (Act V of 1879), s. 135J, whether retrospective—Record of Rights, entry in—Presumption of correctness.

The provisions of section 135J of the Bombay

Bombay Land Revenue Code—conold.

Land Revenue Code, which was enacted by Act IV of 1879, are not retrospective, and the presumption contained in that section does not, therefore, apply to entries made before 1913. **B** HATHISINGH v. KUBER ETHA, 22 BOM. L. R. 33 667

Bombay Revenue Jurisdiction Act (X of 1876), s. 4 (a), whether ultra vires—Government of India Act, 1858 (21 & 22, Vict. C. 68), s. 6—Vatandar patil, dismissal of—Suit for declaration that dismissal is illegal, maintainability of.

Plaintiff, who was a vatandar patil, was dismissed from his post and his life-interest in the patilki vatan was forfeited. He brought a suit against the Secretary of State for a declaration that the order of dismissal was illegal and for possession of the vatan lands;

Held, 1) that the suit was barred by the provisions of section 4 (a) of the Bombay Revenue Jurisdiction Act;

2) that section 4 (a) of the Bombay Revenue Jurisdiction Act was not ultra vires of the Government by virtue of the provisions of section 65 of the Government of India Act, 1858, inasmuch as the plaintiff could not have brought a suit claiming the same relief against the old East India Company. **B** RACHANGAUDA IRANGAUDA PATIL v. SECRETARY OF STATE FOR INDIA, 21 BOM. L. R. 1155 129

s. 4 (k)—Bombay Titles to Rent-free Estates Act (XI of 1852)—Jurisdiction of Civil Courts—Kaji inam—Resumption by Collector—Suit for declaration that order directing resumption is illegal, whether cognisable by Civil Court.

A suit by the holder of a kaji inam, based upon a decision of the Assistant Inam Commissioner under the Bombay Titles to Rent-free Estates Act, 1852, for a declaration that an order of the Collector that the plaintiff should pay certain rent in respect of the inam lands or that the lands should be forfeited is illegal and ultra vires, is cognisable by a Civil Court under section 4 (k) of the Bombay Revenue Jurisdiction Act, and the circumstance that the plaintiff is an alienee from the original grantee does not take the suit out of the provisions of the clause. **B** MAHAMADSAHEB APPALAL KAJI v. SECRETARY OF STATE FOR INDIA, 21 BOM. L. R. 1159; 44 B. 120 98

s. 4 (k)—Bombay Titles to Rent-free Estates Act (XI of 1852)—Jurisdiction of Civil Courts—Khatibki inam—Suit for declaration that inam is not liable to assessment, whether cognisable by Civil Court

A suit against the Government for a declaration that the plaintiff is the full owner of a khatibki inam and of the khatibgiri rights appertaining to it and for an injunction restraining the Collector from recovering the full assessment from him, the claim being based on an adjudication made by the Inam Commissioner under the Bombay Titles to Rent-free Estates Act of 1852, is cognisable by the Civil Courts under section 4 (k) of the Bombay Revenue Jurisdiction Act, and the circumstance that the plaintiff claims as alienee from the original khatib does not take the suit out of the clause. **B** FAKRODINSAB v SECRETARY OF STATE FOR INDIA, 21 BOM. L. R. 1166; 44 B. 120 145

Bombay Titles to Rent-free Estates Act (XI of 1852)—*Kaji inam*—Jurisdiction of Civil Courts. See BOMBAY REVENUE JURISDICTION ACT, s. 4 98

—*Khatibki inam*—Jurisdiction of Civil Courts, See BOMBAY REVENUE JURISDICTION ACT, s. 4 105

Bombay Tramways Act (I of 1874), s. 24—*Bye-laws framed by tramways company*—Notice modifying bye-laws not sanctioned by Governor in Council, validity of.

A notice issued by the Bombay Tramway Company modifying a bye-law framed by the Company under section 24 of the Bombay Tramways Act and duly sanctioned by the Governor in Council, has no legal effect unless it is sanctioned by the Governor in Council. **B SORAB MERWANJI ALPAIVALLA v. EMPEROR**, 21 Bom. L. R. 1103; 21 Cr. L. J. 88 488

Buddhist Law, Burmese—Divorce—Revival of marriage—Re-union, effect of.

Under Buddhist Law mere physical re-union with a divorced wife is not sufficient to revive the status of marriage. In order to have this result the re-union must be of such a nature that had there been no divorce it would have amounted to a valid marriage. **U B MAUNG PO LAT v. MA NGWE MA**, 3 U. B. R. (1919) 182 575

—*Marriage of virgin below twenty years of age*—Consent of parents, whether necessary.

Under Burmese Buddhist Law a virgin under twenty years of age must have the consent of her parents to her marriage. If such consent is not obtained, the marriage is not a good marriage.

Where, however, a minor is steadfastly determined to marry her lover and continues of the same mind, such consent is not necessary. **L B MA SA v. SAN TUN U**, 12 Bur. L. T. 136; 10 L. B. R. 50 81

—*Partnership*—Husband and wife borrowing money—Presumption.

Under Burmese Buddhist Law there is no presumption that whenever a husband and wife borrow money there is a partnership between the two and that the money is borrowed for the purposes of that partnership. **U B MAUNG TAW v. MOOSAJI AHMED AND CO.**, 3 U. B. R. (1919) 189 513

Burma Gambling Act (I of 1899), ss. 6, 7—Criminal Procedure Code (Act V of 1898), ss. 79, 10—Search warrant under s. 6, whether can be endorsed to another officer—Search by officer to whom warrant is endorsed, legality of—Presumption under s. 7, whether arises.

Section 101 of the Criminal Procedure Code is not applicable to warrants issued under section 6 of the Burma Gambling Act.

The Burma Gambling Act contains no provision authorising the endorsement of a warrant issued under section 6 thereof by the officer to whom it is issued, to another officer. Therefore, the entry and search of a house by an officer to whom a warrant is so endorsed is not an entry under the provisions of section 6 of the Act, and consequently anything found as the result of such search cannot give rise to the presumption contained in section 7 of the Act. **L B PO THWAI v. EMPEROR**, 12 Bur. L. T. 165; 21 Cr. L. J. 9 57

—**s. 7**, presumption arising under, rebuttal of.

Where numerous packs of cards as well as some dice were found in a house, but it was held proved that the persons who were playing cards in the

Burma Gambling Act—concl'd.

house were nearly all employees of the house-owner, that they were playing for recreation and that though the play was for money no commission was taken:

Held, that the presumption arising under section 7 of the Burma Gambling Act from the discovery of the packs of cards and the dice was rebutted. **L B EMPEROR v. SEIN KEE**, 12 Bur. L. T. 163; 21 Cr. L. J. 4 52

—**s. 10**—Field shed, whether place to which public have access.

A field shed which the owner has left after the completion of field work and which is not in the occupation of anybody, but which has not been abandoned to the use of the public, is not a place to which the public have access within the meaning of section 10 of the Burma Gambling Act. **L B NGA HLWA v. EMPEROR**, 12 Bur. L. T. 164; 21 Cr. L. J. 2 50

Burma Municipal Act (III of 1898), Ch. VI, s. 180 (1)—Order directing disposal of surface water, legality of—Disobedience of order, whether offence.

There is nothing in Chapter VI of the Burma Municipal Act which empowers a Town Committee to pass general orders or directions regarding the disposal of sullage or surface water. The neglect to comply with such an order, therefore, is not an offence under section 180 (1) of the Act. **U B SOHAN SINGH v. EMPEROR**, 3 U. B. R. (1919) 188; 21 Cr. L. J. 94 494

Calcutta Municipal Act (III of 1899), ss. 559 (52), 561—Bye-laws of Calcutta Corporation regulating hours of closing theatres, whether ultra vires—Abetment of offence under bye-law, whether punishable—Penal Code (Act XLV of 1860), s. 40.

The bye-laws of the Municipal Corporation of Calcutta prescribing the hour of closing theatres and the section of the Calcutta Municipal Act providing a penalty for the breach of any bye-law, are not ultra vires.

The Calcutta Municipal Act is a local and special law and section 40 of the Penal Code applies to the abetment of an offence which is thereby made punishable. **C PROBODH CHANDRA v. CORPORATION OF CALCUTTA**, 24 C. W. N. 198; 21 Cr. L. J. 173 781

Calcutta Police Act (I of B. C. of 1866), ss. 3, 13C—"Police Officer," who is—Officer under suspension, whether Police Officer—Commissioner of Police, power of, to detain such officer in custody.

An Officer of the Calcutta Town Police when placed under suspension ceases to be a Police Officer, and the Commissioner of Police has no authority to order his detention in custody. **C PRAMATHA NATH BARAT v. P. C. LAHIRI**, 46 C. 581; 21 Cr. L. J. 15 63

Cantonments Act (XIII of 1889), s. 32, scope of—Oral gift of property situate in Cantonment, validity of.

The effect of section 32 of the Cantonments Act is that a gift of property situate in a Cantonment must be made in the manner provided by section 123 of the Transfer of Property Act.

An oral gift by a Muhammadan of such property is, therefore, not valid. **L MUHAMMAD BEG v. AMAR NATH**, 2 U. P. L. R. (L.) 33 829

Cattle Trespass Act (I of 1871), s. 20 495

Cause of action—Suit for restitution of conjugal rights. See CIVIL PROCEDURE CODE, s. 20 (c) 120

Census report, entry in, value of. See PUNJAB PRE-EMPTION ACT, s. 3 (3) 642

C. P. Land Revenue Act (XVIII of 1881), s. 65-A (4) (a)—Thekadari tenure, whether transferable—Award directing sale of thekadari tenure, legality of.

The transfer of interest in a thekadari tenure is prohibited under section 65-A, sub-section 4 (a), of the C. P. Land Revenue Act and an arbitration award directing a sale of such an interest is illegal and unenforceable and no decree can be passed on such an award. **N TIKARAM v. TEJRAM** 274

C. P. Tenancy Act (XI of 1898), s. 45

(1)—Sale of village share—Occupancy rights in sir land, surrender of—Surrender, validity of—Contract Act (IX of 1872), s. 65, applicability of—Parties contravening provisions of Statute, effect of—'In pari delicto potior est conditio defendentis,' applicability of.

The defendants sold to the plaintiff their share in a village, reserving to themselves the occupancy rights in the sir land, and on the same day executed another deed by which they surrendered their occupancy right in the sir land accrued to them by virtue of the sale. The plaintiff was put in possession of the village share under the sale-deed and of the land under the surrender deed, but the defendants ejected him on a subsequent date. The plaintiff brought the present suit for possession of the land surrendered:

Held, (1) that the mere fact of the possession having been delivered to the plaintiff did not suffice to separate the transaction of surrender from that of sale and that the surrender must be held to be void under the provisions of section 45 (1) of the Central Provinces Tenancy Act.

(2) that the plaintiff was not entitled to get back the consideration for the surrender, as both the parties knew that they were contravening the provisions of the Central Provinces Tenancy Act and, therefore, the maxim *in pari delicto, potior est conditio defendentis* applied.

The test as to whether a surrender in such a case is an evasion of the provisions of section 45 (1) of the Central Provinces Tenancy Act consists in the fact as to whether the transaction is distinctly separate from that of sale of the village share.

If a covenant to relinquish the sir lands is part of the transaction of sale or of mortgage, then the agreement to surrender will be void and unenforceable, no matter what ingenious devices may be employed to give colour to it. If the Court is satisfied that there was first of all a transfer by way of sale or mortgage and that the transferee, having obtained the status of an ex-proprietary tenant with full knowledge of that fact and of the rights preserved to him by the Statute, deliberately chooses, as a separate transaction, to relinquish his ex-proprietary tenancy into the hands of new proprietor, or of the mortgagee in possession, then the law cannot go further in the way of protecting a reckless and imprudent man against the consequences of his own acts.

Section 65 of the Contract Act has no application where the contract embodies a purpose known to be

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illegal to which both sides are parties. **N BHURE v. SHEO GOPAL** 794

— ss. 95, 97—Jurisdiction of Civil and Revenue Courts—Landlord and tenant—Suit for possession by occupancy tenant, whether cognisable by Civil Court—Claim for mesne profits, whether changes nature of suit.

A suit for possession of land of which the plaintiff became an occupancy tenant by operation of law upon the sale of the proprietary rights in sir is a suit between landlord and tenant and must be tried by a Revenue Officer, even though the plaintiff has not obtained possession of the land as tenant and has not been recognised as such by the defendant landlord.

In such a suit a claim for mesne profits and for a house which the plaintiff seeks to recover as an agriculturist is ancillary to the main relief asked for and does not change the nature of the suit. **N POONABAI v. BALLABHDAS** 827

Charge, material alteration in, at close of trial, legality of. See CRIMINAL PROCEDURE CODE, s. 227 409

Chaukidar's register, entry in, admissibility of. See EVIDENCE ACT, s. 35 166

Circumstantial evidence, nature of. See PENAL CODE, s. 193 60

—, sanction to prosecute based on—Validity of sanction. See CRIMINAL PROCEDURE CODE, s. 195 884

Civil Procedure Code (Act V of 1908), ss. 2 (11), 47—'Representative' in s. 47, meaning of—Purchaser at sale in execution of money decree, purchaser from decree-holder, purchaser under money decree and stranger purchaser at sale in execution of mortgage, whether 'representatives' of either party to suit.

Per **Abdur Rahim, Offg. C. J.**—A person who has bought the property of the defendant in a suit since the institution of that suit, whether at a Court auction held in execution of a money decree passed in another suit or by private purchase, is entitled and bound to have any question relating to the execution, discharge or satisfaction of the decree decided under section 47 by the Court executing the decree, when his interest is affected either by the decree itself or by the sale held in execution of that decree, and the same rule applies to a purchaser of the property under such sale, whether he is the decree-holder himself or a stranger. Whether the purchaser in the one case or the auction-purchaser in the other is to be regarded as the representative of the judgment-debtor or the decree-holder depends upon the nature of the question raised and who the contesting party is.

Section 47, Civil Procedure Code, should be interpreted in as liberal a spirit as the language would reasonably admit of.

The word 'representative' in the section is not confined to legal representatives.

Per **Oldfield, J.**—The inclusion of auction-purchasers as parties to proceedings relating to an auction-sale does not make section 47, Civil Procedure Code, inapplicable to them.

Ordinarily, the purchaser at a sale held in execu-

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tion of a money decree is the representative of the judgment-debtor. Where he is also the decree-holder and his position comes in question in distinct proceedings, his character as decree-holder in one execution can have no effect on his position in another and there is nothing in authority or on principle to debar his being treated like any other stranger to the latter, no reason appearing for according him any other rights than a stranger purchaser from the judgment-debtor, whether by execution or private sale, would acquire.

The purchaser from a decree-holder purchaser under a money decree is a representative of the judgment-debtor for the purposes of enquiry into a question relating to the execution of a distinct decree affecting the same property.

The term 'representative' in section 47, Civil Procedure Code, is not to be identified with 'legal representative' in section 2 (11) of the Code and a purchaser at a Court auction represents some one, that is, either the judgment-debtor or the decree-holder.

Per *Seshagiri Aiyar, J.*—Where the equity of redemption is purchased under a money decree, in matters relating to the execution of a mortgage decree, the auction-purchaser under the money decree will be the representative of the judgment-debtor in the mortgage decree.

Whether an auction-purchaser, be he the decree-holder himself or a stranger or purchaser from the decree-holder purchaser, is a party to the proceedings in respect of the sale depends on whether the issues arising for decision relate (a) to execution, (b) to deciding rival rights of the decree-holder and of the judgment-debtor in the subject-matter. If these conditions are satisfied, the fact that others are interested in the result of the decision should not affect the jurisdiction and competency of the executing Court to deal with the matter. **M** VEYINDRAMUTHU PILLAI v. MAYA NADAN, (1919) M. W. N. 881; 26 M. L. T. 191; 38 M. L. J. 32; 43 M. 107

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S. 11—Res judicata—Co-defendants, issue [between, decision of, when operates as res judicata.

A decision on an issue arising between co-defendants has the effect of *res judicata* if it is necessary that the issue should be determined for the purpose of granting relief to the plaintiff. Where such an issue is determined adversely to a defendant, it is not open to him in a subsequent suit between himself and the other co-defendants to raise the question already decided by the finding on that issue. **A** HARBANS v. RAM KUMAR NAIK, 18 A. L. J. 126; 2 U. P. L. R. (A.) 46

974

S. 11—Res judicata—Court, competency of, to try subsequent suit, how to be judged—Value of property, increase in, effect of—Jurisdictions, different, owing to alteration in value of property, effect of.

Under section 11, Civil Procedure Code, the competency of the Court to try the subsequent suit has to be judged with reference to the time when the first suit was brought, that is, as if the second suit had been instituted at the time when the first suit was filed. Thus, where the first suit was within the jurisdiction of a Munsif and the subsequent suit by reason of an increase in the value of the property was beyond his jurisdiction and within the juris-

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diction of a Subordinate Judge, such subsequent suit would nevertheless be barred, inasmuch as if the subsequent suit had been brought at the time when the first suit was brought, the Munsif would have been competent to try it. **O** GOPAL v. RAM HARAKH, 6 O. L. J. 547; 22 O. C. 331

335

S. 11—Res judicata, determination of, by reference to pleadings, issues and judgment. See VILLAGE TEMPLES

202

S. 11, O. IX, r. 8—Res judicata—Dismissal for default, whether operates as res judicata—Defendant, absence of, effect of—Landlord and tenant—Thekadar, whether entitled to trees standing on land leased—Landlord, right of, to enter and fell timber—Tenant, permission of, whether must be obtained—Transfer of Property Act (IV of 1882), s. 108 (h).

The dismissal of a suit in terms of Order IX, rule 8, of the Civil Procedure Code, is not intended to operate in favour of the defendant as *res judicata*.

The application of the principle of *res judicata* cannot be avoided by a defendant on the ground that he did not appear at the trial, but the conclusive effect of the decision must be confined to the point actually decided in the suit.

A *thekadar* has, in the absence of any contract or local usage to the contrary, no right to fell timber, nor does the mere grant of protected status confer on him any right to cut down trees and appropriate them to his own use if he had no such right before the grant of that status.

The position might, however, be different if the trees are planted by the person claiming the right to cut them or by his forefather, the principle embodied in section 108 (h) of the Transfer of Property Act being applicable to such a case.

A lessor is not entitled as owner of the trees standing on the land leased out to enter and fell them at his pleasure.

If the lessor desires to take out timber he must, by arrangement with his lessee, acquire permission to go on the land for the purpose. It is not, however, open to the lessee to arbitrarily refuse permission when the lessor, as owner of the timber, desires to fell what he is entitled to take, but reasonable notice of the lessor's intention to enter and fell should be given. **N** TIKARAM v. RAM CHANDRA

789

S. 11—Res judicata—Landlord and tenant—Rent decree, ex parte, whether operates as res judicata.

A rent decree though only *ex parte* is *res judicata* of the question of the existence of the relationship of landlord and tenant between the parties. **C** BASANTA KUMAR SARKAR v. SUKHOMOY MONDAL

763

S. 11—Res judicata—Promissory note, suit on—Dismissal for default—Suit, subsequent, on original cause of action, maintainability of.

Plaintiff sued to recover a sum of money advanced on a promissory note. The suit was dismissed in consequence of his failure to put in an appearance. An application to reinstate the suit was dismissed, as also an appeal against the order dismissing the application. He then instituted a fresh suit to recover the same sum of money on the basis of entries in his account book, and

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alleged that the promissory note was null and void and ineffective and that he was entitled to recover the sum in lieu of which the promissory note had been executed:

Held, that the suit must fail, as the plaintiff's cause of action was one and indivisible, and the fact that the transaction was recorded in his account book did not give him another or different cause of action. It is only where a promissory note is invalid owing to some inherent defect therein, that the party suing thereon is entitled to fall back upon an action for money had and received to his use, and not where, as in this case, the previous suit was dismissed in default of plaintiff's appearance.

A MUNDAR BIBI v. BAIJNATH PRASAD, 18 A. L. J. 81
424

S. 11—*Res judicata*—*Suit for possession based upon false cause of action—True cause of action known to plaintiff not put forth—Subsequent suit based upon true cause of action, whether barred.*

In a suit for possession the plaintiff must establish his title in that very suit by urging and proving all that would go to establish his title. He cannot reserve one or more of such grounds for a future suit.

If a plaintiff sues for property on a false claim or cause of action when in reality he has in fact and in law a true claim and cause of action for the same property of which he is aware, he must be taken in law to have abandoned his true claim and cause of action. **N UMRAOBI v. HIMMATBI**
200

S. 11, Expl. IV, O. XXI, rr. 101, 103—*Res judicata—Ejectment, suit for, against puisne mortgagee—Failure to plead right of redemption, effect of—Redemption, suit for, whether barred—Claim proceedings—Order, whether affects right of redemption.*

A right to possession upon redemption is not a right to the present possession of the property.

An order passed under rule 101 of Order XXI of the Civil Procedure Code becomes conclusive under rule 103 of the Order only so far as the present right to possession of the property is concerned. It does not affect a party's right to possession upon redemption.

A puisne mortgagee is not bound to set up his right of redemption in a suit against him for ejectment and his failure to do so does not preclude him from relying upon this right in a subsequent suit for possession upon redemption. **N BALIRAM v. NARAYAN**
276

ss. 15, 115, O. II, r. 2, O. VII, r.

10—*Applicability of s. 15—Suit, whether can be transferred to Court of lower grade after it has been properly instituted—Relinquishment of claim, what amounts to—Plaint, return of, for presentation to proper Court, when can be ordered—Appeal—Appellate Court, refusal of, to hear appeal—Revision—High Court, interference by.*

The mere fact that in the course of the trial of a suit the plaintiff is found to be entitled to a part only of the relief claimed by him and that that part would have been within the competency of a Court of a lower grade, if the suit had originally been confined to it, gives no authority to the Court under section 15 of the Civil Procedure Code to transfer the suit to a Court of a lower grade, as once a suit

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is properly instituted and is legally pending, the operation of the section is exhausted. The section depends for its application upon what is actually claimed in the plaint filed, and not upon what ought to have been claimed or is found after trial to have been claimable.

The relinquishment by a plaintiff of a portion of his claim under Order II, rule 2 (1), of the Code refers primarily to the relinquishment before the institution of the suit, and the rule has no application to any part of a dismissed claim abandoned in appeal. No such abandonment can affect appellate jurisdiction.

After a claim has been tried and dismissed, the mere fact that an appeal is made only as to a part of it, does not involve an admission that the suit was wrongly instituted so as to justify the procedure laid down in Order VII, rule 10, of the Code, as this rule only applies when it is found that a suit as originally framed was wrongly instituted, and the abandonment of a claim *pendente lite* cannot be given retrospective effect so as to vitiate the institution of the suit.

The refusal by a District Judge to hear an appeal amounts to a refusal to exercise a jurisdiction vested in him by law, and is open to revision under section 115 of the Code. **N NUR KHAN v. SHAIKH RAHIM**
655

S. 20—*Contract, suit on—Offer, whether part of cause of action—Forum, proper—Jurisdiction, determination of.*

In a case of contract the offer is part of the cause of action and an action founded on contract may be instituted in the Court which has jurisdiction over the place where the final offer was made, but not in a Court within whose jurisdiction part of the negotiations took place. **M KUTHIRAVATTAM APPU THAMBAN v. FOULKES**, 10 L. W. 445
260

S. 20 (c)—*Contract Act (IX of 1872), s. 4—Contract, C. I. F., incidents of—Contract for supply of goods—Non-delivery—Breach—Damages, suit for—Cause of action—Place of suing—Consignor drawing on bills of lading and transmitting bills to consignee—Offer and quotation, distinction between—Completed contract, tests of, when contract to be made out from correspondence—Construction of terms.*

Plaintiffs, merchants in Negapatam, offered to purchase timber from the defendant trading at Mandalay. Plaintiffs' offer was accepted by the defendant at Mandalay. The course of dealings was that defendant prepared scantlings and then put them on board a ship which was neither the plaintiffs' nor the defendant's. He then made out a bill of lading in his own name and drew on it the money due to him according to his estimate from the National Bank. The National Bank transmitted the bills to the Bank of Madras, which in its turn passed them on to the plaintiffs. As the defendant failed to supply the timber according to the contract, the plaintiffs sued defendant in the Negapatam Sub-Judge's Court for damages:

Held, that the cause of action did not arise wholly or in part at Negapatam and that, therefore, the Negapatam Court had no jurisdiction to entertain the suit.

Incidents of a C. I. F. contract discussed.

An offer of a proposal is distinct from, and should not be confused with, either an invitation to offer

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or quotations given indicating the value of the articles to be supplied.

Where a contract depends on correspondence, the whole correspondence should be considered and not particular portions of the series.

Where everything essential to make a completed contract has been settled, the mere fact that a formal document has to be drawn up will not render the contract incomplete.

Where both the plaintiff and the defendant reside in the same place, the offer can be communicated at once and would be received at the place from which it emanates. But where the acceptor resides in a different place, it is when the offer reaches him that there can be a complete offer. Until a proposal is received, therefore, there is no offer. The place from which the offer is sent does not furnish a venue for a suit when the acceptor resides elsewhere. **M FIRM OF A. M. MYLAPPA CHETTIAR v. AGA MIRZA MAHOMED SHIRAZEE**, 37 M. L. J. 712; 26 M. L. T. 504 **550**

— **s. 20**—*Restitution of conjugal rights, suit for—Forum, proper—Jurisdiction—Residence, meaning of—Opportunity to respondent to resume relations, whether necessary*

In suits for restitution of conjugal rights jurisdiction is given either by the residence of the respondent within the jurisdiction of the Court, or by the fact that the cause of action arose within the jurisdiction. But residence within the meaning of section 20 of the Civil Procedure Code must not be merely temporary residence as that of a traveller, but actual permanent residence.

Before a suit for restitution of conjugal rights is filed, it is essential that the respondent should be given an opportunity of a conciliatory character to resume conjugal relations. A demand threatening legal proceedings if not complied with is not sufficient. **L B EZRA v. EZRA**, 12 BUR. L. T. 120 **65**

— **s. 20 (c)**—*Restitution of conjugal rights, suit for—Cause of action, accrual of—Place of suing.*

In a suit by a husband against his wife for restitution of conjugal rights, the cause of action arises in the wife absenting herself from the husband's residence, and, therefore, a Court within the local limits of whose jurisdiction such residence is situate is competent to try such suit. **A CHITTAR v. HARJU** **120**

— **s. 22**—*Transfer of case, when to be directed.*

A case should not be transferred from one Court to another merely on the ground that the defendant has all his evidence at the latter place. A strong case must be made out in order to overrule the rights of the plaintiff to select the forum of his suit. **L SHIV PARSHAD v. KANHAYA SHAH RUCHI SHAH**, 167 P. R. 1919 **925**

— **s. 33, O. XX, r. 6**—*Judgment and decree, distinction between—Paragraph in judgment, whether decree.*

In the case of an original civil suit the decree must be quite distinct from the judgment.

A paragraph in a judgment not drawn up in the form of a decree and not embodied in a separate form is not a decree within the terms of the Civil Procedure Code. **L GELA RAM v. GANGA RAM** **913**

— **s. 35, O. XXII, r. 3 (2)**—*Suit, abatement of—Non-survival of right to sue—Costs, award*

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of, out of deceased plaintiff's estate—Discretion of Court.

Courts have a discretion to award costs to a defendant in a case where a suit abates on the cause of action not surviving the death of the plaintiff, out of the deceased plaintiff's estate. The words 'costs of and incident to all suits' in section 35 of the Civil Procedure Code are wide enough to cover such a case.

For the purpose of calculating Pleador's fees such a case should be treated as similar to one dismissed for default of prosecution after framing issues. **M DONTU PEDDA CHENCHAYYA v. MALLAM BALAYYA**, 37 M. L. J. 596; 10 L. W. 616 43 M. 234 **118**

— **ss. 47, 102**—*Decree in suit of small cause nature of value below Rs. 500—Execution, order in—Appeal, second, whether lies.*

No second appeal lies against an order passed in execution proceedings arising out of a suit of the nature cognisable by a Court of Small Causes and of value below Rs. 500. **C KUNJA BEHARI ROY v. PANCHANON SIKDAR** **429**

— **s. 47, O. VII, r. 10**—*Execution of decree—Jurisdiction and power of executing Court, question as to, whether relates to execution—Plaint, whether can be returned for presentation to proper Court as application—Jurisdiction, question of, how to be decided—Maintainability of suit, whether must be determined before returning plaint—Procedure—Appeal heard by one Bench, whether can be re-heard by different Bench.*

A question as to the legality of an execution Court's procedure or as to its jurisdiction or power to order a sale is a question falling under section 47, Civil Procedure Code.

Order VII, rule 10 (), Civil Procedure Code, gives a Court power to return a plaint for presentation as an application in the Court having jurisdiction to accept it as an application.

There is nothing to prevent a Court ignoring a relief as being based on no shown cause of action and then proceeding to find that the other reliefs are outside its jurisdiction.

A case heard by one Bench can be re-heard by another Bench, i.e., a Bench composed of different Judges. **O BALDEO DAS KEDAR NATH v. BOMBAY MERCANTILE BANK, LTD.**, 6 O. L. J. 640 **364**

— **s. 47, O. XXI, rr. 53, 53, 60, 61, 63**, *scope of—Claim petition by party exonerated, dismissal of—Order, finality of—Claimant, whether can plead title in defence to suit by auction-purchaser.*

The meaning of Order XXI, rule 63, Civil Procedure Code, is that the parties to the proceedings shall be concluded by the order made thereon, and that the purchaser at a Court sale shall take the property purchased by him free from any claims negatived by that order, subject to any right of appeal or of suit to which the claimant may be entitled.

Order XXI, rule 63, Civil Procedure Code, may possibly be construed, where the aggrieved claimant or objector is a party to the suit, as substituting a right of suit for the right of appeal.

As section 47, Civil Procedure Code, does not prescribe the procedure to be followed in claim proceedings, regard must be had to the provisions of Order XXI, which deals with "execution of decrees

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and orders," and rules 58 to 63 of that Order, which are grouped under the sub-heading "investigation of claims and objections," regulate applications made on the ground that any property attached in execution is not liable to such attachment.

The concluding words of the first paragraph of rule 58 (1) of Order XXI of the Civil Procedure Code must be held to apply only to the case where the claimant or objector is not a party.

Where a party exonerated from a suit preferred a claim to property attached in execution of the decree against the other defendants, alleging that it was his self-acquisition, and the property was subsequently sold and the auction-purchaser sued for partition as against all the defendants who were members of a joint family:

Held, that the exonerated defendant was precluded from raising the plea of self-acquisition as a defence, inasmuch as he had neither appealed against the order on his petition nor filed a separate suit to establish his title. **M VENKATACHELLA REDDY v. MUTHIALU REDDY**, 37 M. L. J. 624 **536**

s. 48, O. XXI, r. 15, O. XXXIV, r. 3—Execution, application for—Order delivering possession, whether adjudication that execution not barred—Order, whether can be questioned in subsequent execution proceedings—Decree absolute for foreclosure—Order for possession, absence of—Irregularity—Joint decree-holders—Execution by one, effect of—Decree omitting shares of judgment-debtors, whether enforceable—Limitation for executing decree.

An order delivering possession of property under an execution application amounts in law to an adjudication that the application is in time, and it is not open to the judgment-debtor to question the legality of that order in proceedings started on a subsequent application for execution.

The absence of a formal order for possession in a decree absolute is a mere irregularity and does not vitiate proceedings consequent on the execution of the decree.

Order XXI, rule 15, Civil Procedure Code, allows one of several decree-holders to apply on behalf of all and it is not for the judgment-debtor to say that sufficient steps have not been taken to safeguard the interests of the other decree-holders, when they themselves have made no complaint whatever.

Where a decree absolute in a suit for foreclosure is incapable of execution owing to the absence of a formal order for delivery of possession, the rule of 12 years contained in section 48 of the Civil Procedure Code applies from the date the decree becomes capable of execution, that is, from the date of the formal order for delivery of possession.

A decree is not incapable of execution merely because it omits to specify the shares of the judgment-debtors in the property decreed, if the decree-holder has secured possession. **N AMIRALI v. GOPALDAS** **924**

s. 48—Limitation Act (IX of 1908), s. 15—Execution of decree—Limitation period fixed by s. 48, whether can be extended—Stay of execution, effect of—Force or fraud, effect of.

Section 48 of the Civil Procedure Code does not contemplate a deduction of any particular period

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from the prescribed period of twelve years. Where, however, force or fraud is proved, that gives a fresh starting point of limitation under sub-section (2), clause a), of the section.

The period during which execution proceedings have been stayed cannot be deducted from the period of twelve years prescribed by section 48 of the Civil Procedure Code. **N GOVINDA v. UMRAO SINGH** **279**

s. 66, O. VI, r. 17, O. XXI, rr. 84, 94—Auction sale—Purchaser, agreement by, to share property with others—Sale certificate—Joint purchasers, names of, whether can be entered in certificate—Specific performance—Amendment of plaint, when to be permitted.

An auction purchase of a *jote* was made by the defendant alone and the earnest money was paid by him alone but instead of paying the balance of the purchase-money from his own pocket, he obtained a portion of it from the plaintiffs under an agreement that the plaintiffs would be joint purchasers of the *jote* with him:

Held, (1) that the names of the plaintiffs could not be inserted in the certificate of sale, because the person who was declared to be the purchaser after the bids were concluded was the person in whose name the certificate was to be granted under Order XXI, rule 94, of the Civil Procedure Code;

(2) that there having been no agreement before the sale, the second clause of section 66 of the Code of Civil Procedure did not apply to the case but that the plaintiffs were entitled to claim specific performance of the contract.

Where the facts upon which a plaintiff would be entitled to maintain a suit for specific performance of a contract are all stated in the plaint, the plaintiff should be allowed to amend the plaint and add a prayer for specific performance of the contract, although the plaint originally contained no such prayer and the Courts below did not try such a case. **C BABU RAM MONDAL v. DAKHINA SUNDARI NAMASUDRANI**, 24 C. W. N. 27 **726**

s. 66—Benami purchase at execution sale, whether illegal—Statutory provision barring equitable jurisdiction of Court, construction of—Purchase at execution sale in benami of one of several heirs, whether deprives other heirs of their right—Tenant having attorned to beneficial owner, whether can refuse to pay rent to his heirs.

Although the object of section 66 of the Code of Civil Procedure is to discourage benami purchases at Court sales, it does not render such purchases illegal. Inasmuch as the section bars the equitable jurisdiction of the Court, it must be strictly construed and should not be extended beyond its express terms.

Where a Muhammadan father purchased a *jote* at an execution sale with his own money in the name of one of his sons and settled it with a tenant, who attorned to him and after his death paid rent to his heirs for some time:

Held, that having been brought upon the land by the father, it was not open to the tenant to say after the father's death that he was not the tenant of his heirs, and that a suit for rent brought

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by the heirs would not be barred under section 66 of the Code of Civil Procedure, simply because the father had purchased the *jote* at an auction sale in the name of one of his sons. **C MAHAMMED EMARTULLA SIRCAR v. MAHAMMED DIDAR BUX SIRCAR**, 24 C. W. N. 51 **127**

S. 66—Money decree, execution of—Attachment of immoveables—Mortgage, execution of, by judgment-debtor to avoid sale—Money borrowed, non-payment of, to decree-holder—Auction-sale of attached property—Suit by mortgagee against judgment-debtor and auction-purchaser, maintainability of.

One V. obtained a money-decree against the 1st defendant. In execution he attached the latter's properties. The 1st defendant executed a mortgage of the properties to plaintiff in order to avoid the sale by paying the borrowed amount to the purchaser. The payment, however, was not made and V. brought the properties to auction-sale and they were purchased by 4th defendant, who mortgaged them to 5th defendant. Plaintiff sued the 1st defendant and his sons and 4th and 5th defendants on his mortgage:

Held, that section 66, Civil Procedure Code, did not bar the suit as 4th and 5th defendants did not hold the properties for the benefit of the 1st defendant. **M MONGOLA SWAYI v. VISVANATHA SANTASO SINGARAO**, 37 M. L. J. 586 **967**

ss. 68, 71, O. XLVI, r. 1—Collector executing decree, whether "Court"—"Court" in O. XLVI, r. 1, meaning of—Reference by Collector, whether competent.

Only a Court has jurisdiction to make a reference under Order XLVI, rule 1, of the Civil Procedure Code, and the word "Court" in the rule means a Court of Civil judicature.

The functions of a Collector in executing a decree transferred to him for that purpose, though designated as judicial, are purely ministerial, and in the exercise of these functions he is not a Court of civil judicature. A Collector, therefore, to whom a decree is transferred for execution under section 68, Civil Procedure Code, has no jurisdiction to make a reference under Order XLVI, rule 1, of the Code. **O ALI BAHADUR KHAN v. BISHESHAR SINGH**, 22 O. C. 319; 2 U. P. L. R. (J. C.) 21 **564**

S. 70—Local Government, power of, to make rules—Revenue Court—Execution of decree—Finality of orders—Suit to set aside order, maintainability of.

A Local Government has power to frame rules under section 70 of the Civil Procedure Code, giving finality to orders passed by Revenue Courts in execution of certain decrees, and no suit can be brought to set aside an order under those rules by a person against whom such order has been made. **A FARHAT-UN-NISA v. SUNDARI PRASAD**, 18 A. L. J. 124; 2 U. P. L. R. (A.) 35 **801**

S. 73—Decrees in favour of several creditors—Attachment in execution of one—No action taken by other creditors—Proceeds, whether liable to rateable distribution.

There were several decrees against one M., including one in favour of J. S. M. had obtained a decree against one B. whose representative-in-interest was one J. R. J. S. applied for execution by attachment of the decree held by M. against J. R. and a private

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arrangement was come to whereby J. S. agreed to regard his decree as satisfied on payment of a certain sum by J. R. This sum having been paid, the other creditor of M. objected to the arrangement and claimed rateable distribution:

Held, (1) that inasmuch as there was no other claimant before the Court at the time when J. S. applied for execution, it was open to the latter to attach the whole of the decree held by M. against J. R.;

(2) that the money, obtained by J. S. from J. R. not having been paid into Court so as to constitute "assets held by the Court," was not liable to rateable distribution. **L JADU RAI v. MISRI**, 3 P. W. R. 1920; 11 P. L. R. 1920 **41**

S. 92, applicability of, to private trust.

The rule embodied in section 92 of the Civil Procedure Code cannot be extended to private trusts. **C MANOHAR MOOKERJEE v. PEARY MOHAN MOOKERJEE**, 20 C. L. J. 177; 24 C. W. N. 478 **6**

S. 92—Temple, management of—Scheme suit—Trustees, additional, appointment of, validity of.

Where in a scheme suit for the management of a temple it appears that the members of a community have contributed largely towards the temple, the appointment of one of the members thereof to represent the community on the board of trustees of the temple is not improper. **M ANNASAMI AYYANGAR v. NARAYANAN CHETTIAR**, 10 L. W. 494 **263**

S. 99—Enhancement of rent of two *etmams*, suit for—Misjoinder of causes of action—Misjoinder not affecting merits—Bengal Tenancy Act (VIII B. C. of 1885), ss. 7, 9, 30, 37, 191, 192—Temporary settlement holder, right of, to enhance rent—*Etmam* tenancy, nature of—Rent, customary rate of—Enhancement, method of.

A suit for enhancement of rent of two *etmams*, where the plaintiff and defendants are the landlord and tenants of both and have the same interest in each, is not bad for misjoinder of causes of action; the misjoinder, if any, is merely technical and does not affect the merits of the case within the meaning of section 99, Civil Procedure Code.

Neither section 9 nor section 37 of the Bengal Tenancy Act is a bar to the enhancement of rent by a temporary settlement holder, as such holder is, by virtue of the terms of sections 191 and 192 of the Act, not precluded from exercising the ordinary powers of a landlord under sections 7 and 30 of the Act.

An *etmam* tenancy is a tenure not held at a fixed rate of rent and the rent thereof is liable to be enhanced under the ordinary procedure under section 7 of the Bengal Tenancy Act.

A rate of rent fixed fifty years ago and which is not the rate on which the tenancy is held since the last Settlement, cannot, in a suit for enhancement, be regarded as the customary rate.

Where in a lease a progressive rent is not fixed at its inception, and the lease is not a reclamation lease, the full rent is liable to enhancement.

In a suit for the enhancement of rent of a tenure where a customary rate of rent is not proved, the method of dividing equally the net profits of the tenure between the landlord and the tenure-holder is correct. **C JOGESH CHANDRA ROY v. MOKBUL ALI**, 23 C. W. N. 945; 30 C. L. J. 140 **850**

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s. 99, O. I, r. 3—*Declaratory suit by reversioners in respect of several alienations, whether maintainable—Appeal—Misjoinder of parties and causes of action, whether can be made ground of appeal—Decree, whether can be set aside on ground of misjoinder.*

Plaintiffs sued for a declaration that alienations made by their father and uncles were without consideration and legal necessity and did not affect their reversionary rights. The land had been mortgaged on various occasions and eventually sold and all the mortgagees as well as the vendee were impleaded as defendants. A preliminary objection that the suit was bad for misjoinder of parties having been taken and upheld, the plaintiffs proceeded in their case against the vendee only. Their suit was dismissed. On appeal the District Judge held that there was no misjoinder of parties or causes of action and reversed the decree of the first Court. Defendants preferred a second appeal to the High Court:

Held, (1) that the suit was not bad for misjoinder of parties and the plaintiffs were competent to bring one suit against the vendee and the prior mortgagees;

(2) that the order of the first Court on the point of misjoinder of parties vitally affected the merits of the case and the District Judge was justified in reversing the decree and remanding the suit for the trial of the original plaint. **L RALIA RAM v. MULK RAJ**, 2 U. P. L. R. (L.) 29; 27 P. L. R. 1920 **512**

s. 102, O. XLI, r. 23, O. XLIII, r. 1 (a)—*Small cause of value below Rs. 500—Appeal—Remand, order of—Appeal, second, whether lies.*

There is no second appeal in a suit of a small cause nature of value below Rs 500. An order of remand, therefore, in such a suit is not open to appeal. **A AMBA PRASAD v. MUSHTAQ HUSAIN**, 18 A. L. J. 167; 2 U. P. L. R. (A.) 69 **432**

s. 103, O. XX, r. 4—*Judgment, contents of—Court of first instance, duty of—Evidence, consideration of—Documentary evidence, failure of Court to mention, effect of—Appeal—Appellate Court, consideration of evidence by—Appeal, second—High Court, power of, to determine issue of fact.*

A Court of first hearing is bound to consider all the evidence adduced before it, but the mere fact that that Court omits to mention a document in its judgment is no sufficient proof that it failed to take the document into consideration, especially where the document is of obviously no importance or weight. Where, however, the document is of obvious weight or importance, it is incumbent on the Court to mention the document in its judgment and its omission to do so may be regarded by a Court of Appeal as sufficient proof that the document was not taken into consideration.

A party is not entitled to have a document considered by an Appellate Court, unless the attention of the Court is drawn to it, or it is impliedly relied on. In the absence of evidence to the contrary, it may be presumed that a respondent relies on the judgment of the lower Court in his favour, and that any document, treated as a document of importance by that Court, has been impliedly brought to the notice of the Appellate Court.

Where an Appellate Court has determined an issue

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of fact without a proper consideration of the evidence, it is within the power of the High Court, under section 103 of the Civil Procedure Code, to determine that issue, if there is sufficient evidence on the record for its determination. **O RAM UDIT v. BISHESHWAR**, 6 O. L. J. 551; 22 O. C. 312; 2 U. P. L. R. (J. C.) 22 **353**

s. 104 (f), Sch. II, paras. 15, 21—*Arbitration, reference to—Arbitrator deciding dispute upon his own knowledge—Award, validity of—Order directing award to be filed—Appeal, whether lies—Decree following upon order, effect of.*

An order directing an award to be filed is appealable. The fact that a decree is drawn up in terms of the award has not the effect of taking away the right of appeal against the order.

Where, in the absence of any agreement that an arbitrator should decide a dispute upon his own knowledge of the facts and without taking any evidence, an arbitrator does so decide a dispute, his act is fatal to the award on the ground of misconduct. **A LACHMI NARAIN v. SHEO NATH PANDEY**, 1 U. P. L. R. (A.) 177; 18 A. L. J. 78 **443**

s. 104 (2), O. XXI, r. 92, O. XLIII, r. 1 (j)—*Execution of decree—Sale set aside—Appeal, second, whether lies.*

Where an execution sale is set aside under Order XXI, rule 92, of the Civil Procedure Code and the right of appeal given by Order XLIII, rule 1 (j), of the Code is availed of, no second appeal is competent from the order passed by the Appellate Court. **L JIWAN SINGH v. SAWAN MAL**, 168 P. R. 919 **941**

s. 109—*Appeal to His Majesty in Council on interlocutory matter, whether permissible.*

Appeals on matters interlocutory in their nature should be allowed to be preferred to His Majesty in Council only when their decision will practically put an end to the litigation and finally decide the rights of the parties. **A MUHAMMAD SAJJAD ALI KHAN v. MUHAMMAD ISHAQ KHAN**, 1 U. P. L. R. (A.) 168; 18 A. L. J. 83 **504**

s. 109, O. XLV, r. 3—*Appeal to His Majesty in Council—Remand, order of, whether appealable—Mortgage—Registration, fraud effected in procuring, effect of, whether question of general importance.*

An appeal does not lie to the Privy Council as of right against an order of remand by the High Court, unless it is a final order within the meaning of section 109 of the Civil Procedure Code and the case is otherwise a fit one for appeal to His Majesty in Council involving a substantial question of law of general interest.

The question whether the fraud of a mortgagor alone in procuring the registration of the mortgage deed in a particular registration office, by representing that some portion of the mortgaged property was within the jurisdiction of that office, would vitiate the mortgage and disentitle the mortgagee, who was ignorant of the fraud, to enforce it, is a substantial question of law of general importance to satisfy the requirements of rule 3, Order XLV, of the Civil Procedure Code. **A DIRGPAL SINGH v. PAHLADI LAL**, 18 A. L. J. 137; 2 U. P. L. R. (A.) 99 **528**

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S. 109 (c)—*Appeal to His Majesty in Council—Question of fact—“Any decree or order,” meaning of—Judges arriving at opposite conclusions on vital question—Fitness of case for appeal.*

Under section 109 (c) of the Civil Procedure Code a High Court can, if persuaded that a case is a fit one for appeal to His Majesty in Council, grant leave to appeal in any case even upon a question of fact.

The words “any decree or order” in clause (c) of section 109 of the Civil Procedure Code do not mean any decree or order other than a decree or final order passed on appeal by a High Court or by any other Court of final appellate jurisdiction.

Where two Judges have arrived at diametrically opposite conclusions on the vital question on which the suit should be decided, the case is a fit one for appeal to His Majesty in Council. **O SHEO BAHADUR SINGH v. BENI BAHADUR SINGH**, 6 O. L. J. 664 **828**

S. 109—*Suit, value of, below Rs. 10,000—Question in dispute one of evidence—Appeal to His Majesty in Council—Leave, whether should be granted.*

Where the subject-matter of a suit is less than Rs. 10,000 in value, and the sole question upon which the decision of the case rests is one of evidence, the point is not one of general interest and importance to justify the grant of a certificate that the case is a fit one for appeal to the Privy Council. **A MUZAFFAR ALI v. MUHAMMAD JAWAD** **463**

SS. 109, 110—*Suit, value of, in excess of Rs. 10,000—Appeal, value of, below Rs. 10,000—Appeal to His Majesty in Council—Leave, whether can be granted—Misjoinder, whether question of law justifying appeal to Privy Council.*

Where the original value of a suit exceeds Rs. 10,000, but in an appeal by one of the defendants to the High Court, the contest is in respect of his liability for a sum less than Rs. 10,000, the case, for the purposes of an appeal to His Majesty in Council, does not come within the purview of the first paragraph of section 110, Civil Procedure Code, nor does it fall under the second paragraph of that section as involving any question regarding property of the value of Rs. 10,000 or upwards.

The question whether the omission to implead one of the plaintiffs in an appeal to the High Court is fatal to the appeal, is not a question of law of general importance involved in the appeal, to justify a certificate that the case is otherwise a fit one for appeal to His Majesty in Council. **A MUHAMMAD HASHIM v. RAM SAHAI** **450**

SS. 110, 149—*Appeal, dismissal of, for insufficiency of Court-fee—Affirmation of decree of lower Court—Leave to appeal to Privy Council—Substantial question of law—Refusal to allow deficiency of Court-fee to be made up, whether question of law.*

A decree of the High Court dismissing an appeal on account of insufficiency of Court-fee is one affirming the decree of the 1st Court within the meaning of section 110 of the Civil Procedure Code.

A refusal by the High Court to show any indulgence under section 149, Civil Procedure Code, and allow the deficiency in Court-fee to be made good is not a question of law within the meaning of

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section 110, Civil Procedure Code. **L SATTO v. AMAR SINGH**, 2 U. P. L. R. (L.) 27; 16 P. W. R. 1920; 1 P. L. R. 1920 **400**

S. 115, O. IX, r. 13—*Ex parte decree, setting aside of—Sufficient cause for non-appearance—Revision—High Court, power of interference of.*

Under Order IX, rule 13, of the Civil Procedure Code a Court can set aside an *ex parte* decree only when it is satisfied that the defendant was prevented by sufficient cause from appearing when the suit was called on for hearing.

Where the very basis which would give the Judge jurisdiction to set aside an *ex parte* decree does not, on his own order, exist, the High Court can interfere under section 115 of the Civil Procedure Code. **PAT RAMESH PRASHAD v. GULAB CHAUDHURY**, 1 P. L. T. 69 **965**

S. 115, O. IX, r. 8—*Government of India Act, 1915, (5 & 6 Geo. V, C. 61), s. 107—Suit, trial of—Commissioner, appointment of—Dismissal for default before Commissioner makes report, legality of—Appeal, whether lies—Revision—High Court, interference by.*

A Court is not competent to dismiss in default a suit in which a Commissioner is appointed and has not made his report, as such suit cannot be heard until the Commissioner has finished his work.

No appeal lies against such order of dismissal but the High Court can set it aside under section 115 of the Civil Procedure Code or under section 107 of the Government of India Act. **C SATINDRA NATH BANERJEE v. BANWARI MUKUNDA DASS** **568**

S. 115, O. XLI, r. 5—*Receiver, appointment of—Appeal—Order directing—Receiver not to act pending decision of appeal, validity of—Revision, whether lies.*

An order made by an Appellate Court on an appeal against an order appointing a Receiver, directing the Receiver not to take any steps in regard to, or exercise any dominion over, the property till further orders, is an order made in the exercise of jurisdiction vested in the Court by law, and the High Court has no power to interfere therewith under section 115 of the Civil Procedure Code.

Where a Receiver is appointed by writ, it is open to the Appellate Court, on an appeal against the order of appointment, to stop the issue of the writ pending the decision of the appeal, or, if the writ has been issued, to direct the Receiver through the Court which appointed him not to take any steps in compliance with the writ of appointment. **PAT MULCHAND SINGH v. TARNI PRASAD SINGH**, 4 P. L. J. 642; (1920) PAT. 40 **222**

S. 115—*Revision—Error of law—High Court, interference by—Rent, suit for, dismissal of, on ground that whole holding was not described in plaint, whether error of law.*

The High Court will not interfere under section 115, Civil Procedure Code, with a mere error of law.

The dismissal of a suit for rent on the ground that the holding of which rent is claimed consisted of two plots but only one was described in the plaint, is an error of law. **C ABINASH CHANDRA CHOUDHURY v. OSMAN BISWAS** **757**

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S. 115—Revision—Failure to decide plea, whether refusal to exercise jurisdiction. See **BENGAL TENANCY ACT**, s. 153 (a) **662**

S. 115, scope of—Revision, interference in, when permissible—Jurisdiction, question of.

The application of section 115 of the Civil Procedure Code is very limited and its provisions must be construed strictly.

A material irregularity or illegality is not in itself a sufficient ground for revision under clause c) of section 115 of the Civil Procedure Code. There must have been at the same time a wrong or irregular exercise of jurisdiction. **U. B. MA E KO v. MA PWA HMI**, 3 U. B. R. (1919) 179 **501**

S. 144—Decree awarding costs—Costs realised—Decree reserved—Restitution—Court, duty of.

A party realising costs awarded to him under a decree must refund the amount on reversal of the decree, quite apart from the fact that the property in the suit was given to a charity or applied to any other purpose, as the Court is bound, under section 144 of the Civil Procedure Code, to restore the parties to the position which they would have occupied but for the decree which was subsequently reversed. **A ISHRI MAL v. UMRAO SINGH** **816**

S. 144, O. II, r. 2—Restitution, whether can be ordered in case not falling under s. 144—Application for restitution—Suit, subsequent, for mesne profits, whether barred—Limitation Act (X of 1908, Sch. I, Arts. 109, 181—Injunction, temporary, possession under, whether wrongful—Application for restitution—Limitation applicable.

A Court has inherent power to order restitution in a case not covered by section 44, Civil Procedure Code, for the obvious reason that where a Court by a temporary injunction deprives a person of what he is legally entitled to, it should *ex debito justitiæ* restore that which he has thus lost and also compensate him for the profits which he has been precluded thereby from earning.

Order II, rule 2, Civil Procedure Code, has no application to a case to which section 144 applies. A suit, therefore, for mesne profits following on an application for restitution to possession is not precluded.

Possession under a temporary injunction is not wrongful for the purposes of Article 109 of Schedule I to the Limitation Act, and as that article is confined to suits, it is inapplicable to an application for restitution. Article 181 provides the period within which such an application must be made. **N RADHA v. SAKHU** **664**

S. 151, O. XLIV, r. 1—Appeal, presentation of, with proper Court-fee. Additional Court-fee called for—Application to continue appeal as pauper, maintainability of—Limitation Act (IX of 1908, Sch. I, Arts. 171, 181.

Even if an Appellate Court has power under section 151, Civil Procedure Code, to allow an application by an appellant to continue his appeal as a pauper, such power should be exercised subject to the conditions imposed by the proviso to Order XLIV, rule 1, i. e., it should be rejected where, from a perusal of the memorandum of appeal, there is no reason to think that the decree is contrary to law

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or some usage having the force of law or is otherwise erroneous or unjust.

Quære.—Whether an Appellate Court has jurisdiction to allow an appellant to continue as a pauper an appeal originally filed with the prescribed Court-fee.

Obiter.—An application for permission to continue an appeal as a pauper would probably be governed by Article 181 of Schedule I of the Limitation Act. **M SOLAIYAPPA CHETTY v. LAKSHMANAN CHETTY**, 10 L. W. 659; 38 M. L. J. 146; (1920) M. W. N. 277 **761**

S. 151, applicability of—Appeal heard after death of respondent—Application to set aside proceedings—Inherent power of Court—Remedy, proper.

Section 151 of the Civil Procedure Code cannot be invoked in aid of an application to an Appellate Court, asking that proceedings before it in an appeal be set aside as a nullity on the ground that on the date of hearing of the appeal the respondent was not living. The correct procedure is to apply, within the period of limitation, for a review of the judgment passed in the appeal. **N GANGADHAR v. JAGANNATH** **284**

S. 151, O. IX, r. 13—Ex parte decree, setting aside of—Bona fide mistake, whether sufficient cause—Inherent power of Court, exercise of.

A Court is not confined to a narrow construction of the expression "prevented by sufficient cause" in Order IX, rule 13, of the Civil Procedure Code: it has inherent power to set aside an *ex parte* decree in certain circumstances.

A *bona fide* mistake as to the date of hearing is a sufficient cause for setting aside an *ex parte* decree. **L B CHRISTENSEN v. MITCHELL**, 12 BUR. L. T. 158 **44**

S. 152—Amendment of decree—Appeal, whether lies.

There is no appeal from an order passed under section 152 of the Civil Procedure Code. **A MAHESH PRASAD SINGH v. BUDHWANTI**, 2 U. P. L. R. (A.) 70 **387**

S. 152—Decree, mistake in, as to costs—Application to rectify mistake—Court, power of, to correct decree.

An application to correct a decree in the matter of costs is correctly made under section 152 of the Civil Procedure Code. **N KRISHNA v. MAHADEO** **821**

O. I, r. 8—Suit by community with respect to *akhra*, maintainability of. See **HINDU LAW—Akhra** **742**

O. I, r. 10, scope of. See **EVIDENCE ACT**, s. 114 (g) **636**

O. VII, r. 18 (2)—Documents produced by plaintiff, whether can be used to cross-examine his own witnesses—"Defendant's witnesses", meaning of—Guardians and Wards Act (VIII of 1890, s. 27—Guardian, whether can ratify unauthorised act of previous guardian—Arbitration—Compromise approved by arbitrator, whether award.

Where documents containing depositions of witnesses in a suit, having some bearing on the subject-matter of the suit in which they are

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produced, are tendered by the plaintiff after the filing of the plaint, but before any of the witnesses are examined, he is entitled to cross-examine witnesses on the basis of the documents, even though the witnesses may have been cited on his behalf.

The expression "defendant's witnesses" in rule 18 (2) of Order VII of the Civil Procedure Code includes witnesses who have turned hostile to the plaintiff, and may be treated as the adversary's witnesses.

A guardian appointed under the Guardians and Wards Act cannot ratify the unauthorised acts of a former guardian; this can be done by the minor alone on attaining majority.

The mere approval of a compromise arrived at between the parties before an arbitrator is not an award. **N SHANKAR v. GOVINDA** 311

O. VIII, r. 3—Pleadings—Mortgage-deed, denial of, effect of—Attestation, whether must be proved.

By putting a plaintiff to proof of the mortgage-deed set up by him, the defendant must be taken to put the plaintiff to proof of its execution, which includes its signing and attestation. **O MUHAMMAD IBRAHIM v. ALI NABI**, 6 O. L. J. 600 107

O. XII, r. 6, order under, whether justified on ambiguous admission in written statement. See **LETTERS PATENT (CAL.)**, CL. 15 836

O. XVI, r. 1—Appeal filed without copy of decree, effect of.

A petition of appeal filed without a copy of the decree appealed against is not valid as an appeal. **Pat CHATURBHUI SAHAY v. MUHAMMAD HABIB** 36

O. XXI, rr. 2, 16—Assignment of decree—Enquiry as to character of assignment, whether permissible—Benamidar assignee, whether can execute decree.

On an application for execution of a decree by the transferee thereof it is permissible to enquire whether the transferee is really a benamidar for the judgment-debtor.

Where the transferee of a decree is found to be a benamidar for the judgment-debtor, the Court is bound by Order XXI, rule 16, of the Civil Procedure Code to refuse execution in his favour. **L GURDITTA MAL v. PARTAP SINGH**, 2 U. P. L. R. (L.) 42 944

O. XXI, r. 2—Execution of decree—Satisfaction—Admission of part satisfaction by decree-holder, effect of—Certification of payment, form of—Admission of decree-holder recorded by Court, whether sufficient.

Where a decree-holder admits part satisfaction of his decree, the Court is bound to recognise the fact, and in the absence of any explanation why his admission should not be considered as representing the facts, the judgment-debtor ought not to be put to proof of the alleged payment.

There is no particular form under rule 2 of Order XXI of the Civil Procedure Code in which a decree-holder must certify payment to the Court. A mere admission by him recorded by the Court is legally sufficient. **GAMEN SHAH v. JHANGI RAM**, 55 P. L. R. 1919 257

O. XXI, r. 2—Mortgage decree—Payment made to mortgagee out of Court—Certification, absence of—Payment, whether can be pleaded as bar to execution of final decree.

Where in a mortgage suit the parties enter into

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an agreement before the preliminary decree is passed, and a payment under such agreement is made out of Court to the mortgagee, before the final decree is passed, such payment falls within the scope of rule 2 of Order XXI of the Civil Procedure Code, and unless it is certified to the Court as required by that rule, it cannot be pleaded as a bar to the execution of the final decree.

The expression "the Court whose duty it is to execute the decree" in rule 2 of Order XXI of the Code merely indicates the Court to which certification is to be made, and in the case of a preliminary decree in a mortgage suit, the Court which is to receive the money payable under it is clearly the Court indicated. **M SAMBASIVA AIYAR v. THIRUMALAI RAMANUJATHATHACHARIAR**, 37 M. L. J. 356 137

O. XXI, rr. 2, 16—Transfer of decree, application for, recognition of—Uncertified payment out of Court, plea of, sustainability of.

An uncertified adjustment cannot be considered by the Court as a ground for refusing to recognise the transfer of a decree and where the transferee-decree-holder applies for execution, the Court has no discretion to refuse execution on the ground that there has been an adjustment though not certified to the Court. **M ANANTHA RAMA AIYAR v. KUMARASAWAMI PANDARAN**, 10 L. W. 179 922

O. XXI, r. 15, scope of. See **ANTE**, s. 48 924

O. XXI, r. 17—Execution of decree—amendment of application for, whether step-in-aid. See LIMITATION ACT, SCH. I, ART. 182 (5) 933

O. XXI, r. 36—Execution of decree—Property in possession of mortgagee—Delivery of possession, effect of—Mortgage by several mortgagors—Redemption by one co-mortgagor—Redeeming co-mortgagor, rights of—Remedies of mortgagee, whether can be used—Contribution, liability of co-mortgagors for.

The language of Order XXI, rule 36, of the Civil Procedure Code is wide enough to include delivery to a person while the property is in the rightful possession of a mortgagee, but such delivery is in fact no delivery at all and has no effect beyond being a notice to the mortgagee that the decree-holder is entitled to redeem.

A co-mortgagor paying off a mortgage is not the successor-in-interest of the mortgagee in every respect, but for the purpose of enforcing his right of contribution against his co-mortgagors he is entitled to all the securities of the mortgagee. He can take advantage of a decree in favour of the mortgagee that the mortgage was good and existed, and he is not precluded from doing so by the fact that he does not admit the decree to be a right decree.

Under section 95 of the Transfer of Property Act, where one of several mortgagors redeems the mortgaged property and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors for his proportion of the expenses incurred in redeeming the mortgage. The section contemplates that the entire share of each co-mortgagor must be treated as one unit for the purposes of contribution, so that a co-mortgagor

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cannot ask to redeem separate fractions of his share.
O LACHMI NARYAN v. RAJ NARAYAN, 22 O. C. 278

O. XXI, rr. 58, 59, 60, 61, 63, 269
scope of—Claim proceedings—Order regarding possession only and not adjudicating on title, effect of—Order on claim petition, when and how far binds judgment-debtor—Payment of decretal amount after one year from date of order, effect of—"Possession", "conclusive", meanings of.

A judgment-debtor will not be bound by an order on a claim petition unless he has been a party to it and also unless the order in terms adjudicates on his title. Where the only matter adjudicated on by the claim order is as to who is in possession and the conclusive effect predicated by Order XXI, rule 63, Civil Procedure Code, only affects possession and not the title, the order does not bind the judgment-debtor even though he is a party and actively contests the claimant's right, and the judgment-debtor or his heirs are not bound to sue to establish their title within a year of the date of the order.

Per *Seshagiri Aiyar, J.*—The scope of Order XXI, rules 58 to 61, Civil Procedure Code, should be restricted to concluding the parties regarding the right to attach the property in execution, and not to finally determine the rights of the parties to the property itself.

The term "possession" in Order XXI, rule 60, of the Civil Procedure Code signifies bare possession and not possession indicative of title.

Quære.—Whether a payment of the decree amount after a year from the date of the adverse order has the same effect as payment within a year and makes the order spend itself out.

Per *Bakewell, J.*—The meaning of the word 'conclusive' in Order XXI, rule 63, Civil Procedure Code, is that the realization of the attached property shall proceed or be stayed as directed by the order of Court and that there shall be no appeal therefrom except as prescribed by the rule. If the attached property be sold in pursuance of the order, then the purchaser will take it free from or subject to the rights asserted by the claimant or objector as determined by the Court.

Quære.—Whether if the attachment be raised the execution proceedings simply come to an end or there is an adjudication as to the title of the judgment-debtor. **M VEDALINGAM PILLAI v. VEERATHAL**, 37 M. L. J. 547; 26 M. L. T. 513; (1920) M. W. N 77

O. XXI, r. 78—Execution of decree— 530
Sale of goods—Goods not answering description—Purchaser, remedy of—Consideration, failure of—Suit for recovery of price paid, maintainability of.

Where goods offered for sale, whether in execution of a decree or privately, are described as of a particular denomination, and every circumstance points to the buyer having contracted for the specific goods produced as described, but the goods tendered do not answer that description, the purchaser is entitled to reject them, and, if he has paid for them, to recover the price as money had and received for his use. **N TUKARAM v. DEOSI** 315

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O. XXI, r. 89—Execution of decree—
Sale, application to set aside, whether can be made to officer conducting sale.

An application under Order XXI, rule 89, of the Civil Procedure Code to set aside an auction sale must be made to the Court.

The Collector or other officer conducting the sale is not the "Court" within the meaning of Order XXI, rule 89 of the Civil Procedure Code. Therefore, an application under that rule made to the Collector or other officer cannot be considered as having been properly made. **B TIPANGAYDA v. RAMANGAYDA**, 22 Bom. L. R. 35; 44 B. 50

O. XXI, r. 89—Private sale after Court 670
auction but before confirmation—Right of purchaser and judgment-debtor to set aside sale—"Owning the property," meaning of.

A purchaser at a private sale from a judgment-debtor after the Court auction but before its confirmation is entitled to apply to set aside the sale under Order XXI, rule 89, Civil Procedure Code, but the judgment-debtor who has parted with his rights is debarred from so applying.

The words "owning the property" in rule 89, Order XXI, of the Civil Procedure Code mean owning on the date of the application and not owning on the date of the Court auction sale.

Per *Spencer, J.*—When both the judgment-debtor (who has sold the property after Court auction) and the private purchaser jointly apply to set aside the sale, there is no reason to refuse their joint application. The right to apply depends on whether the judgment-debtor has actually sold his interest unconditionally on the sale being set aside and has thus divested himself of all further interest in the property or has only agreed to sell it on that condition. **M GANTASOLA JAGANNADHAN v. THATHAYARTHI RAMABRAHMAN** 753

O. XXI, rr. 90, 92, applicability of. 508
See MADRAS ESTATES LAND ACT, s 101

O. XXI, r. 90—Execution of decree—
Sale, application to set aside, made after statutory period. See LIMITATION ACT, SCH. I, ART. 180 66

O. XXI, r. 92, O. XXXIX, r. 1—
Injunction by inferior Court to superior Court to stay sale, effect of—Injunction, when can be issued—Sale, when to be confirmed—Stay order, rules as to, effect of, whether applicable to injunctions—Sale in ignorance of injunction, whether irregularity—Proclamation of sale, notice of.

An order by an inferior Court to a superior Court to stay a sale does not take away the jurisdiction of the latter Court to sell, especially where an appeal lies to the superior Court from that order.

A prohibitory order by way of injunction can be issued so long as the property in dispute is in danger of being wrongfully sold in execution of a decree, but once it is sold no such order can be passed.

A Court is bound under Order XXI, rule 92, Civil Procedure Code, to confirm a sale after it dismisses an application to set it aside.

The rule that a stay order issued by an Appellate Court suspends the power and jurisdiction of the executing Court to conduct further proceedings from the moment the order of the superior Court is passed, cannot be extended to the case of an

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injunction passed under Order XXXIX, rule 1 of the Civil Procedure Code.

A sale held in ignorance of an order by way of injunction staying the sale is an irregularity, but the sale will not be set aside unless the judgment-debtor has sustained substantial injury by reason of such irregularity.

A judgment-debtor who sets up another to file an objection to a sale proclamation and himself files an affidavit in support of an application to stay the sale, cannot be said to be ignorant of the proclamation. **N DHARAMCHAND V. MESSRS. MIT-UI BUSSAN KAISHA & Co.** 928

— **O. XXI, r. 101**, when conclusive. See CIVIL PROCEDURE CODE, s. 11 276

— **O. XXII, rr. 4, 11**—Appeal—Death of one of several respondents—Legal representatives of deceased not brought on record, effect of—Abatement of appeal, whether partial or total.

Ordinarily an appeal does not abate in its entirety on the death of one of several plaintiffs-respondents because of the failure of the appellant to revive it against the representatives of the deceased: the abatement only takes effect as against the latter. But from the nature of the suit the result may follow that the appeal has thereafter become imperfectly constituted, so that the appellant can no longer invite the Court to adjudicate upon the matters in controversy.

Where for instance the hearing of such an appeal would result in two contradictory declarations in the same suit, the Court cannot hear the appeal on the merits, in other words, the appeal abates in its entirety. **C KALI DAYAL V. NAGENDRA NATH**, 30 C. L. J. 217; 24 C. W. N. 44 822

— **O. XXII, r. 9**—Abatement of suit, effect of—Appeal, whether lies—Application to set aside abatement, rejection of—Right of judgment-creditor of deceased plaintiff, whether affected by abatement order.

An order of abatement is a judgment and should be followed up by a decree. It is also appealable as a decree.

An order of abatement operates as a judgment in favour of the defendant and the only course open to a legal representative of the deceased plaintiff to escape the effect of the abatement order is to apply to set aside the abatement. If he does not succeed in vacating the judgment and so long as the defendant continues in possession, the order of abatement is conclusive of the defendant's rights to the property.

A person who has obtained a decree against the deceased plaintiff stands in no better position and is equally concluded by the abatement order. Though the principle of *res judicata* may not apply to him he has to displace a chain in the title of the defendant, and has to establish against a party in possession and in whose favour an order of Court has been passed that that party is not entitled to retain possession as owner of the property.

The prohibition against suit applies equally to execution and the decree-holder cannot execute the decree against the property as if it belonged to the judgment-debtor. **M BAHIMUNNISSA BEGAM V. SRINIVASA AYYANGAR**, 11 L. W. 139; 38 M. L. J. 268 565

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— **O. XXXII, rr. 1, 4**—Agra Tenancy Act (II of 1901), s. 63—Ejectment suit—Minor plaintiff—Next friend, wrong person named as—Substitution after expiry of limitation for suit, whether permissible.

Where in a suit for ejectment a minor is included among the plaintiffs under the guardianship of a person and there is a dispute between that person and another as to who is the minor's guardian resulting in the latter being substituted as the guardian, the suit as originally filed is not faulty in its citation of plaintiffs, even though the substitution is made after the period prescribed for the filing of the suit has expired. **UPB R ISHWARI CHAUDHARI V. DUKHI**, 1 U. P. L. R. (B. R.) 43 575

— **O. XXXII, r. 4 (2)**—Guardian ad litem—Person appointed guardian who has failed to furnish security, whether can act as guardian ad litem—Minor, representation of.

Where upon the application of a person he is appointed the guardian of a minor conditional on his furnishing security in a specified amount, and he fails to furnish the security, in consequence of which the necessary certificate is not issued to him, he cannot be regarded as a proper guardian ad litem of the minor in a suit and the minor cannot be said to be properly represented in a suit by such person unless the latter is formally appointed guardian ad litem of the minor. **C BHUTNATH NAG V. SATYA KINKAR NAG** 368

— **O. XXXIII, r. 5**—Application for leave to sue in forma pauperis, rejection of—Construction of document filed with plaint—Adjudication on merits, legality of—'Cause of action,' meaning of—Jurisdiction.

The expression 'cause of action' used in clause (d) of rule 5 of Order XXXIII, Civil Procedure Code, means a subsisting cause of action at the date of the application to sue in *forma pauperis*, that is, one which has not been extinguished by limitation. In deciding this point the Court must, however, confine itself to the allegations in the petition and must not go beyond them.

A Court should not reject an application under Order XXXIII, rule 5, of the Civil Procedure Code on the ground that on the construction of a document filed along with it no cause of action is disclosed. The construction of the document, whether easy or difficult, should be reserved for the trial of the suit. **M NATESA AIYAR V. MANOYYA AIYAR**, 10 L. W. 539 462

— **O. XXXIV, rr. 2, 3**—Mortgage—Preliminary decree in foreclosure suit—Application to extend time for payment—Application made after time fixed—Sufficient cause is question of fact.

An application to extend the time fixed by a preliminary decree for foreclosure made after the expiry of that time is entertainable.

The question of the sufficiency of cause for granting an extension is a question of fact to be decided according to the circumstances of each particular case and the discretion of the Court in dealing with the same. **N KANHAI SINGH V. KARU** 860

— **O. XXXIV, rr. 7, 8**—Mortgage—Redemption, decree for—Preliminary decree, whether can be executed—Payment after expiry of period

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fixed but before final decree, effect of—Final decree, whether must be passed—Procedure.

The preliminary decree in a suit for redemption is provisional and until it is made final, redemption cannot be permitted.

Order XXXIV, rule 8, of the Civil Procedure Code provides for an extension of time for good cause shown, and ordinarily where a mortgagor decreed-holder wishes to pay in the redemption money after the time specified but before the final decree, the correct course for him is to apply for an extension of time. The Court may, however, treat an application to pay in the money as tantamount to an application for extension of time. But the Court is not absolved from the necessity for passing a final decree and there is no provision for the execution of the preliminary decree before it has been made final. **U B MAUNG TUN MAUNG v. MA YWE**, 3 U. B. R. (19 9) 1-3 **507**

O. XXXIV, r. 8—Partition, suit for—Joinder of alienee of family property—Decree for possession of portion of alienated property on payment of certain amount within specified time—Decree, nature of—Redemption decree—Failure to pay amount on due date—Court, power of, to enlarge time.

In a suit for partition of joint family property, the alienee of the family property was impleaded as a party. The Court found the alienation binding on the family to the extent of Rs. 800 and directed delivery of possession of a portion of the alienated property to the plaintiffs on their paying Rs. 400 to the alienee within a specified date. The plaintiffs failed to pay the amount within the time specified but paid the amount subsequently and applied for and got possession of the property decreed. The District Munsif subsequently reversed his own order on the alienee's application, holding that he had no jurisdiction to enlarge the time. The order was confirmed on appeal:

Held, that the decree directing delivery to plaintiffs was in effect a redemption decree and the Court had, therefore, power to enlarge the time for payment under Order XXXIV, rule 8, Civil Procedure Code. **M IDUMBU PARAYAN v. PETHU REDDY**, 37 M. L. J. 695; 11 L. W. 25; 43 M. 357 **451**

O. XXXIX, r. 1—Injunction, temporary, to restrain marriage, whether can be granted.

A Muhammadan wife obtained a declaration against her husband that she had ceased to be his wife by reason of the fact that she had exercised against him the option of puberty given by the Muhammadan Law. The husband appealed from the decree, and, during the pendency of the appeal, applied for a temporary injunction restraining certain relatives of his wife, who were parties to a cross-suit by the husband for restitution of conjugal rights which had been dismissed and was also the subject of an appeal, from giving the woman away in marriage before the disposal of the appeals:

Held, that the application was not maintainable. **A MUHAMMAD YAMIN v. RAZIA BEGAM**, 17 A. L. J. 1138; 1 U. P. L. R. (A.) 185; 42 A. 134 **223**

O. XXXIX, r. 1—Injunction, temporary, when to be granted—Interlocutory injunction, when should be granted—Balance of convenience—Irreparable injury, what is—Status quo, preservation of.

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In granting a temporary injunction to a plaintiff all that is necessary to see is whether the plaintiff has shown a *prima facie* case in support of the title asserted by him.

An interlocutory injunction should only be granted in cases where property, which it is essential should be kept in its existing condition during the pendency of the suit, is "in danger of being wasted, damaged or alienated."

In granting an *interim* injunction it is the duty of the Court to see on which side is the balance of inconvenience if the injunction do not issue, and to bear in mind the important principle of retaining immovable property *in statu quo*.

By the term 'irreparable injury' it is not meant that there must be no physical possibility of repairing the injury, all that is meant is that the injury would be a material one and one not adequately reparable by damages. **C BEGG DUNLOP & Co. v. SATIS CHANDRA**, 23 C. W. N. 677; 29 C. L. J. 534; 46 C. 1001 **862**

O. XXXIX, r. 2—Temporary injunction, grant of, principles governing—Remedy, other, available, effect of—Contract, breach of—Arbitration, reference to—Injunction restraining arbitration proceedings, when should be granted

A temporary injunction should not be granted unless the applicant satisfies the Court that its interference is necessary to protect him from irreparable or at least serious injury before the legal right can be established at the trial

If there is any other remedy open to the applicant by which he can protect himself from the consequences of the injury apprehended, a temporary injunction will not be granted

Where one party to a contract alleges a breach of the contract and refers the matter to arbitration and the other party brings a suit for a declaration that it is not liable upon the contract, then if the existence of the contract itself is denied, no temporary injunction should be granted restraining the arbitration proceedings, but if the contract is impeached on grounds of equity, such as fraud or misrepresentation, a temporary injunction should ordinarily be granted. **L SOHAN LAL-CHIMAN LAL v. JAI NARAIN BABU LAL**, 2 U. P. L. R. (L) 30 **546**

O. XL, r. 1, O. XLIII, r. 1 (s)—Order allowing application for appointment of Receiver—Appeal, whether lies.

An order allowing an application for the appointment of a Receiver, without actually appointing any one to that office, is not appealable. Rule 1 of Order XL of the Civil Procedure Code contemplates an order appointing a Receiver. **A MOHAMED ASKARI v. NIRAR HUSAIN**, 18 A. L. J. 212; 2 U. P. L. R. (A.) 95 **520**

O. XL, rr. 3, 4, O. XLI, r. 1 (s)—Order holding Receiver liable for sum of money—Appeal, whether lies—Receiver appointed by subordinate Court—High Court, power of, to examine account

An order holding the Receiver of an estate liable to the estate for a certain sum of money is not appealable, unless it is accompanied by an order under rule 4 of Order XL of the Civil Procedure Code.

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A Receiver appointed by a Court subordinate to the High Court is not an officer of the High Court, and that Court has no jurisdiction to examine his accounts in order to ascertain his liabilities. **PAT** GANESH LAL v. KUMAR SATYA NABAYAN SINGH, 4 P. L. J. 636; (1920) PAT. 35 **207**

O. XLI, r. 1, O. XLVII, r. 1—Appeal, dismissal of—Review, admission of appeal on—Grounds not taken in original memorandum of appeal, whether can be urged at hearing.

Grounds taken in an application for review of an order dismissing an appeal, which were not urged in the memorandum of appeal as originally filed, cannot be urged in support of the appeal after its re-admission upon the application for review.

C SASADHAR BHATTACHARJEE v. ARUN KUMAR BHATTACHARJEE **631**

O. XLI, rr. 4, 33—Appellate Court, power of, to make order appropriate for ends of justice. See EVIDENCE ACT, s. 114 (g) **636**

O. XLI, r. 17—"Appear," meaning of—Court, whether bound to wait for Pleaders—Practice.

The word "appear" in rule 17 of Order XLI of the Civil Procedure Code does not simply mean that the party or his Pleader are physically present in Court and, therefore, can be seen by the eye, but it has a much more technical meaning, that is to say, that they are actually present in Court for the purpose of conducting the case.

It is desirable, if possible, to accommodate parties to some extent if their Pleaders happen to be absent in another Court and have a chance of attending within a short time so as not to disturb the business of the Court, but a Judge is not bound to wait.

PAT RAMDHAN TEWARI v. RISHUN PRAGASH NARAIN SINGH, 5 P. L. J. 17; 1 P. L. T. 156 **715**

O. XLI, r. 22—Appeal—Cross-objections—Respondent, claim against by co-respondent, whether maintainable.

Under Order XLI, rule 22, of the Civil Procedure Code one respondent in an appeal can claim relief against a co-respondent by way of a memorandum of cross-objections. **O** JAGANNATH v. HANUMAN SINGH, 6 O. L. J. 544, 2 U. P. L. R. (J. C.) 27 **332**

O. XLI, r. 22—Appellant, admission of, that appeal does not lie, effect of—Cross-objections, whether can be heard.

An admission by an appellant at the hearing of the appeal that the appeal does not lie amounts in effect to a withdrawal of the appeal under Order XLI, rule 22, Civil Procedure Code, and the respondent is in such a case entitled to be heard on his cross-objections. **M** VENKATA PERUMALLA PILLAI v. MARAPUDI VENKATASWAMI NAIDU, 10 L. W. 605 **506**

O. XLI, rr. 22, 33—Cross-objection against defendant not party to appeal, whether can be urged—Failure of litigant to avail himself of ordinary remedy—Court, whether can give him relief.

Plaintiffs sued two defendants for recovery of a certain sum alleged to be due on book accounts and obtained a decree against defendant No. 2 alone, who appealed impleading the plaintiffs alone as respondents. The plaintiffs filed cross-objections

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and in their memorandum of objections impleaded defendant No. 1 also among the respondents. No notice was, however, issued to him. The Appellate Court passed a decree making the defendant No. 1 jointly liable with defendant No. 2. Against this decree defendant No. 1 preferred a second appeal to the High Court:

Held, that as defendant No. 1 was no party to the appeal, no cross-objection under Order XLI, rule 22, of the Civil Procedure Code could be entertained against him and the lower Appellate Court was not justified in passing a decree against him.

The powers given by Order XLI, rule 33, of the Civil Procedure Code are discretionary and no Court would be justified in making use of that rule to pass a decree in favour of a litigant who has failed to avail himself of the ordinary remedy by way of appeal. **L** ILAHI BAKHSI v. JAWINDA MAL **971**

O. XLI, r. 27—Appellate Court, power of, to take additional evidence, when to be exercised.

Rule 27 (b) of Order XLI of the Civil Procedure Code does not mean that in order to enable an Appellate Court to pronounce judgment in favour of a particular party, additional evidence should be admitted in appeal; it means only that where it is impossible to pronounce judgment at all on the evidence, the Court may call for a witness. **PAT** JRINGUR JHA v. BADRI SAHU **666**

O. XLV, r. 13—Partition suit—Preliminary decree—Appeal to His Majesty in Council—Proceedings for final decree, whether can be stayed—Execution proceedings, when should be stayed.

Inasmuch as proceedings under a preliminary decree are not proceedings in execution of a decree, but are proceedings in the suit for a final decree, an application to stay such proceedings cannot be entertained under the provisions of Order XLV, rule 13, Civil Procedure Code.

Where an appellant is pursuing his appeal expeditiously, the Courts should be very chary of removing property from his possession and placing it in the hands of another who may ultimately be found never to have been entitled to it. **A** RAM NARAIN v. HARNAM DAS, 1 U. P. L. R. (A.) 166; 18 A. L. J. 142 **561**

O. XLVII, r. 1—Review, application for—Appeal, pendency of, whether bar to hearing of review application—Appeal, disposal of, effect of.

The fact that an appeal is pending against a decree is no ground for rejecting an application to review the judgment on which such decree is based.

Petitioner applied to the trial Court for a review of its judgment, and about the same time preferred an appeal against the same order. The trial Court refused to hear the application for review, on the ground that an appeal was then pending against the order which it was asked to review. Petitioner then moved the High Court in revision and during the pendency of his petition, his appeal was disposed of:

Held, that though the order refusing to hear the application for review was erroneous, yet as upon disposal of the appeal the decree of the trial Court no longer existed, the final decree being that of the Appellate Court, there was no order which the High

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Court could set aside. **A** RAM PARSAN UPADHYA v. NAGESHAR PANDE, 18 A. L. J. 135; 2 U. P. L. R. (A.) 43 **764**

Sch. II, para. 17—Arbitration, reference to—Arbitrator refusing to act, effect of—Application to enforce agreement, maintainability of.

Where an arbitrator definitely refuses to act, no matter for what reason, the Court has no jurisdiction to entertain an application to enforce the agreement to refer the dispute to the arbitration of such arbitrator. **A** AHMAD NOOR KHAN v. ABDUR RAHMAN KHAN, 1 U. P. L. R. (A.) 167; 18 A. L. J. 76 **366**

para. 17 (4)—Arbitration, reference to—Parties inactive for six years—Reference, whether cancelled—Agreement to refer, whether can be filed.

On 24th December 1912 the parties, agreed to refer their differences to arbitration. On the 29th December 1912 they fell out and nothing was done under the agreement of reference for six years. After the lapse of that period one of the parties applied under paragraph 17 of Schedule II to the Civil Procedure Code to have the agreement filed;

Held, that the conduct of the parties, coupled with the long and unexplained delay, amounted to a cancellation of the agreement and that, therefore, the agreement could not be filed. **N** MADHAO KASHINATH v. SAMBASHIVA **126**

Commissioner of Police, Power of, to detain Police Officer. See CALCUTTA POLICE ACT, s. 3 **63**

Companies Act (VII of 1913), ss. 3, 164, 200—Winding-up referred to District Court—Contributories residing within jurisdictions of different High Courts—Procedure.

An order for the winding up of a company was made by the Punjab Chief Court, and under section 164 of the Companies Act, subsequent proceedings were taken in the Court of the District Judge of Lahore against contributories residing in districts within the jurisdiction of the Allahabad High Court. On an application to the Allahabad High Court by the Official Liquidator to enforce these orders:

Held, that the High Court had jurisdiction to enforce the orders by proceedings in execution before itself, or to authorise the Official Liquidator to apply to the various District Courts in respect of each of the persons against whom orders for contribution had been passed; and that as the balance of convenience was in favour of the latter course, the Official Liquidator was authorised to proceed accordingly. **A** In the matter of THE NATIONAL INSURANCE & BANKING CO. LTD, 1 U. P. L. R. (A.) 182 **384**

s. 76 (1)—General meeting, what is—Default in holding general meeting—Offence.

Section 76 of the Companies Act, 1913, does not differentiate between a general meeting and an extraordinary general meeting of a company. Where, therefore, an extraordinary general meeting of a company was held within fifteen months of the last general meeting, it was *held* that no offence had been committed under section 76 (1) of the Act. **A** LACHMI NARAIN v. EMPEROR, 2 U. P. L. R. (A.) 171; 21 C. L. J. 94 **494**

"Confession and avoidance", defence of, nature of. See POSSESSION **131**

Confession, retracted, value of. See EVIDENCE ACT, s. 24 **881**

Contract Act (IX of 1872), s. 3—Transfer of grant land in contravention of conditions of grant, whether within section. See CONSTRUCTION OF DOCUMENT **42**

s. 7—Acceptance, what amounts to—Proposal to purchase goods accompanied by price—Price credited by seller to purchaser's account—Acceptance, whether complete.

The acceptance of a proposal must be absolute and unqualified and a person making a proposal cannot impose on the party to whom it is addressed, the obligation to refuse it under the penalty of imputed assent, or attach to his silence the legal result that he must be deemed to have accepted it, but an acceptance may be made without express communication.

A written proposal for the purchase of goods, accompanied by a sum of money as the price thereof, conveyed by a purchaser to the seller and received by the latter, who credits the money so received to his account, amounts to a definite acceptance of the proposal and renders the seller liable in an action for damages in case of his failure to carry out the contract. **A** BISHUN PADU HALDAR v. FIRM CHANDI PRASAD & Co., 1 U. P. L. R. (A.) 183; 88 A. L. J. 73 **437**

ss. 11, 17—Evidence Act (I of 1872), s. 115—Minor, mortgage by, validity of—Fraudulent misrepresentation as to age, effect of—Estoppel.

A mortgage made by a minor is wholly void. A false representation made to a person who knows it to be false is not such a fraud as to take away the privilege of infancy.

There can be no estoppel where the truth of the matter is known to both the parties. **L** HARNAM SINGH v. NARAINA, 162 P. R. 1919; 2 U. P. L. R. (L.) 40 **876**

ss. 16, 74—Mortgage—Compound interest, whether penal—Undue influence—Hardship, relief on ground of.

In the absence of a finding that a contract to pay compound interest was brought about by undue influence on the part of the creditor, or that he had unduly taken advantage of his position in the matter, he cannot be deprived of the compound interest stipulated to be paid. The fact that the borrower failed to realise what the rate of compound interest would work out to in a few years or that he entered into an improvident bargain (unless it is an unconscionable one), would not entitle him to relief from a Court of Justice on the ground of hardship. **C** HIRENDRA KUMAR ROY v. DEBENDRA KUMAR DAS **558**

s. 23—Agreement opposed to Excise Law—License to sell liquor—Clause prohibiting sale by stranger—Partnership between licensee and stranger, legality of—Debts incurred by partners—Creditor, right of—Burden of proof.

Where a clause in a license for the sale of spirituous liquor prohibits sale by a stranger and the employment of an agent, the taking of a partner by the licensee, which has the effect of not only selling a portion of the business to him but of making him an agent for the sale of liquor, is illegal.

Where the carrying on of a business *prima facie* legal becomes *malum prohibitum*, the burden of proving that the prohibition was known to a creditor

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of the business is on the debtor. **M GANAPATHI BRAHMAYYA v. KURELLA RAMIAH**, 10 L. W. 476; 43 M. 141; 38 M. L. J. 123 **45**

s. 25 (2)—Bond, suit on—Consideration received during minority—Suit, whether maintainable—Interest, whether can be recovered—Provincial Small Cause Courts Act (IX of 1887), s. 25—Revision—High Court, power of interference of, extent of.

An agreement made by a person of full age to compensate a promisee who has already voluntarily done something for the promisor at a time when the promisor was a minor, falls within the terms of section 25, clause 2, of the Contract Act and is enforceable, but no interest can be recovered upon such an agreement.

Under section 25 of the Provincial Small Cause Courts Act the High Court has wider powers of interference than under section 115 of the Civil Procedure Code. **L PRABH DIAL v. SHAMBHU NATH**, 20 P. L. R. 1920 **436**

s. 62—Novation of contract—Collapse of substituted agreement, effect of, on original contract. See **LIMITATION ACT**, s. 19 **318**

s. 62—Settlement contract, whether discharges original contract See **ARBITRATION** **285**

s. 65, applicability of. See **C. P. TENANCY ACT**, s. 45 **794**

ss. 69, 70—Execution of decree against family properties—Attachment of self-acquired properties of member—Payment to avoid attachment—Reimbursement, right to.

Where a person shows that in execution of a decree against family property, properties belonging to him exclusively as his self-acquisition were threatened with attachment as family properties, and to prevent attachment he paid the amount of the decree, he is entitled to obtain a refund of the amount so paid. **M MUTHUSAMI ASARI v. ANGAYAKANNU ASARI**, 11 L. W. 115 **807**

s. 74—Mortgage—Interest, enhanced rate of, on default—Penalty—Compensation, whether can be awarded.

Where a mortgage-deed provides that on default of payment of interest the rate of interest payable on the loan would be enhanced, the enhanced rate is in the nature of a penalty and cannot be awarded. But in such a case some interest must be allowed as compensation. **L RAM CHAND v. JAGIRI MAL** **897**

s. 74—Mortgage—Interest, high rate of, in case of default—Penalty—Court, duty of—Reasonable rate.

A mortgage-deed provided that the principal sum should be paid within six months from the date of the mortgage and that in case of default interest at the rate of 37½ per cent. should be charged. In a suit on the mortgage interest at the rate of 37½ per cent. was claimed. The Court, however, held that the stipulation for payment of interest was by way of penalty and awarded interest at the rate of 12½ per cent. On appeal:

Held, that the decision was correct and that the rate of interest awarded was reasonable, but that interest at that rate should have been allowed up to the date fixed for payment and interest at 6 per

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cent after that date. **O KALI PRASAD v. MUHAMMAD YASIN KHAN**, 6 O. L. J. 666 **833**

ss. 134, 139, applicability of, to negotiable instruments—Principal and surety—Endorsement of promissory note—Suit against debtor, endorser and surety—Release of debtor during trial, whether exonerates surety—Negotiable Instruments Act (XXVI of 1881) s. 39.

The general rule regulating the relationship of principal and surety contained in sections 134 and 139 of the Contract Act applies to all cases of contract, including those relating to negotiable instruments.

In a suit on a promissory note endorsed over by the payee to the plaintiff against the debtor, endorser and another surety, the plaintiff exonerated the principal debtor:

Held, that there was a reservation of the plaintiff's intention to prosecute his remedies against the other two and that a decree could be passed against them.

Section 134 of the Contract Act does not, in terms, depart from the rule of English Law as to the reservation of remedies against the sureties. **M MURUGAPPA MUDALIAR v. MUNUSWAMI MUDALI**, 38 M. L. J. 131; (1920) M. W. N. 178; 11 L. W. 248 **758**

s. 178—Person employed to take delivery of goods, whether in possession of goods—Pledge by person in possession, validity of—Fraud of third person, effect of.

Where a person, to whom goods are consigned, employs another to take delivery, making over to him the relative documents for the purpose of obtaining delivery, the latter has possession, within the meaning of section 178 of the Contract Act, both of the documents and the goods they represent, and is in a position to make a valid pledge of the goods, inasmuch as he did not obtain them by means of fraud or of an offence within the meaning of the second proviso to the section.

The provision contained in section 178 of the Contract Act, so far as it goes, gives statutory effect to the principle that where one of two innocent parties must suffer for the fraud of a third, the loss should fall on him who enables such third party to commit the fraud. But it is unsafe to employ that principle as a separate and independent ground of decision. **C PROFULLA KUMAR BOSE v. KAMINI KUMAR ROY**, 23 C. W. N. 907 **224**

Contribution, liability of co-mortgagors for. See **CIVIL PROCEDURE CODE**, O. XXI, r. 36 **269**

, suit for—Costs, joint decree for—Decree realised from one of several judgment-debtors—Right to contribution.

Where in the case of a joint decree against several defendants costs are awarded to the plaintiff, and these are realised from one defendant alone, that defendant is entitled to maintain a suit against his co-defendants for contribution. **A RAMSARAN DAS v. SAGAR MAL** **370**

Construction of document—Mortgage—Future tense, use of, effect of—Contract Act (IX of 1872), s. 23—Lower Burma Land and Revenue Act (II of 1876), s. 18, rules framed under, r. 20 (3)—Mortgage of grant land without sanction of Deputy Commissioner, validity of.

Where from a document, construed as a whole, it

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appears that the intention of the parties was to effect a mortgage *in præsenti*, the mere fact that the future tense is used should not be construed as indicating that the parties intended the document to be a mere agreement to mortgage to be followed by an instrument of mortgage in due course.

A transfer of grant lands without the sanction of the Deputy Commissioner, in contravention of the conditions of the grant, renders the grant liable to resumption and the grantee to certain penalties, but it cannot be said that such transactions are forbidden by law, within the meaning of section 23 of the Contract Act.

A mortgage of grant lands without the sanction of the Deputy Commissioner is a valid mortgage of the right, title and interest of the mortgagor in the grant, but the mortgagee runs the risk of having his grant resumed. So long, however, as the Deputy Commissioner does not take action to resume the grant, the mortgage holds good and can be legally enforced. **L B PO MAUNG v. R. M. C. R. M. CHETTY**, 12 Bux L. T. 156 **42**

Co-sharers in well, rights of—Right to irrigate lands through lands belonging to co-sharer, extent of—Presumption.

Where several persons are joint owners of a common well, it is implied in their covenant of partnership in the well that each co-sharer shall have a right to take water through the more adjacent fields. The line of irrigation, once determined, cannot be altered at the caprice of any co-sharer, and it is a fair presumption that the shortest line of lead would be that selected by the co-sharers. **L JANG v. DOGAR**, 2 P. W. R. 1920; 2 U. P. L. R. (L.) 18; 12 P. L. R. 1920 **104**

Costs, award of, out of deceased plaintiff's estate—Discretion of Court. See CIVIL PROCEDURE CODE, s. 35 **118**

—awarded to plaintiff—Death of plaintiff—Attorney, whether can realise costs from opposite party.

Where costs are awarded to a party and he dies before they are realised, and his legal representatives are unable to pay his Attorney's costs, it is open to the Attorney to ask the Court for an order for direct realisation of his costs from the opposite party. **C HARNANDROY v. GOOTIRAM**, 46 C. 1070 **691**

Court-fee, refusal to allow deficiency in, to be made up—Whether question of law. See CIVIL PROCEDURE CODE, s. 110 **400**

Court Fees Act (VII of 1870), s. 7 (iv) (c), Sch. II, Art. 17—Suit for declaration that decree passed against plaintiff shall not affect him, whether maintainable—Prayer for general relief, effect of—Injunction, prayer for, whether necessary—Consequential relief.

The mere prayer for general relief is not necessarily a prayer for consequential relief so as to take the suit out of the class of suits for declaration only.

Plaintiff sued for a declaration that a certain decree being based on fraud shall not affect his rights and for any other relief which the Court might deem fit to grant. The Subordinate Judge, holding that this was a suit for a declaratory decree and other consequential relief, called upon the

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plaintiff to pay *ad valorem* Court-fee and on his failure to do so, rejected his plaint. The plaintiff appealed:

Held, (1) that the suit as brought was one for a declaration only;

(2) that a suit for a mere declaration was not competent in this case, unless followed up by a prayer for consequential relief by injunction or otherwise;

(3) that the Court ought to have allowed the plaintiff an opportunity to amend his plaint so as to include the necessary prayer for consequential relief by injunction or otherwise. **L BUA DITTA v. LADHA MAL**, 2 U. P. L. R. (L.) 37 **833**

ss. 7 (IX), 12—Civil Procedure Code (Act V of 1908), O. VII, r. 11—Suit dismissed for insufficiency of stamp—Appeal, whether lies—Sui for redemption or foreclosure for adjudged sum—Appeal—Court-fee payable.

An appeal lies from an order of a Court dismissing a suit or appeal on the ground that the plaint or memorandum of appeal is insufficiently stamped, where a question of law such as the interpretation of the Court Fees Act is involved.

In a suit for redemption or foreclosure of a mortgage where the question raised in appeal is the right to redeem or foreclose for an adjudged sum, the Court-fee payable on the memorandum of appeal will be governed by section 7, clause IX of the Court Fees Act, that is to say, will be according to the value of the principal mortgage money. If, however, the memorandum of appeal challenges the amount to be paid or received by the appellant, the fee will be assessed on the difference between the sum awarded (as payable or receivable) by the lower Court that and maintained as due in the memorandum of appeal. **O GUMANI v. BANWARI**, 22 O. C. 289 **733**

s. 19-C, scope of—Court-fees paid on Will—Death of beneficiary before full administration—Probate of beneficiary's Will—Court-fee, whether payable—“Estate,” meaning of.

The “estate” referred to in section 19C of the Court Fees Act means the property of a deceased person, and it is impossible to dissociate the identity of the person from the property in the meaning of the word.

Section 19C of the Court Fees Act only provides for cases where a fresh grant of Probate of a Will or Letters of Administration of the estate of the same person becomes necessary and the fees have already been paid in respect to the whole or part of the property comprised in the estate of the deceased person.

There is nothing in the wording of the section which can be so construed as to support the contention that when a beneficiary under a Will dies before the estate of the testator is fully administered and Probate is taken out of the Will of the beneficiary, then no Court-fees are required to be paid in respect of that portion of the beneficiary's estate which he has taken under the previous Will and in respect of which Court-fees have already been paid. **PAT BHAGWATI SARAN SINGH v. SECRETARY OF STATE**, 5 P. L. J. 36; (1920) PAT. 81 **703**

Criminal Procedure Code (Act V of 1898)

Penal Code (Act XLV of 1860), ss. 420, 477—Valuable security—Document presented to Sub-Registrar by executant but taken back before registration and destroyed—Civil suit filed—Criminal trial, whether advisable.

The petitioner executed a *kabala* in favour of the complainant and presented it for registration, but took it back from the Registrar before registration on the pretext that he could not understand whether it was a mortgage or a *kabala*, and having thus obtained possession of the document tore it to pieces. The complainant preferred a complaint and also instituted a Civil suit for specific performance of the contract. The Sub-Registrar did not complain. On the contrary when asked by the trying Magistrate to report on the case he reported in favour of the petitioner:

Held, that having regard to the circumstances of the case it was inadvisable that a charge under section 420, or section 477, Indian Penal Code, should be enquired into by a Criminal Court. **C HIBA LAL GHOSE v. MAKHAN LAL DAW**, 30 O. L. J. 175; 21 Cr. L. J. 16

ss. 4 (o), 190—Cattle Trespass Act (I of 1871), s. 20—Magistrate empowered to take cognisance of offences, whether can take cognisance of offence under s. 20, Cattle Trespass Act.

A Magistrate of the Second Class, who is authorised under section 190 of the Criminal Procedure Code to take cognisance of offences upon receiving complaints, has power to take cognisance of complaints under section 20 of the Cattle Trespass Act. **B EMPEROR v. VISHVANATHA VISHNU JOSHI**, 21 Bom. L. R. 1084; 44 B. 42; 21 Cr. L. J. 95

s. 46 (3)—Arrest of offender—Use of more force than is necessary. See PENAL CODE, s. 99

ss. 87, 89, 439—Absconder—Forfeiture of property—Application to set aside forfeiture—Proclamation, validity of, whether can be questioned—Failure to specify date of proclamation, effect of—Proclamation allowing less than thirty days for appearance, validity of—Revision—High Court, power of, extent of.

A person applying under section 89 of the Criminal Procedure Code to set aside an order of forfeiture of his property cannot contest the legality of the proclamation under that section, but there is nothing to prevent the High Court from considering it in the exercise of its revisional jurisdiction.

An order under section 87 (3) of the Criminal Procedure Code, stating that the proclamation was duly published but omitting to specify the date of the publication, cannot be considered as conclusive evidence that the requirements of section 87 have been complied with.

Where a proclamation under section 87 of the Criminal Procedure Code does not give thirty days for the appearance of the accused, the proclamation is invalid and the subsequent proceedings following upon it are liable to be set aside. **L EMPEROR v. MULTAN SINGH**, 32 P.R. 1919 Cr.; 21 Cr. L. J. 210

s. 101, whether applies to search warrant under Burma Gambling Act, s. 6. **See BURMA GAMBLING ACT, s. 6**

s. 103 (2), scope of. **See PENAL CODE, s. 187**

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ss. 107, 439—Order requiring security to keep the peace made without enquiry, legality of—Accused willing to give security, effect of—Revision, maintainability of.

It is illegal to make an order requiring a person to furnish security to keep the peace, without any inquiry as to whether he was likely to commit a breach of the peace, or was otherwise a proper subject for proceedings under section 107 of the Criminal Procedure Code.

The fact that a person has, in obedience to an order, expressed his willingness to furnish the security demanded to keep the peace, is no bar to his moving the High Court to set that order aside. **A CHANDER SHEKHAR v. EMPEROR**, 21 Cr. L. J. 59

ss. 107, 145, 439—Proceedings under s. 145—Order dropping proceedings under s. 145 and directing proceedings under s. 107—Revision—High Court, interference by.

Where by an order of a Magistrate proceedings under section 145, Criminal Procedure Code, are dropped, because proceedings under section 107 would meet the case, and proceedings under the latter section are actually pending, the High Court will not interfere in revision with the order dropping proceedings under section 145. **C JHARU KHAN v. SARADA CHARAN SIKDAR**, 21 Cr. L. J. 134

s. 107—Security to keep peace, when to be demanded—Consent of accused, whether sufficient—Evidence, independent, whether necessary.

To justify an order to furnish security to keep the peace, there must be evidence on the record that the persons from whom security is demanded are likely to commit a breach of the peace. The mere consent of the persons to be bound down is not sufficient: the fact of a likelihood of a breach of the peace must be established by independent testimony on oath. **A JAGDAT TEWARI v. EMPEROR**, 2 U. P. L. R. (A) 38; 21 Cr. L. J. 176

s. 110—Defence witnesses caste-fellows of accused—Evidence, value of.

The mere fact that some of the witnesses produced by a person against whom proceedings have been instituted under section 110 of the Criminal Procedure Code, are his caste-fellows, is not by itself a sufficient reason for discrediting their testimony. **O ROHAN v. EMPEROR**, 6 O. L. J. 541; 21 Cr. L. J. 60

ss. 110, 118—Security for good behaviour—Statements of approvers in dacoity cases, value of—Corroboration, whether necessary—General reputation, Police suspicion, whether can be made basis of—Evidence of good character, value of.

The Police, having failed to establish the guilt of the accused in regard to three specific charges of dacoity, instituted proceedings against the accused under section 110, Criminal Procedure Code:

Held, that the Magistrate was not wrong in initiating proceedings under section 110 of the Criminal Procedure Code but, in such circumstances, the evidence against the accused must be very satisfactory before security can be demanded of him under section 118 of the Code.

Statements of approvers in different dacoity cases implicating the accused in a proceeding under section 110 of the Criminal Procedure Code ought

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to be left out of consideration, if there is nothing to corroborate them.

Where in a proceeding under section 110 of the Criminal Procedure Code the prosecution witnesses for general repute say that they believe the accused to be a thief or a dacoit, but in cross-examination they admit that their suspicion is the outcome of house searches and arrests by the Police, the accused is entitled to the benefit of the admission by the prosecution witnesses as to the origin of their suspicion. Where there is positive evidence for the defence that the accused is a good man, it is not a sufficient reason for casting it aside to say that proof of malice against the accused on the part of the prosecution is wanting. **C SURENDRA NATH v. EMPEROR**, 21 Cr. L. J. 170 **778**

s. 133—Claim based on substantial grounds—Order directing party to establish claim in Civil Court, legality of.

Where in a proceeding under section 133 of the Criminal Procedure Code the Magistrate finds that the claim of right set up is based on substantial grounds, he has no jurisdiction to make an order directing that party to establish his claim in a Civil Court. **C PEARY LAL MULLICK v SURENDRA KISHORE MITTER**, 24 C. W. N. 247; 21 Cr. L. J. 87 **487**

s. 133—Obstruction to public river causing damage to owners—Order directing removal of obstruction, legality of—Public river—Riparian owners, rights of.

An order directing the removal of a dam constructed across a public river, which amounts to unlawful obstruction of the river and causes damage to the lower riparian owners, is justified under the provisions of section 133 of the Criminal Procedure Code.

No riparian owner is entitled to obstruct a public river. **O JAGAN NATH v. CHANDRIKA PRASAD**, 6 O. L. J. 616; 21 Cr. L. J. 55 **407**

ss. 144, 145, 146, 435, 439—Preliminary order under s. 145, interference with, in revision, whether competent—Order under s. 145 during subsistence of another order under s. 144, legality of—Joint possession, applicability of s. 145 (6) to—'Evicted,' meaning of—Receiver appointment of, under s. 145, powers of, extent of—Attachment, order of, scope of—Attachment of moveables, validity of—Enquiry when rival lessees claim under separate trustees—Revisional powers of High Court, when to be exercised—Government of India Act, 1915 (5 & 6 Geo. V, C. 61), s. 107.

It is competent for a Divisional Magistrate to initiate proceedings under section 145, Criminal Procedure Code, during the subsistence of an order passed by a Sub-Magistrate under section 144 of the Code.

The High Court will not ordinarily interfere with a preliminary order under section 145 of the Criminal Procedure Code except where such order is manifestly illegal.

The word 'evicted' in section 145 (6) applies to cases where a person is found to be disentitled to the extent of possession which he claims as well as to cases where he is found not to be entitled to possession at all.

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Section 145 of the Criminal Procedure Code is not applicable where the contesting parties are entitled to joint possession.

An attachment under section 146 of the Criminal Procedure Code connotes more than a Civil Court attachment and implies the taking and keeping possession of the property attached by the Magistrate.

There is no objection to the appointment of a Receiver under section 145 of the Criminal Procedure Code, though the powers of such Receiver are not those of a Receiver appointed under section 146 (2) of the Code but are limited to taking possession of the properties and submitting an inventory thereof.

Section 145 of the Criminal Procedure Code does not give powers to a Court to attach moveables.

Per **Sadasiva Aiyar, J.**—The High Court can interfere with orders under Chapter XII, Criminal Procedure Code, only by virtue of the powers vested in it by section 107 of the Government of India Act.

A Magistrate can take action under section 145 of the Criminal Procedure Code when rival lessees claiming under separate trustees to be in actual possession are likely to cause a breach of the peace. **M GOPALA AIYAR v. KRISHNASAWMY IYER**, 11 L. W. 459; 21 Cr. L. J. 73 **473**

s. 145—Evidence, order of taking of—Procedure—Title, question of, whether can be investigated.

Although there is nothing in section 145, Criminal Procedure Code, to suggest which party should begin the case, it is unusual for the second party to begin his evidence.

In a proceeding under section 145 the Court is in no way concerned with the question of title, it has merely to consider and investigate the question of possession. **PAT RAM PARASAD SAHU v. EMPEROR**, 21 Cr. L. J. 136 **616**

ss. 145, 429, 435, 439—Government of India Act, 1915 (5 & 6 Geo. V, c. 61), s. 107—Letters Patent (Cal.), cl. 36—Proceedings under s. 145, Cr. P. C.—Failure to join party, whether error of jurisdiction—Irregularity—Revision—High Court, power of interference of—Difference of opinion between Judges—Procedure—Opinion of senior Judge, whether to prevail.

When on an application to the High Court under section 107 of the Government of India Act, there is a difference of opinion between the Judges the decision of the senior Judge prevails.

Sections 435 and 439 of the Criminal Procedure Code must be read together, and if a case is outside section 435, section 439 cannot apply to it.

The Criminal Procedure Code has not overruled the provisions of section 36 of the Letters Patent.

Even if the provisions of section 36 of the Letters Patent do not apply to a case not coming before the High Court in its original or appellate jurisdiction, in the absence of any provisions to the contrary, in the case of a difference of opinion between the Judges, the decision of the senior Judge should prevail in accordance with the principle laid down in section 36 of the Letters Patent.

Per **Newbould, J.**—The omission to join a party in proceedings under section 145 of the

Criminal Procedure Code—contd.

Criminal Procedure Code is not an error of jurisdiction.

Per *Shamsul Huda, J.*—There is no authority for the proposition that the High Court's power of superintendence over inferior Courts is confined to questions of jurisdiction alone. This power can be exercised, not only where inferior Courts act without jurisdiction or refuse jurisdiction, but also when these Courts commit an illegality or a material irregularity. **C** MOTIRAM BEWAH v. MARIJAN SARDAR, 24 C. W. N. 97; 31 C. L. J. 163; 21 Cr. L. J. 25 **169**

— **s. 145**, order under, form of—Joint possession of disputed properties—Criminal proceedings, validity of.

An order under section 145 of the Criminal Procedure Code should merely declare whom the Magistrate finds to be in actual possession of the property in dispute, regarding which proceedings have been taken to prevent a breach of the peace.

Where parties are in joint possession of property in dispute, a Magistrate has no jurisdiction to take action under section 145 of the Criminal Procedure Code. **PAT** JOGESWAR DAS v. EMPEROR, (1919) PAT. 479; 21 Cr. L. J. 224 **1008**

— **ss. 145, 435, 439**—Possession, dispute as to, enquiry into—Refusal of Magistrate to examine witnesses—Irregularity—Revision by High Court, whether competent—Order based only on local inspection, validity of.

Where a Magistrate declines to receive oral evidence in an enquiry under section 145, Criminal Procedure Code, his proceedings can be revised by the High Court.

A decision as to possession based solely on local inspection is not what section 145 of the Criminal Procedure Code contemplates. **M** SREEMANAVEDAVA RAJU v. PARAPRAVAN NAIDU, 38 M. L. J. 73; (1920) M. W. N. 123; 27 M. L. T. 85; 11 L. W. 235, 21 Cr. L. J. 46 **254**

— **s. 145**, proceedings under—Civil Procedure Code (Act V of 1908), O. XXI, r. 35 (1), possession under, nature of—Dispute between judgment-debtor and decree-holder—Possession delivered by Civil Court in execution of decree—Criminal proceedings, legality of.

Where in execution of a decree possession of property is delivered to the decree-holder under Order XXI, rule 85 (1), of the Civil Procedure Code, the property cannot form the subject of proceedings under section 145 of the Criminal Procedure Code at the instance of the judgment-debtor, inasmuch as the dispute between the parties has been adjudged, and a Magistrate, who starts such proceedings, acts illegally and without jurisdiction.

Possession delivered under Order XXI, rule 35 (1), of the Civil Procedure Code, is actual possession and not symbolical or formal possession. **PAT** BEWARI GIR v. BHUBANESWARI KOER, 1 P. L. T. 9, 5 P. L. J. 104, (1920) PAT. 71, 2 U. P. L. R. (PAT.) 21; 21 Cr. L. J. 200 **984**

— **ss. 164, 533**—Evidence Act (I of 1872), ss. 21, 26, 80, 91—Confession, oral, made before a Magistrate, admissibility of.

Per *Shah, J.*—A confession made to a Magistrate during the course of an investigation which is not reduced into writing is inadmissible in evidence and cannot, therefore, be proved by oral evidence.

Per *Hayward, J.*—An oral confession made to a

Criminal Procedure Code—contd.

Magistrate is *prima facie* relevant under sections 21 and 26 of the Evidence Act, though it has to be proved by oral testimony and not by the production of any writing duly recorded by any Magistrate under section 80 of the Evidence Act. **B** EMPEROR v. MARUTI SANTU MORE, 21 Bom. L. R. 1065; 21 Cr. L. J. 65 **465**

— **s. 164**—Statement by prisoner in jail implicating another, whether admissible—Suspicion, conviction based on, legality of.

A statement made by a prisoner undergoing a sentence of imprisonment, implicating another person in the commission of the offence for which he was convicted and subsequently retracted by him when produced as a witness, is not admissible in evidence against that other person.

A conviction based on mere suspicion is bad. **A** NOOR v. EMPEROR, 18 A. L. J. 87, 2 U. P. L. R. (A.) 37; 21 Cr. L. J. 189 **893**

— **ss. 179, 181 (2)**—Penal Code (Act XLV of 1860), s. 406—Criminal breach of trust—Offence, what constitutes—Offence committed at one place, whether can be tried at another—Jurisdiction.

The gist of the offence of criminal breach of trust is the dishonest misappropriation, conversion or disposal of the property: the loss to the complainant is a consequence of the breach of trust and not necessarily an integral part of it.

Complainant authorised the accused to withdraw certain money belonging to the complainant at Rangoon and to transmit it to him at Maymyo. The accused withdrew the money but failed to remit it to the complainant. He was prosecuted for criminal breach of trust at Maymyo:

Held, that inasmuch as the money had been received, retained and misappropriated at Rangoon, the Rangoon Courts alone had jurisdiction to try the case. **U** B ABDUL SALAM v. RAMNEWAL SINGH, 3 U. B. R. (1919) 172; 21 Cr. L. J. 149 **617**

— **ss. 192, 439, 529**—Revision—Point not urged before trial Magistrate or Sessions Judge, whether can be taken in revision—Transfer of case by Magistrate not authorised to transfer—Irregularity.

Where a point is not urged in the Court of first instance or before the Sessions Judge on appeal, the High Court will not interfere in revision unless there has been a miscarriage of justice.

The transfer by a Sub-Divisional Magistrate of a case under section 192, Criminal Procedure Code, when the case has already been transferred to him by the District Magistrate, is a mere irregularity covered by section 529 of the Code. **PAT** YUSUF ALI KHAN v. EMPEROR, 21 Cr. L. J. 96 **496**

— **ss. 195, 476**—Order directing prosecution for forgery—Documents alleged to be forged not produced in sanction proceedings—Order, legality of.

N and S produced two bonds in the course of two civil suits which were eventually compromised. C., the defendant in both suits, filed a complaint against N and S, under section 417 of the Penal Code, alleging that he had been deceived into the compromise. Evidence was recorded and the bonds examined by a Court witness, who was of the opinion that alterations had been made in them. Warrants of arrest were thereupon issued. On the date of hearing C. alone was examined but the two bonds were not produced by him or given in evidence and N. and S.

Criminal Procedure Code—contd.

were discharged. Subsequently the Magistrate commenced proceedings under section 476 of the Criminal Procedure Code and finally ordered the prosecution of both N. and S. under section 471 of the Penal Code. N. and S. moved the High Court on the revision side:

Held, that as the bonds were not given in evidence during the proceedings to which the petitioners were parties, the Magistrate had no jurisdiction to take action under section 476, Criminal Procedure Code. **L. NANAK CHAND v. EMPEROR**, 21 Cr. L. J. 7, 4 P. W. R. 1920 Cr., 3 P. L. R. 1920 **55**

s. 195—Penal Code (Act XLV of 1860), s. 193—Sanction to prosecute granted by Munsif—Order affirmed by District Judge—High Court, whether can interfere—Sanction to prosecute for perjury, when to be granted—Perjury, conviction for, when can be upheld—Practice—Patna High Court, whether bound to follow, practice of Calcutta High Court.

Where sanction to prosecute given by a Munsif is confirmed on appeal by the District Judge, the High Court has power to interfere with the order of the District Judge under section 195 (6) of the Criminal Procedure Code.

Where there is great delay in applying for sanction to prosecute for perjury, and where the Magistrate would have to determine the question by merely weighing the evidence on both sides sanction ought not to be granted.

No person can be convicted under section 193 of the Penal Code except on proof that it is impossible that the statements of the party accused made on oath can be true.

Where there is a general practice sanctioned by concurrent decisions in the Calcutta High Court, the Patna High Court will not depart from it. **PAT PADARATH SINGH v. RATAN SINGH**, 5 P. L. J. 23; 21 Cr. L. J. 145; (1920) PAT. 140 **673**

s. 195—Sanction to prosecute—Sanction based on circumstantial evidence, validity of.

In the absence of any direct evidence, the existence of circumstantial evidence is sufficient to justify an order granting sanction to prosecute. **PAT GAURI SHANKAR PRASAD v. BALDHO KOERI**, 21 Cr. L. J. 180 **884**

ss. 195, 476—Penal Code (Act XLV of 1860), s. 211—Sanction to prosecute, when to be granted—Prosecutor actuated by enmity—Procedure—Court, duty of.

An application for sanction to prosecute should not be granted where it appears that the object of the applicant is not to vindicate public justice but to satisfy private spite. If in such a case the Court is of opinion that proceedings ought to be instituted in the interests of justice, it should proceed under section 476 of the Criminal Procedure Code. **A SHEIKH SANAOU v. EMPEROR**, 21 Cr. L. J. 64 **416**

ss. 195 (6), 476—Sanction to prosecute—Period of sanction, expiry of—Order directing prosecution under s. 476, legality of—Interpretation of Statutes.

Sanction to prosecute was granted by a Munsif. On appeal to the District Judge it transpired that more than six months had elapsed since the date of the sanction; the District Judge accordingly revoked the sanction, but directed the prosecution

Criminal Procedure Code—contd.

of the accused under section 476, Criminal Procedure Code. On revision to the High Court:

Held, that the order of the District Judge was illegal and must be set aside.

Section 476 of the Criminal Procedure Code must be read consistently with section 195 of the Code.

It is a well-known rule of construction that each part of a Statute must expound every other part.

PAT LALJI TEWARI v. EMPEROR, 1 P. L. T. 147, (1920) Pat. 125; 21 Cr. L. J. 190 **894**

ss. 202, 204—Cognisance of case—Complaint—Magistrate, power of, to issue summons—Enquiry, whether necessary.

A Magistrate has full power, upon receipt of a complaint, to issue a summons to the person accused, if he believes in the truth of the complaint. If he finds there are good grounds for proceeding, it is not necessary for him to call for an inquiry beforehand. **PAT ABDUL KHALIQUE v. SURJA SINGH** 21 Cr. L. J. 220 **1004**

ss. 209, 213, 436—Case triable by Court of Session—Accused discharged by Magistrate—Commitment to Sessions ordered by District Magistrate—Duty of Magistrate making inquiry.

When a Magistrate holding an inquiry into a case triable by a Court of Session has certain evidence put forward by witnesses which would make out a *prima facie* case, it is his duty to make an order of commitment. It is not open to him, in commenting upon the truth or otherwise of the depositions made to him, to discuss the probabilities of the evidence being true.

Where in such a case the accused is discharged by the Magistrate, the District Magistrate has power to examine the evidence and if he finds a *prima facie* case established against the accused, to make an order of commitment to the Court of Session. **PAT BALMAKUND DAS v. EMPEROR** 21 Cr. L. J. 202 **986**

ss. 209, 210, 213—Case triable by Court of Session—Enquiry by Magistrate—Prima facie case made out—Magistrate, whether can try case himself—Procedure.

Where a *prima facie* case is made out against an accused person in the Court of a Magistrate, and the case is triable exclusively by a Court of Session, the Magistrate ought to commit the accused for trial by that Court, and not dispose of the case himself. **A SAHDEO v. SARJOO**, 21 Cr. L. J. 61 **413**

ss. 215, 478—Letters Patent (Mad.), cl. 15—Trial of civil suit on Original Side of High Court—Commitment under s. 478, Cr. P. C., to Sessions—Appeal against order of commitment, maintainability of.

No appeal lies against an order of commitment made under section 478, Criminal Procedure Code, by a Judge presiding on the Original Side of the High Court in the course of the trial of a suit, except under the provisions of section 25 of the Code.

Clause 5 of the Letters Patent is controlled by the specific provisions of section 215, Criminal Procedure Code. **M VENKAT GIBI AIYAR v. N. M. FIRM**, 37 M. L. J. 652; 10 L. W. 538; 21 Cr. L. J. 28; 43 M. 361 **172**

ss. 227, 228, 229—Sessions trial—Charge, material alteration in, at close of trial, legality of—Sessions Court, power of, exercise of—Prejudice to accused.

Where upon the trial of an accused person upon

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specific charges in a Court of Session, it is found at the conclusion of the trial that the charges as framed disclose no offence against the accused, it is illegal and prejudicial to the accused to alter or amend the charges and to convict him thereon without affording him an opportunity of meeting the altered or amended charges. The fact that the accused cross-examined the prosecution witnesses to prove the unsustainability of the charges as originally framed, is no ground for holding that by substantially altering the charges the accused was not prejudiced.

A Court of Session is not a Court of original jurisdiction, and, though vested with large powers of amending and adding to charges, can only do so with reference to the immediate subject of the prosecution and committal, and not with regard to matter not covered by the indictment. **M MUTHU GOUNDAN v. EMPEROR**, (1920) M. W. N. 149; 11 L. W. 317; 21 Cr. L. J. 57 **409**

ss. 236, 237, applicability of—Penal Code (Act XLV of 1860), ss. 109, 363—Person charged with kidnapping, whether can be convicted of abetment of the offence.

Section 236, Criminal Procedure Code, which must control section 237 of the Code, only applies when from the evidence led by the prosecution it is doubtful which of the offences has been committed by the accused. But if the evidence which has been led by the prosecution leads to one result and one result only, it cannot possibly be said that it is doubtful which of the offences has been committed by the accused.

A person charged with an offence under section 363 of the Penal Code cannot be convicted of an offence under that section read with section 109, where he was not charged with that offence. **Pat SHEORATNI v. EMPEROR**, 21 Cr. L. J. 41 **252**

s. 239—Joint trial of several accused for offences not arising out of same transaction, legality of—"Transaction", meaning of.

If accused persons have been wrongly tried together in respect of offences which cannot be jointly tried together legally in point of law, the conviction so obtained against them is illegal and void and cannot stand. It is not a mere irregularity; it is a question of substance, and not of form.

If several accused start together for the same goal, this suffices to justify their joint trial under section 239 of the Criminal Procedure Code, even if incidentally one of those jointly tried has done an act for which the others may not be responsible.

The foundation for the procedure laid down in section 239 of the Criminal Procedure Code is the association of two persons concurring from start to finish to attain the same end.

Community of purpose or design and continuity of action are essential elements of the connection necessary to link together different acts into one and the same transaction. In such cases the acts alleged to be connected with each other must have been done in pursuance of a particular end in view and as accessory thereto. **Pat TEFANIDHI GOBINDA CHANDRA v. EMPEROR**, 5 P. L. J. 11; 21 Cr. L. J. 161 **769**

s. 249—Penal Code (Act XLV of 1860), s. 182—Prosecution under s. 182—Magistrate, power of to cancel summons.

Criminal Procedure Code—contd.

Where upon receipt of a Police report that one J. had given false information to the Police against certain persons a Magistrate ordered the prosecution of J. under section 182 of the Penal Code, but subsequently upon receipt of another report in another case that the information given by J. was true, he ordered the summons issued for the attendance of J. to be cancelled:

Held, that the Magistrate had full power to cancel the summons under section 249 of the Criminal Procedure Code. **Pat NATHU THAKUR v. EMPEROR**, 1 P. L. T. 28; 2 U. P. L. R. (Pat.) 27; 21 Cr. L. J. 184 **888**

s. 250—Complaint found to be false and frivolous or vexatious—Compensation, order for, legality of—"Frivolous", meaning of.

An order for the payment of compensation under section 250 of the Criminal Procedure Code can be made in a case which is false as well as frivolous or vexatious.

"Frivolous" means "trifling" "silly", or "without due foundation." **N JAINA v. SANTUKDAS**, 21 Cr. L. J. 41 **249**

s. 250, construction of—Compensation, liability to pay, extent of—"Information", meaning of.

Section 250 of the Criminal Procedure Code is a penal section and must be construed strictly. Words ought not to be introduced into it which would extend the liability to pay compensation to any person beyond the actual complainant or person who gives the information on which the case is instituted.

Per **Pratt, J. C.**—"Information" in section 250 of the Criminal Procedure Code is limited to the information given and entered in the cognizable register under section 154 of the Code. **S WALIMAHOMED v. EMPEROR**, 13 S. L. R. 166; 21 Cr. L. J. 49 **401**

ss. 306, 423 (c)—Trial by Jury—Appeal—Appellate Court, powers of—Appellate Court, whether can interfere in absence of misdirection where Jury have acted on mere circumstantial evidence—Misdirection.

In the case of a trial by Jury the questions that can be gone into by the Appellate Court lie within an extremely narrow compass, and that Court will not interfere with the unanimous verdict of a Jury.

Where in a trial by Jury, the Jury, having been properly warned and properly directed, deliberately by their verdict came to the conclusion that the circumstantial evidence given in the case connected the accused with the guilt and convicted him:

Held, that in the absence of misdirection, the High Court would not interfere merely on the ground that the Jury had convicted on circumstantial evidence alone. **C MOHINI MOHAN GHOSE v. EMPEROR**, 46 C. 635; 21 Cr. L. J. 8 **55**

s. 344, whether applicable to appeals—Adjournment of appeal—Costs, whether can be awarded.

Section 344 of the Criminal Procedure Code is not applicable to appeals. Costs cannot, therefore, be awarded on the adjournment of an appeal. **L SURAJ BHAN v. EMPEROR**, 29 P. R. 1919 Cr.; 2 U. P. L. R. (L.) 44; 21 Cr. L. J. 201 **985**

s. 356—Failure to record evidence in vernacular, effect of—Irregularity—Trial, whether vitiated.

Where a Magistrate omits to prepare a vernacular

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record of the evidence as required by section 356 of the Criminal Procedure Code, he commits an irregularity which vitiates the trial. **A** UDIT NARAIN v. EMPEROR, 17 A. L. J. 1146; 21 Cr. L. J. 28 **172**

— **ss. 367, 424**—Appellate Court, duty of, to write judgment in accordance with law.

The provisions of section 367 of the Criminal Procedure Code have been made applicable to appellate judgments by section 424 of the Code, and it is the duty of an Appellate Court to decide the points raised in appeal and to write a judgment in accordance with law. **L** BINDRA BAN v. EMPEROR, 2 U. P. L. R. (L.) 44; 21 Cr. L. J. 223 **1007**

— **ss. 367, 423**—Magistrate, failure of, to write proper judgment—Appeal—Procedure.

Where in an appeal to the Court of Session, the Judge finds that the Magistrate has not written a judgment in conformity with the provisions of section 367 of the Criminal Procedure Code, the correct procedure is to accept the appeal and to remand the case for hearing *de novo*. Section 423 of the Code does not authorize the retention of an appeal on the file of the Sessions Judge when asking for a judgment which the Magistrate has failed to record. **M** KARUPPIAH PILLAI, *In re*, (1920) M. W. N. 120; 11 L. W. 308; 21 Cr. L. J. 52 **404**

— **s. 403**—Accused, trial of, for specific offence—Acquittal—Subsequent trial on same facts for same offence, legality of.

Where a person is tried for a specific offence and is acquitted, he cannot subsequently be tried for the same offence upon the same facts. **A** RAM CHANDER v. EMPEROR, 18 A. L. J. 85; 2 U. P. L. R. (A.) 46; 21 Cr. L. J. 164 **772**

— **ss. 406, 435, 436, 439**—Penal Code (Act XLV of 1860), ss. 147, 304—Enquiry by Magistrate—Petition by complainant to District Magistrate for commitment to Sessions, rejection of—Accused acquitted in respect of offence under s. 147 and discharged in respect of offence under s. 304—Sessions Judge, order by, directing commitment, legality of.

The Police charged the accused before a Sub-Magistrate under sections 147, 323 and 325 of the Penal Code. During the course of the enquiry P. W. No. 1, who had initiated proceedings before the Police, applied to the District Magistrate to commit the case to the Sessions Court. The District Magistrate rejected the petition, holding that the petition was incompetent and that the Police alone had a *locus standi* to move in the matter. The Sub-Magistrate acquitted the accused of the offence under section 147 of the Penal Code. After the termination of the trial P. W. No. 1 applied to the Sessions Judge under section 436, who ordered the committal of the accused under sections 147 and 304 of the Penal Code:

Held, (1) that the committal under section 147, Indian Penal Code, was illegal as the accused had been acquitted in respect of the charge under that section

(2) that the commitment under section 304 was valid as the Sub-Magistrate, who had evidence of facts pointing to an offence under that section, must be deemed to have impliedly discharged the accused of that offence and it was competent for the Sessions

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Judge to set aside that order *suo motu*. **M** GAND APPARAZU v. EMPEROR, 10 L. W. 521; 38 M. L. J. 194; 21 Cr. L. J. 91; 43 M. 380 **491**

— **s. 417**—Appeal against acquittal—Power of Government to prefer appeals, exercise of—High Court, duty of—Procedure.

The power of appeal under section 417 of the Criminal Procedure Code should be exercised sparingly by the Government. The discretion to exercise that power, however, is not subject to the control of the High Court, and, where, in such an appeal, the Court is of opinion that the lower Court has acted on an erroneous view of the evidence, and that it should have convicted the accused, it has no jurisdiction to refuse to convict.

As between an appeal against an acquittal and an appeal against a conviction, the Criminal Procedure Code makes no distinction. **B** EMPEROR v. SAKHARAM MANAJI, 21 Bom. L. R. 1054; 21 Cr. L. J. 17 **161**

— **s. 421**—Appeal, summary dismissal of—Judgment, contents of See PENAL CODE, s. 498 **619**

— **s. 465**—Sessions trial—Unsoundness of mind of accused—Accused incapable of making defence—Procedure.

Where in a case before a Court of Session the attention of the Court is invited to the fact that by reason of unsoundness of mind the accused is incapable of making his defence, the provisions of section 465, Criminal Procedure Code, make it obligatory on the Sessions Judge, as a preliminary to the hearing of evidence on the charge, to try the issue whether or not the accused, as he stands before the Court, is of unsound mind and consequently incapable of making his defence. In the absence of a clear finding on this point the entire proceedings in the Sessions Court are vitiated. **A** JHABBU v. EMPEROR, 1 U. P. L. R. (A.) 174; 18 A. L. J. 53; 21 Cr. L. J. 83; 42 A. 137 **483**

— **s. 471**—Lunatic accused—Court, power of, to issue direction for detention—Local Government, order of, whether necessary.

Section 471 of the Criminal Procedure Code, as amended by Act X of 1914, no longer requires a Court to report the case of an accused person suffering from mental derangement for the orders of Government. The Court can itself issue a direction for his detention in a lunatic asylum or, if there is no accommodation in it, in jail or some other place of safe custody in British India. **O** EMPEROR v. MAIKU AHIR, 22 O. C. 259; 21 Cr. L. J. 46 **254**

— **s. 476**—Order directing prosecution—Accused, whether must be given opportunity to show cause. See PENAL CODE, s. 209 **686**

— **s. 476**—Penal Code (Act XLV of 1860), ss. 114, 421—Insolvency proceedings—Fraudulent transfer by insolvent—District Magistrate, direction by, to prosecute insolvent under s. 421, Penal Code—Order, legality of.

Upon an examination of the records of an insolvency proceeding the District Judge discovered that the insolvents and others had been guilty of fraudulent transfers. He brought the matter to the notice of the District Magistrate with a view to the persons being prosecuted under sections 421 and 421/114 of the Penal Code. Criminal proceedings were accordingly initiated against them. On revision:

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Held, that the proceedings must be quashed, as there was no authority in the Criminal Procedure Code for the procedure adopted. **A MAHADEO SAHU v. EMPEROR**, 1 U. P. L. R. (A.) 173; 18 A. L. J. 50; 21 Cr. L. J. 56 **408**

ss. 476, 537—*Proceedings under s. 476, when should be started—Preliminary enquiry, whether necessary—Enquiry, nature of Order under s. 476, whether can be questioned in subsequent trial—Successor-in-office of Magistrate making order under s. 476, whether nearest Magistrate—Case sent for trial to successor-in-office—Illegality.*

Proceedings under section 476 of the Criminal Procedure Code should not be taken until the very close of the case in which false evidence has been given, inasmuch as if taken earlier, such action is likely to intimidate subsequent witnesses and defeat the object of the trial.

As a rule a Magistrate should not make up his mind to start proceedings under section 476 of the Criminal Procedure Code against a witness before he has heard all the evidence in the case.

The holding of a preliminary enquiry under section 476 of the Criminal Procedure Code is discretionary, but it should be held, wherever it appears to be necessary to hold it in the interests of justice, and wherever it is held, it must be a real enquiry and not merely a formal one, ample opportunity being given to the accused to show cause why he should not be prosecuted.

The only way in which the validity of an order under section 476 of the Criminal Procedure Code can be challenged is by invoking the revisional jurisdiction of the High Court, but inasmuch as the exercise of that jurisdiction is purely discretionary, such order cannot be challenged as a matter of right. Therefore, a person against whom an order under section 476 of the Criminal Procedure Code is made is not precluded from challenging the validity of the order in the subsequent trial or in an appeal from the conviction obtained in the subsequent trial.

The successor-in-office of a Magistrate who has started proceedings under section 476 of the Criminal Procedure Code cannot be said to be the nearest Magistrate indicated by the section to whom the case might be sent for enquiry or trial.

A direct disobedience of an express provision of the Criminal Procedure Code as to a mode of trial cannot be regarded as a mere irregularity and in a case of this nature the question of prejudice does not arise. **PAT RAMOO SINGH v. EMPEROR**, (1901) PAT 61; 21 Cr. L. J. 29 **173**

s. 488—*Maintenance—Application for maintenance dismissed for default—Second application, if lies.*

Where an application for maintenance under section 488, Criminal Procedure Code, is dismissed for default without any adjudication being made on the merits, it is open to the complainant to make a fresh application under that section. **C MONMOHAN DEY v. SURABALA DAS**, 30 C. L. J. 128; 24 C. W. N. 32; 2 Cr. L. J. 3 **51**

s. 497—*Bail—Non-bailable offence—Court, duty of*

In considering an application for bail from a person accused of a non-bailable offence, the Court

Criminal Procedure Code—concl'd.

must be satisfied by an examination of the investigation inquiry or trial, whether or not there are reasonable grounds for believing that the accused has committed such offence. In the latter case, the accused should be admitted to bail, but not in the former. **A JAWAD HUSAIN v. EMPEROR**, 21 Cr. L. J. 181 **769**

Criminal trial—*Magistrate, whether can inspect scene of occurrence—Procedure.*

It is not only not objectionable but in many cases highly advisable that a Magistrate trying a criminal case should himself inspect the scene of occurrence, in order to understand fully the bearing of the evidence given in Court; but if he does so, he should be careful not to allow any one on either side to say anything to him, which might prejudice his mind one way or another. **O FAQIRAY LAL v. EMPEROR**, 6 O. L. J. 180; 21 Cr. L. J. 16 **774**

Procedure—Offence triable by Court of Session—Evidence in support of charge—Magistrate, duty of—Committal to Sessions.

Where a person is charged with an offence triable exclusively by a Court of Session and there is some evidence to support the story of the complainant, it is the duty of the Magistrate to commit the accused for trial by that Court, and not to convict him of other offences immediately connected with that offence and which ought to have been tried with it. **C MOZE ALI v. EMPEROR**, 30 C. L. J. 132; 23 C. W. N. 1031; 21 Cr. L. J. 10 **58**

—, whether advisable when civil suit filed. See **CRIMINAL PROCEDURE CODE** **64**

Cross-objctions—Respondent, claim against, by co respondent, whether maintainable. See **CIVIL PROCEDURE CODE**, O. XLI, R. 22 **332**

—, whether can be heard when appeal not maintainable. See **CIVIL PROCEDURE CODE**, O. XLI, R. 22 **506**

Custom—*Alienation—Ancestral property—Antecedent debts—Necessity—Duty of alienee to make enquiry*
Per Shadi Lal, J.—An alienee discharging an antecedent debt is not required to make an enquiry into the nature thereof.

But an alienee paying off an antecedent creditor gets no advantage, if he has knowledge of the true nature of the debt or acts in bad faith.

An alienee who is identified with the antecedent creditor, so that he and the creditor cannot be viewed as two separate persons, is in the same position.

Per LeRossignol, J.—It is the duty of an alienee of ancestral land to make enquiry not merely as to the existence of antecedent debts but also as to their nature, if the result of the first enquiry would raise doubts in the mind of an ordinary man as to the immorality or reasonableness of the debts.

Plaintiff sued for a declaration that a certain sale-deed executed by defendants Nos. 2 and 3 in favour of defendant No. 1 shall not affect his reversionary rights. The major portion of the consideration was paid to antecedent creditors to whom the alienors were actually indebted. It appeared, however, that the alienors had embarked upon a career of reckless extravagance and were wasting the property to injure the reversioners.

Held, (1) that the alienee, who was the next door neighbour of the alienors, must have known that

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the debts due to antecedent creditors had been contracted recklessly and without necessity and could not be regarded as just debts;

(2) that under the circumstances the sale could not be held to be binding on the plaintiff's reversioner. **L JHANDU v. NIAMAT KHAN** 842

— *Alienation—Collaterals, remote, right of, to challenge alienation—Burden of proof—Awans of Mauza Pholriwala, Jullundur District.*

No general rule can be laid down as to the applicability to all cases alike of the principle that up to a certain degree of propinquity it is to be presumed that agnatic relations of the alienor are entitled to impeach an alienation of ancestral land and that beyond that degree it is to be presumed that they have no such right.

The general custom of the Punjab does not recognise the right of a collateral, however remotely related, to challenge alienations; and in the case of very distant collaterals the onus of proving a right to control rests on the person who challenges an alienation and not on the alienee.

Among Awans of Mauza Pholriwala in the Jullundur District there is no special custom entitling collaterals in the 10th degree to contest an alienation effected by a childless proprietor. **L QASIM ALI v. GHULAM MUHAMMAD**, 138 P. R. 1919 961

— *Alienation—Consideration, full payment of, not proved—Sale, whether liable to be set aside.*

A sale should not be disturbed merely because the payment of an item of consideration set forth in the deed of sale has not been made or because its payment is doubtful, when the consideration even after the deduction of the doubtful item represents a reasonable sale price. **L PIYARE LAL v. CHAKAR**, 2 U. P. L. R. (L.) 23; 13 P. W. R. 1920; 6 P. L. R. 1920 362

— *Alienation by male proprietor—Widow of predeceased son, whether can challenge alienation.*

The widow of a predeceased son, who desires to challenge an alienation made by her father-in-law, is bound to prove not merely that she is heir to her father-in-law but that she has a right to contest the alienation effected by him. **L HARNAMAN v. DEWAN**, 160 P. R. 1919 908

— *Alienation—Necessity—Male proprietor whether entitled to anticipate needs.*

A male proprietor is no more entitled to anticipate his needs than a widow. **L KHAZAN SINGH v. SUHEL SINGH**, 116 P. R. 1919 923

— *Khanadamad—Hindu Jats of village Bottar, Tahsil Kharian, District Gujrat.*

There is no custom of khanadamadi among Hindu jats of village Bottar, Tahsil Kharian, Gujrat district. **L HARI CHAND v. MATHRA DAS**, 164 P. R. 1919 900

— *or personal law—Arains of Jullundur city—Presumption—Alienation, restriction on powers of—Burden of proof.*

In order to apply the initial presumption against the power of alienation in the case of families claiming to be governed by customary law, it is necessary to prove not merely that the family belongs to an agricultural tribe but also that its main occupation is agriculture.

No such presumption exists in the case of a family which, though belonging to an agricultural

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tribe, has altogether drifted away from agriculture as its main occupation and has settled for good in urban life and adopts trade, industry or service as its principal occupation and means and source of livelihood.

There is no presumption that Arains of Jullundur city are governed by custom. **L GHULAM MUHAMMAD v. BURA**, 2 U. P. L. R. (L.) 25; 8 P. L. R. 1920; 14 P. W. R. 1920 387

— *Pre-emption—Proof of custom—Wajib-ul-arz, entries in, value of—Previous sales to co-sharers, effect of.*

The mention of the existence of the custom of pre-emption in two *wajib-ul-arzes* drawn up at a considerable interval of time between each, the fact that the co-sharers in the village admit the existence of the custom, with the added fact that previous sales have been in favour of co-sharers, are sufficient to establish the existence of the custom.

A ATRAJ SINGH v. MOOLOO SINGH 875

— *Pre-emption—Village confiscated by Government—Settlement record, entry in, value of.*

Certain villages were confiscated by Government in 1857 and were subsequently settled with other persons. In 1860 and 1870 entries were made in the Settlement Records that the custom of pre-emption existed in the villages:

Held, (1) that when the Government became the sole owner of the villages in 1857, the old custom ceased to exist;

(2) that a new custom could not have sprung up between 1857 and 1860 or between 1860 and 1870;

(3) that therefore, the entries in the Settlement Records were not sufficient to prove the existence of the custom of pre-emption. **A RAM SARUP v. RAM DEI**, 18 A. L. J. 118; 2 U. P. L. R. (A.) 37 786

— *Pre-emption—Wajib-ul-arz, entry in, of wishes of co-sharers, whether proof of custom—Appeal, second—Finding of fact, based upon one piece of evidence alone, whether binding.*

Where an entry in a *wajib-ul-arz* dealing with pre-emption records the wishes of the co-sharers as to what should happen in the future, such entry is not binding on the members of the co-parcenary body as a village custom, nor is such entry proof of the existence of the custom of pre-emption.

Where an Appellate Court bases a finding of fact upon one piece of evidence alone without considering the whole of the evidence bearing upon the point, the finding is not binding in second appeal. **A MAHRAJ SINGH v. PITAMBAR SINGH**, 2 U. P. L. R. (A.) 44 768

— *proof of—Local custom—Family custom—Burden of proof—Presumption—Trespasser planting groves, whether grove-holder*

Where in a case a local custom pertaining not only to the persons belonging to the sub-caste of the parties to the case but also to the persons belonging to the other sub-castes of the same caste is alleged to exist, it is sufficient to prove the custom so far as the particular sub-caste under consideration is concerned and it is not necessary for the purposes of that case to prove the custom so far as the other sub-castes are concerned.

Where a local tribal custom is pleaded and it is proved that it exists in the tribe of the locality, there is a very strong presumption that any par-

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ticular family of the tribe in that locality is bound by that custom, although evidence may not have been adduced to prove that the custom pertains to that particular family. In such a case the burden of proving that the custom does not obtain in that particular family lies on the person who says so.

A person who plants groves on property to which he has no title cannot, on being ousted from possession, be given the status of a grove-holder in respect of the groves, possession of the groves going with the land on which they stand. **O MAKUND SINGH v. KALKA SINGH**, 6 O. L. J. 704 **856**

——— **Succession—Self-acquired property—Daughters versus collaterals—Riwaj-i-am—Presumption of correctness—Wajib-ul-arz, entries in, value of—Entries not specifically mentioning ancestral property, construction of.**

Those portions of a *wajib-ul-arz* that refer to custom are not provisions intended to enure for the duration of the settlement only but are statements that a certain custom exists.

There is a presumption as to the correctness of such entries in a *wajib-ul-arz*, but though such entries are evidence, the presumption as to their correctness is a rebuttable one.

The *riwaj-i-am* carries with it a certain presumption of correctness, but the presumption is rebuttable and when positive instances are given, the *riwaj-i-am* cannot be regarded as overriding them.

In the case of self-acquired property the general custom is that daughters are preferred to collaterals.

Where the entries in the *wajib-ul-arz* do not distinctly state that they relate to self-acquired property as well as ancestral, they should be read as merely referring to ancestral property. **L GHULAM MUHAMMAD v. GAUHAR BIBI**, 18 P. W. R. 1920; 10 P. L. R. 1920 **419**

Damages, basis of. See **MORTGAGE** **112**
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——— **Wrongful attachment—Malice, proof of, whether necessary.** See **ATTACHMENT** **827**

Debtor and creditor Debt, failure to demand, for very long period—Presumption—Oudh Laws Act (XVIII of 1876), s. 13—Pre-emption—Price, whether entered in good faith—Fancy price, whether fictitious—Judgment, statement in, that criminal proceedings will be started against witness or party, propriety of.

Where it is found that a money-lender has allowed a debt to remain outstanding for a very long period without obtaining some document or security for it and without at any time demanding payment, the presumption is that the debt has been paid off.

In a suit for pre-emption in order to determine whether the price entered in the sale-deed has been fixed in good faith, the Court is entitled to examine whether there is any very great difference between the price and the market value of the property. If the price entered in the sale-deed greatly exceeds the market value, that fact would be relevant to the issue of good faith but it would be open to the vendee to show special circumstances which induced him to pay a fancy price for the property.

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If a Court in the course of its judgment finds that a witness has given false evidence or that a party has rendered himself liable to criminal proceedings, there is no impropriety in stating in the judgment that separate proceedings will be taken against such witness or party. **O NARAIN PRASAD v. DURGA SINGH**, 6 O. L. J. 595; 22 O. C. 335 **95**

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——— **Compromise decree not in accordance with law, effect of.** See **BENGAL TENANCY ACT**, s. 18 **750**

——— **settling certain rights and liabilities—Recurring liability—Subsequent decrees based on first prior decree—Reversal of prior decree on appeal, effect of, on subsequent decrees—Res judicata.**

Where the extent of a recurring liability, such as the liability to pay rent, has been determined in one suit and other suits between the same parties as to subsequent periods have been decided on the authority of that decision while it was itself under appeal to a higher Court, the party who ultimately succeeds in the appeal from the first decision is entitled to regard the intermediate decrees as superseded and to enforce his rights as regards the intermediate periods with reference to the decision in the first case.

The fact that the subsequent suits were decided on the authority of the first decision and not as *res judicata*, makes no difference. **M ZEMINDAR OF PANGIDIGUDEN v. VENKATAPPAYYA**, 37 M. L. J. 591 **647**

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Dekkhan Agriculturists' Relief Act (XVI of 1879), s. 2 (1st)—"District to which this Act may for the time being extend," meaning of.

The extension of the Dekkhan Agriculturists' Relief Act to a particular district contemplated in section 2 (1st) of the Act is the extension of the substantial portion of the Act and not merely the extension of a particular section or one or more sections. What is meant is that there must be an extension of the Act sufficient to provide that its main purpose applies to the district, or a really substantial part of the main purpose. **B CHANBASAYYA v. CHENNAI GAVDA**, 22 Bom L. R. 44

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Discretion of Court, exercise of, interference with, when permissible. See **APPEAL**, SECOND

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Divorce Act (IV of 1869), s. 43—Decree nisi passed by District Judge—Custody and maintenance of children, order as to, nature of—Procedure.

An order under section 43 of the Divorce Act as to the custody and maintenance of the children should not form part of a decree nisi for the dissolution of marriage passed by a District Judge.

Such an order is merely *ad interim* and is liable to terminate upon the confirmation of the decree by the High Court. **L THE INDIAN DIVORCE ACT**, In the matter of, 142 P. R. 1919

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Easements Act (V of 1882), s. 12—Landlord and tenant—Tenant, whether can acquire easement as against landlord

A tenant is incapable of acquiring any easement right in the land demised to him as against his landlord. **M BASAVANAGUDI NARAYAN KAMATHY v. LINGAPPA SHETTY**, 26 M. L. T. 439, 38 M. L. J. 28; 11 L. W. 34

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s. 15—Right of way—Uninterrupted enjoyment—Acquiescence by servient tenement, whether necessary—Question of fact—Burden of proof

The uninterrupted enjoyment for 20 years of a right of way, which raises a presumption of right amounting to a presumption of law, must have been acquiesced in by the owner of the servient tenement.

Knowledge of the fact of enjoyment on the part of the owner of the servient tenement is an essential condition to the acquisition of an easement where the Court is asked to presume a grant. The fact that there has been active obstruction on the part of such owner would negative any such presumption.

In order to negative submission to an interruption the party interrupted need not have brought a suit.

The question whether there has been submission to, or acquiescence in, an obstruction is a question of fact, and the burden of negating submission should be placed upon the party alleging that he did not submit, the matter being within his special knowledge. **N RAMCHANDRA KAO v. VENKAT KAO**, 6 N. L. R. 76

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Evidence Act (I of 1872), s. 8—Penal Code (Act XLV of 1860), s. 147—Evidence doubtful—Conduct, subsequent, of accused, whether can be considered as evidence against him.

Where the evidence against a person charged with an offence under section 147, Penal Code, is open to doubt, his conduct sometime after the occurrence cannot be taken to be such evidence of conduct under section 8 of the Evidence Act as can be used against him in the case. **PAT ENAYET KARIM v. EMPEROR**, 21 Cr. L. J. 167

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—ss. 10, 30, 54—Witness—Co-accused, when can be competent witness—Statement of accused before trial, whether admissible against his co-accused—Penal Code (Act XLV of 1860), ss. 120B, 420.

Several persons were placed on trial together on charges of offences under section 420, read with section 120B, of the Penal Code. After the case had been opened, the Pleader for the Crown, with the consent of the Court, withdrew from the prosecution of one of the accused R, who was thereupon discharged and afterwards examined as a witness in the case:

Held, that the Magistrate by discharging R. separated his case from that of his co-accused and that he ceased to be on trial with his accomplices and, therefore, became a competent witness against them.

A statement made before trial, but after arrest, by a co-accused, though admissible against the person making it, is not admissible against his co-accused. **C SITAL SINGH v. EMPEROR**, 46 O. 700; 20 C. L. J. 255; 21 Cr. L. J. 5

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—s. 11—Statement by wounded person made shortly after attack—Different statement made subsequently—Former statement, whether admissible—Jury—Misdirection—Criminal Procedure Code (Act V of 1897), s. 297.

A woman mortally wounded and believed to be at the point of death made a statement to a Magistrate naming a particular person as her assailant; she subsequently recovered and was produced as a witness for the prosecution at the trial of the person previously named by her and stated that she did not recognise the person who had attacked her; the statement previously made was admitted in evidence and placed before the jury:

Held, that under section 11 of the Evidence Act the admission of the contents of the statement was not justified, the mere fact that the witness had made such a statement had no bearing on the main fact in issue, and that the placing of that statement before the Jury was a misdirection of a very serious nature. **C EMPEROR v. ABDUL SHEIKH**, 23 C. W. N. 933; 21 Cr. L. J. 183

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—ss. 2, 26—Confession, oral, made before a Magistrate, admissibility of. See **CRIMINAL PROCEDURE CODE**, s. 164

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— **s. 21**—Deposition of insolvent, admissibility of, against insolvent in criminal proceedings. See **PRESIDENCY TOWNS INSOLVENCY ACT**, s. 36 **478**

— **s. 24**—Confession, retracted, value of—Corroboration, whether necessary.

A confession by an accused person made after he has been for a considerable time in Police custody, and subsequently retracted, ought not to be accepted without corroboration. **PAT RUSNA TELI v. EMPEROR**, 21 CR. L. J. 177 **881**

— **s. 27**—Confession leading to discovery of property, admissibility of—Confession, retracted, value of—Corroboration, whether necessary.

The information that leads to the discovery of property under section 27 of the Evidence Act, to be admissible, must be the direct cause of the discovery and not merely introductory to further investigation.

A confession that is afterwards retracted should not be made the basis of a conviction, unless it is corroborated in material particulars and by independent testimony. **M RAMASAMI BOYAN v. EMPEROR**, 11 L. W. 8; 21 CR. L. J. 79 **479**

— **s. 35**—Chaukidar's Register, entry in, admissibility of—Expert evidence as to age, value of.

The question whether any particular entry in a Chaukidar's Register of Births and Deaths is admissible in evidence depends primarily on section 35 of the Evidence Act. Under that section it is not enough to prove that the Chaukidar's Register is an official book, but it is also necessary to prove that any entry relied on in it was either made by a public servant in the discharge of his official duty or made by some other person in performance of a duty specially enjoined by the law of the country.

A Civil Surgeon's evidence as to the age of a girl is on a higher level than that of an ordinary person, as he is able to examine the girl with a particularity and with a knowledge which an ordinary person does not possess. Such evidence, however, is not conclusive and has to be carefully considered. **O MOHAMMAD JAFAR v. EMPEROR**, 22 O. C. 250; 6 O. L. J. 577; 21 CR. L. J. 22 **166**

— **s. 63, III. (c)**—Copy of copy, whether admissible in evidence.

A copy of a copy of a document is not admissible in evidence and no question of the construction of such a document can arise. **PAT ABDEL GHANI SHAH v. SYED MOHAMMAD RAZA**, 1 P. L. T. 47; 2 U. P. L. R. (PAT.) 58 **941**

— **s. 90**—Presumption as to genuineness of document—Document thirty years old on date of arguments—Presumption, whether applicable.

A Court has a right to presume, under section 90 of the Evidence Act, the genuineness of a document which was not thirty years old either on the date of the suit or on the date of its production, but was thirty years old on the date when arguments were heard. **O MAHADEO PRASAD v. NASIBAN**, 6 O. L. J. 615 **368**

— **s. 91**—Promissory note, suit on—Failure to prove pro-note—Original contract, whether can be relied upon.

By the Full Bench (Pratt, J. dissenting).—Where money is lent and at the same time a promissory note is given for the loan, the creditor can sue for

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the money due as on the original contract of loan, if the pro-note cannot be proved.

Per Pratt, J.—Where the promissory note has been given at the same time the loan was taken, the creditor cannot sue for the money due as on the original contract of loan if the promissory note cannot be proved, unless he is in a position to prove that the loan and the giving of the note are separate transactions and that the note is not a reduction to writing of the loan transaction. **L B MAUNG KYI v. MA MA GALE**, 12 BUR. L. T. 137; 10 L. B. R. 55 **84**

— **s. 92, proviso (4)**—Mortgage, registered—Agreement, oral, to accept less than mortgage debt in full discharge of mortgage, whether can be proved.

Under proviso (4) of section 92 of the Evidence Act, oral evidence is inadmissible to prove an agreement whereby a mortgagor agrees to accept less than the amount due to him under a registered mortgage in full discharge of the mortgage. **B JAGANNATH KASHIRAM v. SHANKAR GANPAT**, 22 BOM. L. R. 39; 44 B. 55 **689**

— **ss. 92, 115**—Oral evidence varying terms of document, whether admissible between parties on same side—Estoppel, applicability of doctrine of, against witness.

Section 92 of the Evidence Act merely prevents evidence being given to vary the terms of a document in a proceeding between the parties to that document and their representatives. There is nothing to prevent two persons who are arrayed on the same side, such as joint vendees, to give evidence to vary the terms of the written instrument in a contest between themselves.

In the absence of an allegation or proof that relying upon the recitals in a sale-deed a person has acted to his detriment, the plea of estoppel is not available to him.

The doctrine of estoppel cannot be applied to a witness who is not a party to the suit, where the party calling him is not estopped. **N RAJIB HUSSAIN v. ZINGRAJI** **962**

— **s. 96**—Mortgage deed providing for payment of revenue by mortgagee—Revenue, enhancement of—Intention of parties—Oral evidence, admissibility of—Transfer of Property Act (IV of 1882), ss. 72, 76—Mortgage—Mortgagee, liability of, to pay revenue—“Contract to the contrary” in s. 72, what is.

Where a usufructuary mortgage deed provides for the payment of revenue by the mortgagee, but fails to indicate whether the parties meant the revenue as assessed at the date of the deed or as it might be re-assessed from time to time, evidence may be given under section 96 of the Evidence Act of facts to show what was meant. An express declaration of the parties subsequent to the execution of the mortgage deed, as to what they meant when the deed was executed, is admissible as such evidence.

Section 76 (c) of the Transfer of Property Act imposes on the mortgagee an obligation to pay the revenue and Government charges when they can be paid out of the income. If they can be so paid he cannot recover them under section 72 (b) of the Act, since the permission given by section 72 (b) must be read subject to the obligation imposed by section 76 (c). If they cannot be so paid, then

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in the absence of a contract to the contrary a mortgagee who has paid them out of his own pocket can recover them under section 72 (b). An agreement by the mortgagor to be personally liable for such charges is, however, a contract to the contrary within the meaning of section 72 (b). **O FARZAND ALI v. SADIQ HUSAIN KHAN, 22 O. C. 270**

S. 114 (g)—Accounts, suit for—Defendants, failure of, to produce account books—Presumption—Costs, liability to pay, how to be determined—Civil Procedure Code (Act V of 1908), O. 1, r. 10, O. XLI, rr. 4, 33—Transfer of parties—Court, power of, extent of—Appeal—Appellate Court, power of, to make appropriate order, extent of.

The failure of a defendant in a suit for accounts to produce his account books would justify the Court in raising the presumption, under section 114 (g) of the Evidence Act, that they are being withheld, because, if produced, they would be unfavourable to his case.

Where a defendant is largely responsible for the litigation, and by his obstructive methods hampers the investigation, thereby delaying and lengthening the inquiry, he should be made liable for the whole costs of the suit.

If a suit is instituted for an account between two persons, one alleging that nothing is due from him, and a balance is found to be due from him, that person must pay the costs of the suit and of the account. But the case is different where one party admits a given sum to be due from him and the other claims a much larger sum, and the suit proceeds only for the purpose of ascertaining whether such contested balance is really due or not. In this case, the costs would depend upon the substantial result, that is, if the balance claimed, or a substantial part of it, is shown to be due, the claimant would obtain the costs of the suit; if no part of it is due, he would have to pay them; and if only a portion of it is due, the Court would probably give no costs on either side. But in all these cases the Court would endeavour to see what were the substantial questions and causes of litigation between the parties.

Order I, rule 10, of the Civil Procedure Code authorises the Court to make an order transferring a party from the category of defendants to that of plaintiffs at any stage of the proceedings, not merely after the passing of a preliminary decree, but also after expiry of the period prescribed for an appeal against that decree, so long as the transfer is for the benefit of the parties, or tends to give effect to one of the aims of the law of procedure, viz, the avoidance of a multiplicity of suits with reference to the same subject-matter.

Order XLI, rules 4 and 33, give an Appellate Court ample power to make the appropriate order needed in the interests of justice. Under the former rule, on appeal by one of the parties upon a ground common to all, the decree may be varied in favour of all; under the latter rule, the Appellate Court has power to make the proper decree, notwithstanding that the appeal is as to a part only of the decree, and such power may be exercised in favour of all or any of the respondents or parties, even though such respondents or parties may not

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have filed any appeal or objection. **C DEBENDRA NARAYAN SINGH v. NARENDRA NARAYAN SINGH, 30 C. L. J. 417; 24 C. W. N. 110**

S. 114—Registered letter returned to sender as having been refused by addressee—Presumption.

Where the addressee of a letter containing a notice to quit, sent through the Post Office by registered post refuses to take delivery, a Court would be entitled, under section 114 of the Evidence Act, to presume that the letter reached him in the ordinary course. The fact that the letter was returned to the sender, not through the Dead Letter Office but as a letter which the addressee had refused to accept, would not destroy the presumption. **C GIRISH CHANDRA GHOSE v. KISHORE MOHAN DAS, 23 C. W. N. 319**

S. 115—Estoppel—Matter known to both parties. See CONTRACT ACT, s. 11

S. 115—Estoppel—Representation made by mortgagor to prior mortgagee—Subsequent mortgagee, whether bound by representation.

A subsequent mortgagee is bound by the representations made by the mortgagor to a prior mortgagee and is estopped from challenging the validity of the prior mortgage so far as it affects the share which was subsequently mortgaged. **O GUR DAYAL v. TAID HUSAIN, 7 O. L. J. 31; 2 U. P. L. R. (J. C.) 31**

S. 115—Estoppel—Trustee—Breach of trust—Alienation of trust property, for personal use—Suit, subsequent, as trustee, for possession on behalf of trust, maintainability of.

A trustee who alienates trust property for his own private purposes is not estopped from instituting a suit as trustee to recover the property for the benefit of the trust.

Per *Krishnan, J.*—A trustee who tries to set right a wrong he has done should not be prevented from doing so by any estoppel based on a former breach of trust by him, at any rate where he derives no personal benefit from his later action. **M SENA YASIM SAHIB v. KADUR EKAMBARA IYER, 27 M. L. J. (98; 26 M. L. T. 44); 10 L. W. 672**

S. 132—Penal Code (Act XLV of 1860), s. 500—Defamation—Privilege—Witness, answer given by, to Court, whether privileged.

An answer given by a witness to the Court, after he has left the witness-box, cannot form the subject of proceedings under section 500, Penal Code, as such proceedings are prohibited under section 132 of the Evidence Act. **A GANGA SAHAI v. EMPEROR, 18 A. L. J. 112; 21 Cr. L. J. 186**

S. 134—Witnesses, number of—Proof, quantum of. See PROSECUTION

Execution of decree—Decree, legality of, whether can be questioned—Remedy, form of.

The legality of a decree cannot be questioned in execution. The remedy of the aggrieved party is by a regular suit to set aside the decree as illegal. **P HAR GOPAL v. RAM RICH PAL, 60 P. L. R. 1919**

Execution of document—Delay in executing document after it is written out, effect of—Pleadings—Plaint giving wrong date of execution of document, effect of.

The mere fact that a document is signed and attested a few days after it is written out does not render its execution invalid, or in any way alter the nature of the case set up on its basis, though the

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date of actual execution, as established by the evidence, is found to be slightly at variance with the date entered in the plaint. **O NAZIR BIBI v. RAM RATAN**, 6 O. L. J. 691 **877**

Ex parte decree—Mistake as to date of hearing—Sufficient cause for setting aside. See CIVIL PROCEDURE CODE, s. 151 **44**

Ex parte evidence—Age, value of evidence as to. See EVIDENCE ACT, s. 35 **166**

Fraud, decree obtained by, suit to set aside—Court, duty of—Suit, whether maintainable where no steps were taken to set aside ex parte decree

In a suit to set aside an *ex parte* decree on the ground that it was obtained by fraud, the Court has no jurisdiction to decide on the merits of the former judgment: its function is to decide whether that judgment is vitiated by fraud.

Where a defendant allows a suit to be decided against himself in his absence and takes no steps to have the *ex parte* decree set aside, a suit by him to have that decree set aside on the ground of fraud is not maintainable. **C MANINDRA NATH MITTRA v. HARI MONDAL**, 24 C. W. N. 133 **626**

—, suit based on—Particulars requisite. See PROBATE AND ADMINISTRATION ACT, s. 90 **197**

Ganti tenure—Settlement holder, whether can question ganti tenure, created by previous settlement holder.

Where the settlement holder of an estate executes a *kabuliyat* agreeing to respect the rights of the *gantidar* tenants of the estate, he is bound to recognise the *ganti* tenure and cannot question its existence. **C JARIP SARDAR v. JOGENDRA NATH CHATTERJEE**, 24 C. W. N. 53; 31 C. L. J. 78 **719**

Government of India Act, (5 & 6 Geo. V, C. 61), s. 107, application under—

Difference of opinion between Judges—Procedure. See CRIMINAL PROCEDURE CODE, s. 145 **169**

— **s. 107**—High Court, revisional powers of, when to be exercised. See CRIMINAL PROCEDURE CODE, s. 144 **473**

Grant of annuity—Gift of immoveable property in lieu of annuity—Suit to set aside gift—Annuity, whether must be restored.

By virtue of certain deeds defendant became entitled to receive an annuity generation after generation out of the profits of certain specified villages from the person in possession of the estate. The holder of the estate subsequently gifted certain other villages to the defendant in consideration of the latter relinquishing his right to the said annuity, on condition that if the gifted villages passed at any time out of the hands of the defendant, he would be entitled to have his right to the annuity restored to him. A subsequent holder of the estate sought to oust the defendant from the gifted villages:

Held, that the defendant could not be ousted from the gifted villages without the restoration to him of the annuity granted to him. **O NARAIN SINGH v. DEPUTY COMMISSIONER, PARTABGARH**, 6 O. L. J. 633 **359**

Guardians and Wards Act (VIII of 1890), ss. 7, 17—Minor living with mother—Guardian, whether should be appointed—Welfare of minor.

In the absence of any allegation against the

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character of the mother of a boy aged 9 years and of anything to show that she is not capable of looking after the child, the appointment of a guardian is unnecessary and the boy should not be removed from her care.

Where the object of a person who applies to be appointed the guardian of a minor is not so much the welfare of the minor as the vindication of his own rights to be appointed a guardian, his application should be disallowed. **A SUDHIA v. MAKKA**, 18 A. L. J. 71 **418**

— **ss. 20, 27, 33**—Guardian and ward, relationship between—Duty of guardian to invest moneys belonging to ward—Moneys belonging to ward used by guardian—Profit, whether must be paid to ward—Compensation—Liability of guardian, extent of.

The relationship between a guardian and his ward is very similar to the relationship existing between a trustee and his beneficiary.

A guardian stands in a fiduciary relation towards his ward and is not allowed to make any profit out of his office. He must deal with the property of his ward as carefully as a man of ordinary prudence would deal with it as if it were his own. If he uses the property of the ward in his own business, he must hand over the profits arising therefrom to the ward.

Prima facie it is the duty of a guardian to invest moneys belonging to his ward and his liability extends to profits actually received, or profits which could have been received but for his gross and wilful default.

Every plain neglect of duty by a guardian amounts to a breach of trust, and he must compensate his ward for any loss occasioned thereby. **L LABHU RAM v. BHAG MAL**, 157 P. R. 1919 **926**

— **s. 27**—Guardian, whether can ratify unauthorised act of previous guardian. See CRIMINAL PROCEDURE CODE, O. VII, R. 18 (2) **311**

— **ss. 29, 30**—Guardian, powers of, restriction upon—Transfer of immoveable property without sanction of Court, validity of—Minor, liability of, extent of—Minor, whether bound to restore benefit—Document, date of execution of—Presumption.

The restrictions on the powers of a guardian appointed under the Guardians and Wards Act can be enforced only to such extent as is laid down by the provisions of that Act.

Therefore, although a transaction entered into by a certificated guardian on behalf of his ward in respect of the latter's immoveable property without the sanction of the District Judge cannot be enforced against the ward during his minority so as to affect directly his immoveable property, yet a simple money decree can be passed against him to the extent to which he is found to have benefited by the transaction.

No transaction can be avoided by a minor under the general principles of equity recognised by section 41 of the Specific Relief Act, except on the condition that the person benefited by the transaction restores the benefit he has received or makes such compensation as the justice of the case requires. **O PARSHOTAM DAS v. NAZIR HUSAIN**, 6 O. L. J. 668 **846**

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s. 29—Guardian, whether can accept lease of minor's property from mortgagee—Minor, whether liable to pay rent.

Under section 29 of the Guardians and Wards Act a certified guardian can grant a lease of property belonging to the minor for a period of five years and there is nothing to prohibit a lease for a similar period being taken by the same guardian of property belonging to the minor, from a person holding the same under a mortgage made for legal necessity. The lease, while it imposes upon the minor the liability to pay rent, brings with it a corresponding gain and the transaction is, if beneficial to the minor, of a nature within the competence of the guardian and binding on the ward. **O GUR DIN v. DURGA DIN**, 2 U. P. L. R. (J. C.) 52. **19**

Hague Convention No. VI of 1907, Arts. 1, 2, 3—Art. 3, whether applicable to German ships—"Port" in Arts. 1 and 2, meaning of.

Article 3 of the 6th Hague Convention does not apply to German ships, as Germany did not agree to this particular article.

The word "port" in Articles 1 and 2 of the 6th Hague Convention means a place where ships are in the habit of coming for the purpose of loading or unloading, embarking or disembarking. **B THE RHEINFELS**, 21 Bom L. R. 1116. **444**

Hindu Law—Akhra, whether can be owned by community as a whole—Suit by community with respect to akhra, maintainability of—Civil Procedure Code (Act V of 1908), O. I, r. 8.

The fact that a community has owned an akhra and its properties from time immemorial through panchayats, points to a legal origin although no grant is set up; that community, therefore, has a right to hold and manage the property and to maintain suits with respect to the akhra through panchayats. **C PROBhat CHANDRA SEN v. HARI MOHAN DHUPI**, 24 C. W. N. 206. **742**

Adoption—Widow—Power given to two widows jointly to adopt—Junior widow, death of—Senior widow, whether competent to adopt.

A Hindu by his Will bequeathed his estate to his two widows and empowered them jointly to adopt a boy. The junior widow died, and after her death, the senior widow adopted a son:

Held, that the adoption was not valid, as the power to adopt was a joint permissive power and the surviving widow alone was incompetent to exercise the power. **A LACHMI PRASAD v. PARBATI**, 18 A. L. J. 08; 2 U. P. L. R. (A.) 40. **910**

Gift—Gift of specific amount to be paid out of profits of immoveable property, nature of. See SUCCESSION ACT, s. 60. **140**

Joint family—Alienation by manager—Power to alienate, limits of—"Antecedent debt," meaning of—Burden of proof.

One co-parcener of a Mitakshara joint family cannot, without the consent of the other co-parceners, alienate by way of gift, sale or mortgage the joint family property.

One exception to this rule is when the father, as manager of the family, mortgages or otherwise deals with the joint property for family necessity or for antecedent debt.

The exception in favour of alienations by the father for antecedent debts is more or less the

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creation of case-law and should not be extended and should be very carefully guarded.

An antecedent debt is an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate.

There is a distinction between a case where the property has passed out of the hands of the family by mortgage, sale or other alienation by the father, and the son sues for the recovery of the same and the case where the mortgagee seeks to enforce the mortgage executed by the father against the sons who are in possession of the property. In the former case the son must show the grounds on which he seeks to set aside the alienation by the father, in the latter it is the mortgagee who has to show how he claims for the re-payment of the debt of the father.

PAT SUKHDEO JHA v JHAPAT KAMAT, 1 P. L. T. 49; (1920) PAT. 67; 2 U. P. L. R. (PAT.) 39; 5 P. L. J. 120. **946**

Joint family—Compromise entered into by father to avoid dispute, whether binding on sons See PARTITION SUIT. **325**

Father adjudicated insolvent—Son's interest in joint family property, whether vests in Receiver. See PROVINCIAL INSOLVENCY ACT, s. 2 (e). **931**

Purchase of co-parcener's share in specific items of family property in Court auction—Partition—Allocation of other properties to co-parcener—Purchaser, right of, against substituted properties.

Plaintiff's vendor purchased certain properties in execution of a money decree against first defendant and obtained a certificate of sale. At the time of attachment a partition suit was pending between the first defendant and his co-parceners. The decree in the partition suit allotted certain properties to first defendant which included some only of the items included in the sale certificate. Plaintiff now sued for the allotment of the full extent of the area purchased by him out of the items allotted to the first defendant under the partition decree:

Held, that the plaintiff had no right or equity to compel the first defendant to give properties in substitution of those which had been sold at the Court auction. **M SABAPATHY PILLAY v. THANDAVAROYA ODAYAR**, 37 M. L. J. 620; 11 L. W. 108; 43 M. 309. **515**

Self-acquired property devised by father to sons, whether ancestral property in sons' hands—Release of co-parcener's share for consideration, whether transfer—Release, whether voidable by creditors Death of releasor before action taken by creditors, effect of—Rights of creditors—Partition in status, when effected—Transfer of Property Act (IV of 1882), s. 53.

The self-acquired property of a Hindu devised by him to his sons will be regarded, in the absence of an express intention to the contrary by the deviser, as ancestral property in the hands of the sons and not as their separate and self-acquired property.

Whether in any given case property was intended to pass to the sons as ancestral or self-acquired property is a question of intention turning on the construction of the instrument of gift, the bias being in favour of ancestral property in the absence of words to the contrary. The fact that the grandsons'

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names are not mentioned in the instrument does not tend to show that the property is not ancestral.

Per *Spencer, J.*—A partition of family property among Hindus cannot be treated as a transfer within the scope of section 53 of the Transfer of Property Act, as it only effects a change in the mode of enjoyment of the property and is not an act conveying property from one living person to another.

A document whereby a co-parcener relinquishes his incorporeal right to have a partition effected of joint family property is not a transfer which can be avoided by his unsecured creditors under section 53 of the Transfer of Property Act, if they have taken no action to attach his rights prior to the relinquishment.

Section 53 of the Transfer of Property Act must be strictly construed, as it is a statutory provision and Courts have no power to extend statutory provisions by analogy to transactions which do not fall within the scope of the Statute.

Per *Abdur Rahim, J.*—The law requires some unequivocal and definite expression of an intention on the part of a member of a joint family, to the effect that in future he would regard himself as a separated member, before a severance can be held to have been effected, and the expression of such intention must be communicated to the other members or at least to the manager of the family. From the mere fact that a member of a joint family asks for a partition it is not to be necessarily inferred that he intended a separation of status before a partition was effected.

A relinquishment by a co-parcener of a large share in family properties in lieu of an inadequate and wholly disproportionate cash consideration received from the other members operates as a severance of the joint status and if it is effected to defeat creditors, the document may be avoided by the latter under section 53 of the Transfer of Property Act. **M** INDOJI JITHAJI v KOTHAPALLI RAMA CHARLU, 10 L. W. 498 **146**

— **Marriage**—Nandvansi Ahirs, whether Sudras—(*churi* marriage, whether recognised—Intermarriage between Sudras of different sub-castes, whether permissible.

Ahirs, whether of the Nandvansi or any other sub-caste, are Sudras and the Dauwa Ahirs are a lower caste than the pure Ahirs and the *churi* form of marriage is in vogue among them.

There is nothing in Hindu Law prohibiting marriages between persons belonging to different sections or sub-divisions of the Sudra caste. **N** DOMARSINGH v HIRONDIBAI **254**

— **Minor**—Mortgage executed by guardian—Recital in deed of payment of previous mortgages, whether binding on minor—Necessity, proof of

A mortgage deed was executed by the guardian of a minor on behalf of himself and the minor, it being stated that, the consideration of the mortgage had been credited towards two prior unregistered mortgage deeds, which were neither filed nor proved:

Held, that the mere recital of the existence of the two prior mortgages would not bind persons other than the executant and that it was essential to prove that the mortgage was executed for family

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necessity and for the benefit of the minor on whose behalf the guardian purported to have acted.

O BABU v SADA SHEO, 22 O. C. 258 **240**

— **Minor**—Nearest male, whether entitled to custody of minor girl. See PENAL CODE, s. 361 **402**

— **Partition**, suit for—Manager, whether bound to keep accounts—Expenses during pendency of suit, how to be met.

The manager of a joint family is not obliged to keep accounts while the family remains joint, and when a partition is asked for, partition takes place of the property as it exists in the hands of the manager.

When a suit is filed for partition of joint family property, there is a severance of interest from the date of the filing of the suit, and for purposes of inheritance and succession the family members are no longer considered joint, but so far as the family property is concerned, the family is considered as one entity until the moment comes for division, and then each party gets his actual share. In the meantime if there are any expenses which should be properly incurred by the joint family purse, those expenses are taken out of the family property and they cannot be debited to any particular co-parcener. **B** RAMNATH CHHOTURAM v. GOTURAM RADHAKISAN, 21 Bom L. R. 1179; 43 B 179 **115**

— **Religious endowment**—Absolute dedication, whether can be revoked.

Where there is an absolute dedication of property to a deity, a subsequent deed cannot affect the right of the Thakur to the property, nor can the donor, as owner of the property, revoke the dedication. **C** SASI BHUSAN BHADOR v BASANTA LAL BEAR **518**

— **Bunga**, right of management of, whether can be transferred

A *bunga* being partly religious and partly charitable, the office of manager of a *bunga* partakes of the nature of a religious office and cannot be alienated in the absence of a custom justifying such alienation. **L** GABL SINGH v SURJAN SINGH, 146 P. R. 19.9 **955**

— **Dedication of temple to public**, tests for determining—Foreign decisions, expediency of resorting to, for conclusions on questions of fact

The following circumstances may be taken as establishing that a shrine founded and built by a person has been dedicated for public worship and that the temple has become a public religious endowment:—(1) Worship by the public in the temple for a long time, (2) contributions by members of the public for extension of temple buildings and *utsavams* and founding *kattalais*, (3) building of *choultries* by the public, (4) installation of a copper, instead of a stone, idol by the founder, (5) conducting of processions regularly in public streets, (6) entries in books maintained by public servants treating the temple as public

The following facts do not necessarily militate against a public dedication:—(1) The temple being founded by a private individual, 2, management being in the family of the founder or their spending the income of the temple uncontrolled by the public, (3) the tomb of the founder being in or in

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the vicinity of the shrine, (4) performance of *pujas* to the images of the founder or his descendants, (5) the family of the founder being the *pujaris* of the temple, (6) restrictions being placed against promiscuous entrance into the shrine, (7) the members of the founder's family submitting themselves to be taxed on any particular occasion for the income of the temple.

Per *Sadasiva Aiyar, J.*—Where the shrine in which the idols are installed takes the form of a temple larger than the size of an ordinary middle class house and especially if the temple has *prakarams* and *mantapams*, it is incredible that, except in a few instances in Malabar, such a temple should be a private temple. Even in Malabar, the presumption would be that such a temple is a public temple till the contrary is proved.

It is dangerous and inexpedient for Indian Courts to rely on English and foreign decisions to arrive at conclusions on questions of fact.

Per *Seshagiri Aiyar, J.*—There are two classes of dedications which must be differentiated. The consecration of a temple for public worship is a dedication in the strict sense of the term. In some cases the word dedication is employed to denote an endowment of property to the temple. In the latter case it has to be shown that the property ceased to belong to the individual and was given up for the use of the temple. In the first class of cases it will generally be sufficient to show that there has been free access to the temple and that there have been public worship and public celebrations. **M SUBRAMANIA AIYAR v LAKSHMANA GOUNDAN, (1919) M. W. N. 899; 27 M. L. T. 11 177**

Succession—Dayabhaga School—Koches of Assam, law applicable to—Unchaste daughter, whether entitled to inherit—Subsequent marriage with paramour, effect of

In matters of succession the Koches, aboriginals of Assam, are governed by the Dayabhaga School of Hindu Law, under which an unchaste daughter is not entitled to inherit the estate of her father, and the disability caused by her unchastity is not cured by her subsequent marriage, after her father's death, with the person with whom she lived an unchaste life, as the right to inherit was not hers at the time the succession opened out. **C AITI KOCHUNI v. AIDEW KOCHUNI, 24 C. W. N. 173 695**

Sudras—Mother, whether entitled to share on partition between legitimate and illegitimate sons—Leva Kunbis of Khandesh, whether Sudras.

Among Sudras the mother is entitled to a share when the sons divide the property; and the fact that some of the sons dividing the property are the illegitimate sons of her deceased husband cannot make any difference in the application of the rule.

Leva kunbis of Khandesh District are Sudras **B MANCHARAM BHIKU v. DATTU BHIKU, 21 Bom. L. R. 1172; 44 B. 166 110**

Temple—Archaka excluded from office till payment of fine—Suit by archaka to recover damages—Damages, measure of—Delay in bringing suit, effect of—Voluntary payments, whether income.

Where an archaka of a temple is excluded from his

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employment till he pays a certain amount of fine imposed upon him by the trustees, he is under no obligation to pay the fine under protest and thus reduce the amount of damages recoverable from the trustees by shortening the period of his unemployment.

Where the trustees of a temple eject an archaka from the temple they do so at their own risk, and they cannot be heard to say that a delay in taking steps to test the propriety of their conduct involved a lack of diligence on the part of the archaka, which should mitigate or deprive him of the right to damages.

Payments made to archakas for performing *archakais* in a temple are voluntary, in the sense that their amount and the making of them is at the devotee's option. Where it is in the contemplation of the parties that such payments would be received by an archaka, an action will lie to claim them as damages from the trustees of the temple. **M BALASUBRAMANIA SASTRI v. PONNUSAMI IYER, 10 L. W. 305; 26 M. L. T. 259; 1919 M. W. N. 707 721**

Widow, alienation by—Reversioner, new male, right of, to question alienation—Female reversioners, presence of, effect of—Necessity, proof of—Transferee, failure of, to make enquiry, effect of—Marriage, contemplated, of daughter, whether necessity

A male reversioner, between whom and the estate there are only female heirs, is entitled to sue for a declaration that a transfer made by the widow of the last male holder is invalid.

Where the necessity for an alienation by a Hindu widow is alleged to be the contemplated marriage of a daughter, but it appears that there was no negotiation for the marriage at the time the money was advanced and that the transferee made no enquiries as to the necessity before making the advance, the alienation cannot be upheld as being justified by legal necessity. **PAT RAMYAD PANDAY v. RAMBIHARA PANDE, 4 P. L. J. 334; (1920) PAT. 33 357**

Will, construction of. See SUCCESSION ACT s. 160 140

—, construction of—Female legatees, estate taken by—Devise to mother and sister with direction that properties should go to dayathis of testator after his sister's death without issue—Estate taken by devisees, nature of.

In construing bequests to Hindu women the general rule that a transfer of property conveys all the rights of the transferor, unless a contrary intention appears, applies.

A Hindu left a Will bequeathing his property to his mother and sister *sarva swathanthrathudan* and in the event of the sister dying without issue the property was to go to his *dayathis*:

Held, that the mother and sister took an absolute estate, the provision for the *dayathis* being a contingent bequest which did not cut down the absolute estate given to the female devisees. **M CHIDAMBARANATHA GOUNDAN v SELLAPPA REDDI, 10 L. W. 120; 27 M. L. T. 37 524**

Succession Act (X of 1865), s. 11, applicability of—Separate property of woman, succession to—Step-brother, whether preferred to husband's younger brother—Adopted son, whether full brother of daughter by predeceased wife.

The applicability of section 111 of the Succession Act depends upon a natural meaning as opposed

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to a forced interpretation of the words used in a Will.

The claim of a husband's brother to succeed in preference to the deceased woman's step-brother in respect of her separate property is recognised in textbooks of Hindu Law and has also received judicial confirmation.

Where a man takes a son in adoption after the death of his first wife, the adopted son becomes a step-brother of a daughter by the first wife.

Where of two wives one only joins in an adoption, the adopted son becomes the full son of the wife joining and the step son of the other. **C DURGA DAS v. DEVI PRASANNA ROY**, 23 C. W. N. 1038 **897**

Hindu Widow's Re-marriage Act (XV of 1856), s. 2—Outcasted widow, whether

Hindu—Re-marriage of outcasted widow, effect of—Alienation after re-marriage, validity of

An outcasted Hindu widow does not cease to be a Hindu, and if she re-marries, the provisions of the Hindu Widow's Remarriage Act would apply. Consequently, an alienation by her of her first husband's property after her re-marriage would be invalid **PAT SOMARIA v. BHULARYA** **820**

Interest, high rate of—Coercion or undue influence, absence of. See **TRANSFER OF PROPERTY ACT**, s. 65 **785**

High rate of—Penalty—Duty of Court. See **CONTRACT ACT**, s. 74 **833**

whether payable on annuity See **SUCCESSION ACT**, s. 60 **140**

Interest Act (XXXII of 1939), s. 1—

Sale of goods—Vendor, whether entitled to interest on price of goods—Agreement to pay interest, absence of—Notice to claim interest, failure to give, effect of

In the absence of any agreement to pay interest upon a particular transaction, or of any notice of the creditor's intention to claim interest in case the debt is not discharged by a certain time, a claim for interest cannot be brought within the purview of the Interest Act and consequently cannot be decreed. **A PARSHOTAM DAS v. BITHTHAL DAS** **431**

Interpretation of Statutes—Marginal note, value of See **PENAL CODE**, s. 75 **623**

Irregularity—Failure to join party. See **CRIMINAL PROCEDURE CODE**, s. 45 **169**

Judgment, failure to write proper—Remedy. See **CRIMINAL PROCEDURE CODE**, s. 37 **404**

of Criminal Court, contents of. See **PENAL CODE**, s. 441 **620**

statement in, that criminal proceedings will be started against party or witness, propriety of. See **DEBTOR AND CREDITOR** **95**

Jury, trial by—Appellate Court, power of, to interfere where no misdirection. See **CRIMINAL PROCEDURE CODE**, s. 306 **56**

Lambardar, dismissal of, for failure to assist in recruiting—Family, claims of, whether can be ignored in appointing successor

There are certain offences which exclude all members of the family of an offender from the office of headman. But the failure of a particular individual to assist in recruiting unless he is a member of a tribe or family, which for specific reasons, e.g., the lack of connection with the classes from whom recruits are likely to be obtainable, is permanently unlikely to be successful in this respect) is

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not a matter which should exclude the claims of the family **F C P HAIDAR v. EMPEROR**, 4 P. R. 1919 Rev. **861**

—, powers of, to lease vacant lands, extent of—Consent of co-sharers, whether necessary—Co-sharers, whether can avoid bona fide lease—Wajib-ul-arz, construction of.

Where the *wajib-ul-arz* of a village lays down that before leasing vacant lands, the *lambardar* should consult the wishes of the co-sharers of the village, this does not mean that the consent of the co-sharers should be obtained. The general rule in the Central Provinces is that the *lambardar* leases the vacant lands in the ordinary course of management. The mere fact that the co-sharers are not consulted, does not entitle them to claim on that ground to avoid a bona fide lease. **N HARI PRASAD v. GOVINDA RAO**, **634**

Land Acquisition Act (I of 1894), mortgaged property acquired under, effect of. See **MORTGAGE** **535**

ss. 18, 26—Reference to Court, scope of—Duty of Judge to consider question of compensation in its entirety

When a case is referred under section 18 of the Land Acquisition Act, the whole case is referred subject to the limitation contained in section 6 of the Act, and not merely any particular objection, and the District Judge is empowered, indeed bound, to consider the question of the compensation awarded in its entirety. **L ZIA-UD-DIN v. SECRETARY OF STATE** **920**

Landlord and tenant—Abandonment of house, effect of—Abandonment of land.

The abandonment by a tenant of his house in a village does not amount to an abandonment of the land on which the house stands. **PAT GOPAL JEE SINGH v. RAM NANDAN SINGH** **644**

Denial of landlord's title, effect of—Forfeiture of tenancy—Alternative plea, whether saves forfeiture—Pleadings—Allegation in plaint not traversed in written statement—Plaintiff, whether bound to produce evidence—Practice.

A denial by a tenant of his landlord's title causes forfeiture of the tenancy

Plaintiffs-landlords sued for ejectment of the defendants on the allegation that they were tenants-at-will denying the plaintiffs' title as owners. The defendants pleaded that they were the owners and, in the alternative, that even if they were tenants they were not liable to ejectment so long as they served the *takia*:

Held, (1) that inasmuch as the defendants had denied their landlords' title, they had forfeited their tenancy and were liable to ejectment;

(2) that the alternative plea of the defendants did not affect the question of forfeiture of tenancy;

(3) that inasmuch as the plaintiffs' allegation that the defendants were denying their title as owners had not been traversed in the statement of defence, it was not necessary for the plaintiffs to give evidence in support of their allegation **L KHEM SINGH v. ALI SHER**, 1 P. W. R. 920 **263**

Ejectment, order for—Partition—Possession delivered to landlord other than one to whom plot

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had been allotted, effect of—Ejectment, whether effective as against tenant.

Where an order for ejectment has been carried out and formal possession delivered to the landlord, the fact that shortly before the order was carried out a partition had taken place and the particular plot from which ejectment had been effected had fallen to the lot of another co-sharer landlord, would not make the ejectment less effective as against the tenant. **U P B R BABU KHAN v. BHAIRO PRASAD**, 1 U. P. L. R. (B. R.) 23 **292**

Ejectment suit—Lease held binding in previous suit not inter partes and not produced before Court, value of.

Where in a suit to contest a notice of ejectment the defendant relied upon a lease which was not produced and the only evidence of its existence was contained in an appellate judgment in a suit not *inter partes*:

Held, that the lease could not be held to be binding between the parties to the ejectment suit. **U P B R RAM HARAKH v. JAGDAMBA DEBI**, 1 U. P. L. R. (B. R.) 46 **574**

Joint tenancy—Co-tenant becoming co-sharer in mahal, effect of—Devolution of tenancy—Survivorship—Succession.

Where two brothers are recorded as occupancy tenants, the mere fact that one of them acquires a share in the *mahal* would not affect the occupancy right which he holds jointly with his brother, notwithstanding that at a subsequent settlement, owing to his becoming one of the proprietors of the *mahal*, his name is not recorded along with that of his brother as occupancy tenant. In such a case on the death of one of them the other is entitled to the whole of the occupancy holding by survivorship, and not by succession. **U P B R KHUMAN SINGH v. RAM SARUP**, 1 U. P. L. R. (B. R.) 34 **276**

Occupancy holding, non-transferable—Transfer by tenant in favour of heir without giving up possession—Landlord, right of, re-entry of.

A tenant of a non-transferable occupancy holding purported to transfer the holding by two documents, one in favour of his wife and the other in favour of his daughter. Notwithstanding these documents, however, he remained on the holding and resided at the house erected on a portion thereof down to the date of his death. His wife and daughter were living with him and on his death became entitled to the holding as his heirs:

Held, that the possession of the widow and daughter was lawful possession as heirs and that the landlord did not acquire a right of re-entry and was not entitled to disturb their possession and that the mere fact that the tenant executed two invalid documents in their favour did not alter the character of their possession. **C GOLAPJAN BIBI v. DIL MAMUD** **394**

Rent, payment of, partly in kind and partly in cash—Kabuliyat, provision in, in case of default—Tenant agreeing to pay definite sum as value—Landlord, whether entitled to market value

The question whether a landlord is entitled to realise anything more than the value of the paddy mentioned in the *kabuliyat* on default of payment of

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the paddy by the tenant is one of construction of the *kabuliyat* in each case.

A *kabuliyat* fixed the rent of a tenant as a specified sum of money to be paid in cash and a certain quantity of the produce to be delivered by the tenant to the lessor in a particular month according to a certain measure, and provided that in case of default the landlord would be entitled to recover the cash amount and a specific sum as the value of the produce. In a suit by the landlord claiming to recover the market value of the produce:

Held, that he was entitled only to realize the sum specified in the *kabuliyat* as the value of the produce and not its market value. **C GURUDAS SEN v. GOBINDA CHANDRA SINHA**, 24 C. W. N. 85 **914**

Rent, suit for, against some of several co-tenants—Money decree, whether can be passed.

Where a landlord desires to obtain a rent decree good against the land under the Bengal Tenancy Act, he must ordinarily implead all the co-tenants including the heirs or legal representatives of a deceased co-tenant. For the purposes, however, of a money decree he is free to sue any or all of the tenants, provided at the time of the creation of the tenancy it was intended that each of the tenants should be liable to pay the whole rent. **PAT BERADAR SINGH v. BACHA MAHTO**, (1920) PAT. 9; 5 P. L. J. 32; 1 P. L. T. 55 **39**

Thekadar, whether landlord—Ejectment suit by thekadar, maintainability of.

On the transfer by a proprietor of his proprietary rights to a *thekadar* the latter becomes the tenant's landlord, and unless the proprietor has reserved to himself the right of ejectment, he has the power to eject the tenant. **U P B R KUDAI KHAN v. JAGAT NARAIN DUBEY**, 1 U. P. L. R. (B. R.) 42 **569**

Under-proprietary rights, acquisition of—Adverse possession, acquisition of title by.

Defendants brought a suit to establish under-proprietary rights in 1868. Their claim was rejected but they were given a lease of the village for the term of the settlement. Through some mistake, however, the decree was not given effect to and when the Settlement Khewat came to be prepared a year later, an entry of under-proprietary right was made in their favour. The *khewat* was proclaimed for objections and none were made, and on all subsequent occasions the defendants claimed to be under-proprietors. In 1887 their claim was resisted by the person in possession of the estate, but it was upheld, and on other occasions it was either explicitly or tacitly admitted. The settlement came to an end in 1896, but the defendants continued to be treated as under-proprietors and on two occasions they asserted a transferable right by mortgaging portions of the land. In 1915 the plaintiff for the first time questioned the right of the defendants to be regarded as under-proprietors:

Held, that after the expiry of the settlement the defendants were in adverse possession of the village claiming title as under-proprietors, and that their title had been perfected by prescription. **O SHEO DAYAL v. PIRTHIPAL SINGH**, 6 O. L. J. 592 **100**

Under-proprietary rights for life without power of transfer, whether can be granted—Lapse of under-proprietary title on grantee's death, condition as to—Reversion, superior proprietor becoming entitled

Landlord and tenant—concl'd.

to—Failure to enforce right of reversion, effect of—Trespasser allowed to assert under-proprietary title, effect of—Rent, acceptance of, from trespasser, effect of—Estoppel.

A tenure which is not transferable cannot be treated as under-proprietary, but a superior proprietor can confer under-proprietary title on a person for life without any power of transfer. For, it is possible to conceive that a person might split up his full rights into proprietary and under-proprietary, and then grant the under-proprietary rights to another person for a limited period, reserving the reversion for another person or for himself.

An under-proprietary title for life without power of alienation was granted to a person by the superior proprietor with regard to certain property, with the condition that the under-proprietary title would lapse on the death of the grantee and the superior proprietor would then be entitled to reversion of that title. When the grantee died, the superior proprietor did not elect to claim or enforce the reversion but allowed a trespasser to assert that title and continue to pay the under-proprietary rent, so that on the faith of the trespasser being treated and recognised as an under-proprietor by the superior proprietor, the trespasser did certain acts which were to the detriment of herself and to the advantage of the superior proprietor:

Held, that the superior proprietor was estopped from denying the right of the trespasser to hold the property in question as an under-proprietor for life without any power of alienation. **O JANKI KUNWAR v. MITRA SEN SINGH**, 6 O L J. 636 **901**

Legal Practitioners Act (XVIII of 1879), s. 13 (f)—Guardian and ward—Agreement to pay surety portion of income of minor's estate—Pleader advising guardian to enter into agreement—Bona fide belief of Pleader—Misconduct.

A Pleader who advises his client, who has been appointed guardian for a minor, to enter into an agreement with the persons standing sureties for him to pay them a portion of the income from the minor's property in consideration of their executing the surety bond, *bona fide* believing that it is for the minor's benefit, is not guilty of misconduct within the meaning of section 13 (f) of the Legal Practitioners Act. **M K VENKATA ROW**, *In the matter of*, 11 L. W. 38; 28 M. L. J. 54; (1920) M. W. N. 125 27 M. L. T. 127; 21 Cr. L. J. 19 **163**

ss. 13, 14, scope of—"Charged", meaning of—Professional misconduct—"For any other reasonable cause," enquiry as to—District Judge, whether has power to make enquiry.

The natural construction of section 14 of the Legal Practitioners Act is that it includes clause (f) just as much as any other clause of section 13. The word "charged" in section 14 of the Act should be construed as meaning "is accused" or that an allegation is made to that effect.

A District Judge is legally competent to take action under section 14 of the Act in cases which come under clause (f) of section 13. **L BELI RAM**, *In the matter of*, 152 P. R. 1919; 21 Cr. L. J. 198 **982**

Letters Patent (Bom.), cl. 10—

Bombay Pleaders Regulation (II of 1827), s. 56—"Misbehaviour," meaning of—Disciplinary jurisdiction of High Court, extent of—Satyagraha pledge, signing of, by lawyer, whether unprofessional.

In the exercise of its disciplinary jurisdiction the High Court can deal with a legal practitioner in the same way as if he were applying for enrolment.

The term "misbehaviour" in section 56 of Bombay Regulation II of 1827 is not restricted to misbehaviour in the strict course of a Pleader's professional duties, but includes general misbehaviour.

There may be acts which would entitle the High Court to refuse admission to a candidate seeking to be enrolled as a Pleader or an Advocate, or to consider that it is improper that a Pleader or Advocate should remain as a practitioner of the Court, although the acts complained of do not involve an imputation of general infamy or bad character.

Where certain legal practitioners signed the following pledge:

"Being conscientiously of opinion that the Bills known as the Indian Criminal Law (Amendment) Bill I of 1919 and the Criminal Law Emergency Powers, Bill II of 1919 are unjust, subversive of the principles of liberty and justice, and destructive of the elementary rights of individuals on which the safety of the community as a whole and the State itself is based, we solemnly affirm that in the event of those Bills becoming law and until they are withdrawn we shall refuse civilly to obey these laws and such other laws as a committee to be hereafter appointed may think fit, and further affirm that in this struggle we will faithfully follow truth and refrain from violence to life, person or property:

Held, that those who had signed this pledge were not fit persons to be allowed to continue as members of the legal profession. **B JIVANLAL VARAJRAI DESAI**, *In re*, 2 Bom L R 12; 21 Cr. L. J. 151 **679**

Letters Patent (Cal.), cl. 15—Decision rejecting application for judgment on pleadings, whether judgment—Appeal, whether lies—Civil Procedure Code (Act V of 1908), O. XII, r. 6—Admission, ambiguous, in written statement, whether justifies judgment.

A decision by a Judge on the Original Side of the High Court rejecting an application by the plaintiff for an immediate judgment upon the pleadings is a "judgment" within the meaning of clause 15 of the Letters Patent, and is appealable as such.

An ambiguous admission in a written statement that a certain sum of money was due to the plaintiff is not such an admission as would justify an order under Order XII, rule 6 of the Civil Procedure Code. **C KORAMULL RAM BULLOBH v. MUNGILAL DALIM CHAND**, 23 C. W. N. 1017 **836**

cl. 36, whether overruled by Criminal Procedure Code See CRIMINAL PROCEDURE CODE, s. 145 **169**

Letters Patent (Mad.), cl. 15, controlled by Criminal Procedure Code, s. 215. See CRIMINAL PROCEDURE CODE, s. 215 **172**

Letters Patent (Pat.), cl. 10—Rules of Patna High Court, Ch. VII, rr. 2, 16, Ch. VIII, rr. 3, 4—Letters Patent Appeal—Procedure on admission—Civil Procedure Code (Act V of 1908), O. XLI, r. 11.

Under rules 2 and 16 of Chapter VII and rule 3 of Chapter VIII of the Rules of the Patna High

Letters Patent—concl'd.

Court the Bench before which an appeal under clause 10 of the Letters Patent is laid has jurisdiction to deal with it in exactly the same way as appeals posted to a Bench for hearing under Order XLI, rule 11, of the Civil Procedure Code. **Pat** JAGDIS CHANDRA DAS v. CHANDRA MOHAN DAS, (1919) PAT. 416; 4 P. L. J. 695 **230**

Limitation Act (IX of 1908), ss. 3, 5

—*Appeal filed beyond time—Limitation, extension of*
—*Sufficient cause—Burden of proof—Objection not taken by respondent—High Court, whether can consider question of limitation—Procedure—Practice.*

A petition of appeal filed without a copy of the decree appealed against is not valid as an appeal.

Where an appellant seeks the benefit of the provisions of section 5 of the Limitation Act, he must adduce distinct proof of the sufficient cause on which he relies and must furnish a detailed affidavit explaining the cause of the delay.

Where an Appellate Court exercises the discretion vested in it by section 5 of the Limitation Act, it must record the reasons for allowing an extension of the period of limitation.

Where a respondent fails to object to the admission of an appeal by a lower Appellate Court under section 5 of the Limitation Act, the High Court is not precluded from considering the question of limitation. Even an agreement between the parties that the objection should not be raised would not prevent the High Court from interfering.

The practice of admitting appeals out of time provisionally, without notice to the respondent, and allowing objection to its admission to be taken at the hearing should be discontinued. Provision should be made for the final determination at the stage of admission of any question of limitation affecting the competence of the appeal. **Pat** CHATURBHUI SAHAY v. MUHAMMAD HABIB **36**

—**S. 6**—*Minor, when can take advantage of exemption—Right of action, accrual of, before birth, effect of.*

A plaintiff cannot take advantage of the exemption provided for by section 6 of the Limitation Act unless he is a minor and was in existence at the time when the right to sue accrued.

A minor is not entitled to the benefit of section 6 of the Limitation Act in respect of a right to sue which accrued before his birth. **L** MIRAN DITTA v. BIHARI LAL, 2 U. P. L. R. (L.) 39 **838**

—**S. 12**—*Appeal—Time requisite for obtaining copies, what is—Appellant, whether bound to apply at one time for copies of judgment and decree—Separate periods, whether can be allowed for copies of judgment and decree.*

There is nothing in law which obliges an appellant to make one and the same application for obtaining copies of the judgment and decree to be appealed against.

Where an appellant applied for and obtained a copy of the judgment to be appealed against and subsequently, but before the expiry of the period for filing the appeal, applied for and obtained a copy of the decree:

Held, that the time spent in obtaining a copy of the judgment and the time spent in obtaining a copy of the decree must both be excluded in computing the period of limitation under section 12

Limitation Act—cont'd.

of the Limitation Act. **L** ALI MUHAMMAD v. NATHU, 163 P. R. 1919 **879**

—**S. 12**—*Decree, preparation of, not necessary—Time spent in obtaining copy of decree, whether can be excluded.*

In a case in which it is not necessary to prepare a decree but one is actually prepared, the time occupied in obtaining a copy of the decree should under section 12 of the Limitation Act be excluded in computing the period of limitation for appeal.

Pat MAHESH KANT CHOUDHURY v. RAM PRASAD RAI, 1 P. L. T. 33; (1920) PAT. 75; 2 U. P. L. R. (PAT) 28 **630**

—**S. 12**—*Exclusion of time—Time requisite for obtaining copies—Copies asked to be sent by post, effect of.*

Where in an application for copies the applicant asks that they should be sent to him by post, the time requisite for obtaining the copies under section 12 of the Limitation Act is the time from the date of the application to the date of posting the copies, irrespective of the fact that the copies are ready for delivery before the latter date. **O** IQBAL JEHAN v. MATHURA PRASAD, 6 O. L. J. 660 **831**

—**ss. 14, 29 (b)**—*Registration Act (XVI of 1908), s. 77—Suit to enforce registration of document—Limitation, whether can be extended under s. 14 of Limitation Act.*

In computing the period prescribed under section 77 of the Registration Act for bringing a suit to enforce the registration of a document, the provisions of section 14 of the Limitation Act are not applicable. **C** KALIMUDDIN MOLLAH v. SAHIBUDDIN MOLLA, 24 C. W. N. 4; 30 C. L. J. 455; 47 C. 20 **705**

—**S. 15, Sch. I, Arts. 181, 182**—

Execution of decree—Application, dismissal of, for want of bidders—Application, subsequent, presented more than three years after dismissal of previous application—Limitation.

Where no obstacle, actual or resulting, is imposed upon the execution of a decree by the Court executing the decree or by a Court before which an appeal from an order passed in the execution proceeding is pending or by the Court before which a suit or appeal to contest the validity of the decree or the order passed in execution is awaiting trial, there is nothing to stop the running of limitation either under Article 181 or under Article 182 of Schedule I to the Limitation Act.

The dismissal of an application for execution for no fault of the decree-holder is a mere direction to the officers of the Court to remove the application from the pending list, but the decree-holder's right to apply for its revival accrues from day to day and will be barred if no application is made for the purpose before three years have elapsed from the date when such proceedings were closed in fact or struck off. **O** KALKA SINGH v. GUR SARAN LAL, 6 O. L. J. 656 **426**

—**S. 15**—*Period fixed by s. 48, Civil Procedure Code, whether can be extended. See CIVIL PROCEDURE CODE, s. 48* **279**

—**ss. 19, 20, 21**—*Acknowledgment or payment by manager of joint Hindu family, effect of—Agent, payment by, through servant, whether binds principal—Contract Act (IX of 1872), s. 62*

Limitation Act—contd.

—*Novation of contract—Collapse of substituted agreement, effect of, on original contract.*

An acknowledgment of liability by the manager of a joint Hindu family will not, save under special circumstances, bind the other adult co-parceners who are also parties to the original contract.

Where part of the consideration for a mortgage deed executed by the father and written and attested by the son is payment towards a prior promissory note executed by both father and son, and the mortgagee pays the amount to the obligee of the promissory note, the son must be deemed to have authorised the father to make the payment and time is extended against the son.

Payment by an agent through his servant or friend is payment on behalf of the principal within the meaning of section 20 of the Limitation Act.

In cases of novation, where the contemplated substituted contract fails, *prima facie* the parties cannot be taken to have intended that the liability of the debtor under the original contract would also cease.

M DURAISWAMI AIYAR v. KRISHNIAH, 10 L. W. 466; (1919) M. W. N. 797 **318**

—**s. 20**—*Part payment of principal by agent of debtor—Entry, whether must appear in handwriting of agent—Authority of agent, proof of—Interpretation of Limitation Law.*

The law of limitation must be strictly interpreted.

Where an agent of a debtor makes a part payment of the principal debt, the payment, in order to give a fresh start of limitation under section 20 of the Limitation Act, must appear in the handwriting of the agent making it. Section 20 does not require that the payment should appear in the handwriting of the debtor himself. It must, however, be proved that the agent had authority to make the payment. **PAT BANWARI LAL v. RAM CHANDRA SINGH, 1 P. L. T. 17; 2 U. P. L. R. (PAT.) 23** **802**

—**Sch. I, Art. 49**—*Loan of movable property—Property wrongfully converted by borrower—Suit for recovery of property—Limitation, commencement of.*

In the case of property loaned to be returned when asked for, no action would lie until a return has been demanded and refused and the mere fact that the borrower has, unknown to the lender, wrongfully converted the subject of the loan would not affect the question of limitation.

The period of limitation in such cases would run from the date of demand and refusal, and not from the date when the property was converted wrongfully. **N BHASING v. BIHARILALL** **159**

—**Art. 85**—*Suit on bahi account—Balance struck and carried forward—Reciprocal demands—Account, whether mutual, open and current—Limitation applicable.*

Plaintiff sued for recovery of a certain sum of money alleged to be due on a bahi account. It appeared that plaintiff supplied defendants on occasions not merely with money but with various articles, the values of which were given in the account and debited against the defendants. There were mutual demands between the parties on balances struck up to a certain date, and the account was not closed even on that date, but the balance was carried forward:

Limitation Act—contd.

Held, (1) that in cases of this kind the Court must look to the dealings as a whole;

(2) that so viewed the accounts between the parties were mutual, open and current;

(3) that the suit was governed by Article 85 of Schedule I to the Limitation Act. **L DOGAR MAL v. MULA, 17 P. W. R. 1920; 9 P. L. R. 1920** **453**

—**Sch. I, Art. 109**—*Temporary injunction, possession under, when unlawful. See CIVIL PROCEDURE CODE, s. 144* **664**

—**Art. 120**—*Declaration that defendant is not son of particular person, suit for—Limitation, commencement of.*

A suit to obtain a declaration that a person set up as the son and heir of a deceased is not the rightful heir must be brought within the period prescribed by Article 120 of Schedule I to the Limitation Act, and such period begins to run from the time when, to the knowledge of the plaintiff, the title of son and heir to the deceased is set up. **N PRATAP SINGH v. RAJA DATTAJI RAO** **300**

—**Art. 120**—*Suit by mortgagor against mortgagee to recover share of compensation awarded under Land Acquisition Act—Limitation applicable. See MORTGAGE* **535**

—**Art. 131**—*Suit to establish right to offerings of temple—Arrears, claim for—Limitation applicable.*

A suit for a declaration that the plaintiff is entitled to a certain share in the offerings of a temple is a suit to establish a periodically recurring right and is governed by Article 131 of the First Schedule of the Limitation Act, and limitation begins to run from the date on which the plaintiff is first refused the enjoyment of the right. This Article, however, has no application to a suit for the recovery of arrears of the plaintiff's share in the offerings. **O JAGDEO v. MATHURA PRASAD, 6 O. L. J. 677; 22 O. C. 345; 2 U. P. L. R. (J. C.) 19** **540**

—**Arts. 142, 144**—*Possession, suit for—Record of Rights, entry in, in favour of defendant—Limitation—Burden of proof.*

In a suit for the recovery of possession, where the entry in the Record of Rights is in favour of the defendant, the plaintiff must prove his possession within twelve years of the suit. **PAT KISUN PRASAD SINGH v. SURAJ NARAIN PRASAD** **960**

—**Art. 144**—*Alienation by co-parcener—Adverse possession—Limitation.*

The entry of an alienee from a co-parcener into the property alienated is adverse to the other co-parceners from the very moment of that entry. **M ABDUL GAFUR v. ASHAMATH BIBI, 11 L. W. 31** **385**

—**Arts. 166, 181**—*Execution of decree—Sale in execution Application to set aside sale—Limitation applicable—Scope of Art. 166.*

The scope of Article 166, Schedule I, of the Limitation Act is not limited to applications under Order XXI, rules 89, 90 and 91 of the Civil Procedure Code. The Article is perfectly general in its terms and refers to an application under the Code to set aside a sale in execution of a decree.

An application to set aside a sale in execution of a decree passed against the father of the applicant, on the ground that the property sold belongs to the applicant and not to his father, is governed by Article 166 and not by Article 181 of Schedule of

Limitation Act—contd.

the Limitation Act. **C SATISH CHANDRA v NISHI CHANDRA DUTTA**, 46 C. 975 **431**

Sch. I, Art. 180—Civil Procedure Code (Act V of 1908), O. XXI, rr. 90, 92—*Execution of decree—Sale—Application to set aside sale, made and admitted after statutory period—Sale set aside in part—Application by purchaser for delivery in respect of items preserved—Limitation, suspension of.*

Held, by the Full Bench (Oldfield, J., dissenting) that where an application to set aside a Court sale, made beyond the statutory period after confirmation of the sale, is admitted and is in part disallowed, the period of limitation for an application by the auction-purchaser to be placed in possession must be computed from the date the application to set aside the sale was disallowed, and not from the date of the order of confirmation passed before the application to set aside the sale was made.

Oldfield, J.—The existence of the cause of action for an application for delivery, to which Article 180 of Schedule I to the Limitation Act applies, is not suspended during the pendency of proceedings for setting aside the sale, for once time has commenced to run its running is not suspended. **M MUTHU KORAKKI CHETTY v. MAHAMAD MADAR AMMAL**, 26 M. L. T. 452; 38 M. L. J. 1; 43 M. 185; 11 L. W. 487 **66**

Art. 181—Application for restitution—Limitation applicable. See CIVIL PROCEDURE CODE, s. 144 **664**

Art. 181—Mortgage, suit on—Preliminary decree—Appeal, confirmation of decree in—Final decree, application for—Limitation, commencement of.

Where a decree of a lower Court is affirmed by the Appellate Court, the lower Court's decree is wiped out by being merged in the decree of the Appellate Court, which takes its place to all intents and purposes, and both the decrees cannot exist simultaneously.

Where an appeal is preferred against a preliminary decree in a mortgage suit and that decree is affirmed, the right to present an application to make the decree final accrues on the day the appellate decree is passed. **N NILKANTH v. MADHURAO** **323**

Art. 182—Execution of decree—Cross-examination of objector, whether step-in-aid of execution—Order directing payment of process fees for issue of notice, whether gives fresh start of limitation.

The cross-examination of a person who objects to the execution of a decree does not amount to a step-in-aid of execution so as to give a fresh start of limitation.

An order to pay *talbana* for the issue of a notice does not furnish a fresh starting point for limitation, where *talbana* is not paid, and in consequence notice is not issued. **C AMBITA LAL MUKHERJEE v. HIRA LAL MUKHERJEE** **643**

Art. 182—Execution of decree—Notice, order for service of, whether extends limitation—Limitation, commencement of—Affidavit of service of notice, filing of, whether step-in-aid of execution.
An order for the service of a notice made by a Court to which the notice is sent by an executing

Limitation Act—concl.

Court for service, has not the effect of extending the period of limitation prescribed by Article 182, Schedule I of the Limitation Act, for making an application for execution of a decree.

The filing of an affidavit of service of notice in the Court to which the notice is sent by the executing Court for service, is not a step-in-aid of execution of the decree.

Limitation does not run from the date when the execution case is disposed of, but from the date of presentation of the application for execution. **C KRISHNA PRASAD v. DHIRENDRA NATH**, 24 C. W. N. 55; 30 C. L. J. 58 **1**

Sch. I, Art. 182 (5)—Civil Procedure Code (Act V of 1908), O. XXI, r. 17—*Execution of decree—Amendment of application, whether step-in-aid of execution—Attachment, order directing, effect of—Limitation, objection as to, when can be raised.*

If a decree-holder files a defective application and has to be ordered to amend it, he cannot gain profit from the amendment on the ground that it is a step-in-aid of execution.

In the absence of an application by the decree-holder moving the Court to make an order directing attachment to issue, such order made on the original application for execution does not amount to a step-in-aid of execution.

An order made in execution proceedings without notice to the judgment-debtor does not estop the latter from subsequently contending that the application on which the order was made was barred by time. **PAT SOBRAN MAHTON v. SIBILAS KUR** **933**

Art. 182 (5)—Execution of decree—Application praying that notice be issued to judgment-debtor, whether step-in-aid of execution—Limitation, extension of.

An application for execution headed as "for execution," written in the tabular form prescribed by the Civil Procedure Code for such applications, and stating that the "mode in which the assistance of the Court was required" was by the issue of a notice to the defendant to show cause, if any, why the decree should not be executed against him, is an application to take a step-in-aid of execution sufficient to save limitation within the meaning of clause 5 of Article 182 of Schedule I of the Limitation Act. **C ABDUL AJIJ ABDULLA v. YAKUB ABDUL GANI** **433**

Art. 182 (5)—Execution of decree—Decree-holder auction-purchaser, application by, to be put in possession, whether step-in-aid of execution.

Per Newbould, J.—An application by a decree-holder to be put in possession of property purchased by him at a sale in execution of his decree, is an application to the Court to take a step-in-aid of execution within the meaning of clause (5) of Article 182 of the First Schedule to the Limitation Act.

Per Cuming, J.—An application, to be a step-in-aid of execution, must be one by the decree-holder in his capacity of decree-holder and not in his capacity of auction-purchaser. **C ANNADA PRASAD v. SOMARUDDI**, 23 C. W. N. 924; 30 C. L. J. 135 **839**
Limitation Law, interpretation of. See LIMITATION ACT, s. 20 **802**

Lower Burma Land and Revenue Act (II of 1876), s. 18—Mortgage of grant land without sanction of Deputy Commissioner—validity of. See **CONSTRUCTION OF DOCUMENT 42**

Madras City Municipal Act (III of 1904), ss. 262, 325—License for storing timber—Permission of Municipality to put up a shed on timber yard, whether necessary.

A license obtained under section 325 of the Madras City Municipal Act does not cover the permission that is required under section 262 of the Act.

Therefore, a person who has obtained a license for storing timber is bound to take the permission of the Municipality for putting up a shed over it. **M NANDAMUNI NADAR, In re**, 21 Cr. L. J. 1; 10 L. W. 662; 38 M. L. J. 81; 27 M. L. T. 125; (1920) M. W. N. 111 **49**

Madras District Municipalities Act (IV of 1884), ss. 54, 97, 101, 262—Suit to recover tax collected, maintainability of—Jurisdiction of Civil Courts—Remedy of person aggrieved

The only remedy of a party aggrieved by the assessment imposed on him under section 54 of the Madras District Municipalities Act is to appeal to the Council under section 97 of the Act. A suit to recover the amount collected is barred under section 262 of the Act and Civil Courts have no jurisdiction to find that the assessment was erroneous on facts or to go into the question of the amount of a person's income. **M VIRUDUPATTI v. SARAVANA PILLAI**, 10 L. W. 592 **454**

Madras Estates Land Act (I of 1908), s. 3 (2) (d), (e)—Inam, grant of, by zemindar before Permanent Settlement—Grant, whether of melwaram or both warams—Presumption—Burden of proof—Ejectment of tenants, suit for, by grantee—Occupancy rights, proof of—Jurisdiction of Revenue Court *Madras Regulation XXVI of 1802, s. 2*

In the case of villages granted as inam by a zemindar before the Permanent Settlement, there is no presumption that the land revenue alone was granted. It must be presumed that the grant conferred a right, not only to the land revenue, but also to the land itself.

An action by the grantee in ejectment against the tenants is, however, not maintainable where the defendants have permanent occupancy rights by custom or otherwise, as neither the zemindar by the grant nor the Government by their release could convey rights over which they had no control.

The burden of proving the existence of occupancy rights is on the defendants, tenants.

Where it is not shown that the lands comprised in the grant were in the occupation of tenants at the date of the grant, it is not an 'estate' falling within clause 3 (2) (d) of the Estates Land Act and a suit in ejectment is cognizable by a Civil Court.

Per Napier, J.—The Legislature has specifically dealt with inams in clause (d) of section 3 (2) of the Madras Estates Land Act and could not have intended to provide for any other class of them in clause (e). Clause (e) of the section provides for portions of an estate held on permanent under-tenure and the fact that kattubadi is paid to a zemindar in respect of a pre-settlement inam cannot make that inam either 'a portion' or an under-

Madras Estates Land Act—conold.

tenure. **M NANDIGAM SUBBARAYUDU v. KANNAM SAHEB**, (1919) M. W. N. 836 **22**

ss. 77, 192—Rent suit in Revenue Court—Appeal—Dismissal of suit by Appellate Court without adjudication on merits but on ground of jurisdiction—Appeal, second, whether lies—Revenue Court, power of, in adjudicating on rent claims.

Where a suit for rent instituted in a Revenue Court is dismissed on appeal under section 77 of the Madras Estates Land Act only on the ground that the Revenue Court had no jurisdiction as to the questions raised in the pleadings but without any adjudication on the merits, the plaintiff has the right to prefer a second appeal to the High Court.

In a suit for rent presented under the provisions of the Madras Estates Land Act, the Revenue Court is both competent and bound to decide for itself any question necessary for the disposal of the case, whether its decision on the point would finally determine the question between the parties so as to make it *res judicata* or not. **M VENKATAPATHI NAYANI v. GADDAM CROWDENNA**, 11 L. W. 3 **749**

ss. 101, 111, 124, 131, 132—Civil Procedure Code (Act V of 1908), O XXI, rr. 90, 92, applicability of—Summary proceedings—Sale of ryot's holding for arrears of rent—Order cancelling sale for fraud or irregularity, validity of—Suit by purchaser to declare order invalid, maintainability of.

Where a ryot's holding is sold for arrears of rent under the summary procedure prescribed in section 111 and the succeeding sections of the Madras Estates Land Act and not in pursuance of a decree, the sale cannot be set aside by the Collector on the ground of irregularity or fraud, Order XXI, rules 90 and 92, Civil Procedure Code, being inapplicable to such sales.

If an order cancelling such a sale is passed, it is open to the auction-purchaser to sue to have it declared that his purchase is valid and that the order setting it aside and directing a re-sale is without jurisdiction and null and void and not binding on him.

Order XXI, rule 90, of the Civil Procedure Code applies only to cases where immovable property has been sold in execution of a decree, and it cannot be applied except to such sales inasmuch as its language precludes its application to sales in general, even though made through court officers. **M JAGANNADHA CHARYULU v. BOMMADEVARA SATYANARAYANA VARA. PRASADA**, 37 M. L. J. 706; 11 L. W. 101; (1920) M. W. N. 145; 43 M 351 **508**

Madras Hereditary Village Offices Act (III of 1895), ss. 13, 21—Madras Proprietary Estates Village Service Act (II of 1894), ss. 9, 10, 13, 15—"Succession," meaning of, whether includes right to be appointed to newly created village office—Suit for declaration that a person is not entitled to village office, maintainability of—Jurisdiction of Civil Court.

Per Bakewell, J.—The words "claim to succeed" in section 21 of the Madras Hereditary Village Offices Act should not be understood in the strict sense of the acquisition of an interest upon the death of a person, but mean the right to be appointed upon a vacancy in office. They include, therefore the right to be appointed to a newly created office

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A suit for a declaration that a person is or is not entitled to a village office is not cognizable by the Civil Courts.

Per Odgers, J.—The words "claim to succeed" in section 2 of the Madras Hereditary Village Offices Act do not include any claim to be appointed in the first instance to any of the village offices set forth in the Act.

A suit merely for a declaration that a person is entitled to a village office is cognizable by the Civil Courts. **M ALAGIASUNDARAM PILLAY v MIDNAPORE ZEMINDARY CO., LTD** 816

Madras High Court Appellate Side Rules, App. II, rr. 35, 36, 38—Probate

appeal—Pleader's fees, computation of—Probate proceedings, right in dispute in, what is—'Ad valorem fee' in rr. 35, 36, meaning of.

The graduated scale of fees paid on the amount for which Probate is granted cannot come under the expression *ad valorem fee* used in rules 35 and 36 of the Madras High Court Appellate Side Rules.

The right in dispute in Probate proceedings is not so much a right to property as it is a right to manage and administer the estate by the person applying.

The subject-matter, therefore, of a Probate appeal is not capable of valuation and the proper rule applicable for determining Pleader's fees therein is rule 38 of the Appellate Side Rules. **M KONDA SIDDHIA CHETTY v. VE. KATAROYA CHETTY**, 10 L. W. 511; 57 M. L. J. 659; 6 M. L. T. 440; (1920) M. W. N. 155; 43 M. 282. 292

Madras Irrigation Cess Act (VI of 1865), s. 1—"Engagement with Government,"

easement, whether amounts to Forfeiture of servient estate, effect of—Dominant estate, whether liable to pay cess.

When the Government in India forfeits an estate, the Crown takes that estate *tantum et tale* as it stood in the subject against whom the forfeiture is exercised: it takes it, therefore, subject to all existing easements.

Where a Zemindar had an easement to irrigate his estate free from an artificial channel passing through the estate of his neighbour, and Government forfeited the neighbour's estate for rebellion:

Held, that the Zemindar had an "engagement with the Government" within the meaning of the proviso to section 1 of the Madras Irrigation Cess Act of 1865 and that, therefore, he was not liable to pay the irrigation cess imposed under the Act.

SECRETARY OF STATE v. MAHARAJA OF BOBBILI, (1919) M. W. N. 7; 37 M. L. J. 74; 15 A. L. J. 111 L. W. 94; 2 U. P. L. R. (P. C.) 33; 46 I. A. 302; 4 C. W. N. 415. 154

Madras Proprietary Estates Village Service Act (II of 1894), ss. 6,

15—Submission of nomination by proprietor—Limitation, commencement of—Formal submission of unsigned nomination by proprietor's agent, validity of—Premature submission of nomination, effect of—Power to withdraw before acceptance by Collector

In the case of the creation of a new office under section 15 of the Madras Proprietary Estates Village Service Act the starting point for the six weeks allowed for submission of nomination by the

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proprietor is the day on which all the requisite steps have been completed under section 6, or, in other words, the day on which the last step is completed.

As the power of choice of the person to be appointed to a new office created under the Act is given to the proprietor under section 15, he must exercise it himself and is prohibited from delegating it to another. But once the choice is made, it is competent to his agent to act for him in formally embodying his nomination in the form prescribed and signing it for him and submitting it.

A proprietor is not prevented from submitting his nomination in advance of a new office being created. Such a submission would take effect when the office is created, if not rejected by the Divisional Officer.

A nomination prematurely made may be withdrawn and a fresh nomination may be made after the office is actually created. **M TANGUTHUR NARASIMHAM v. SINGARAJU RAMIAH**, 35 M. L. J. 126; (1910) M. W. N. 253. 728

Malabar Law—Appointment of heir—Succession to estate of appointee Rights of relations of natural family—"Ananthira avakasham," meaning of

According to the customary law of Malabar the relations of the natural family from which an heir is constituted are entitled to succeed to that heir if he dies sonless. The appointment of an heir is very different from an adoption.

The expression "ananthira avakasham" only means the right of heirship, and the appointment of a person with *ananthira avakasham* rights enables his natural relations to succeed to his property. **M KUTUMATT PUTHEN VARIATH SEKHARA VARIER v. KOTAKAT** (1912) M. W. N. 9. 339

Malicious prosecution—"Malice," meaning of—Police Officer directing prosecution as result of enquiry, liability of—Secretary of State, whether liable for acts of officers done in discharge of duty—Tort

In cases of malicious prosecution the term "malice" does not necessarily imply personal spite or grudge on the part of the defendant or his agent, and it exists wherever there is an improper or indirect motive which actuated the prosecutor in instituting criminal proceedings against the plaintiff.

Where a Police Officer acting in the honest discharge of his duties directs the prosecution of a person on a criminal charge as the result of an enquiry, he cannot be held liable in damages if it subsequently turns out that there was no reasonable or probable cause for the prosecution.

The Secretary of State cannot be held civilly liable for tortious acts committed by Police Officers in the performance of duties imposed upon them by the Legislature. **L EVANS v. SECRETARY OF STATE** 14 P. R. 1919. 950

Misjoinder, decree, whether can be set aside on ground of. See CIVIL PROCEDURE CODE, s. 49

—, whether question of law justifying appeal to Privy Council. See CIVIL PROCEDURE CODE, s. 109. 512 450

Mortgage—Mortgagee, entitled to possession—
Failure to take possession—Interest, whether can be recovered.

Where a mortgagee who is entitled to the possession of the mortgaged property omits to take any steps to obtain possession under his mortgage, he is not entitled to recover damages for the period he is out of possession. **N BALWANTRAO v. NARHAR GANGARAM** 814

—Redemption—Mortgaged property acquired under Land Acquisition Act, effect of—Limitation Act (IX of 1908), s. 15 (2), Sch. I, Art. 20—Suit by mortgagor against mortgagee, to recover share of compensation awarded under Land Acquisition Act—Limitation applicable—Secretary of State wrongly impleaded as party to suit—Notice, period of, whether can be excluded.

Where mortgaged property is acquired under the Land Acquisition Act, the mortgage cannot be redeemed as the mortgaged property has ceased to exist.

A suit by a mortgagor against his mortgagee to recover his share of the compensation awarded to the latter in respect of the mortgaged land under the Land Acquisition Act is governed by Article 20 of Schedule I to the Limitation Act.

Where the Secretary of State is wrongly impleaded as a defendant in a suit, the period of notice given to the Secretary of State cannot be excluded under section 5 (2) of the Limitation Act in computing the period of limitation applicable to the suit. **O. ADLIPRASAD v. NIZAM-UD-DIN**, 22 O. C. 42; 2 U. P. L. R. J. C. 25 535

—Redemption, suit for—Consideration, partial failure of—Loss occasioned to mortgagor, whether can be set off—Mortgagee, duty of, to restore mortgaged property to mortgagor on redemption—Possession not originally delivered to mortgagee, effect of.

Where there is only a partial failure of the consideration payable for a mortgage, any loss occasioned in consequence of that failure can only be recovered by a separate suit, and cannot be set off in a suit for redemption.

The duty of a mortgagee to restore at the time of the redemption of the mortgage the mortgaged property to the mortgagor does not arise where possession over that property was not delivered to him at the time of the mortgage or at any time thereafter. **O. ANGAD SINGH v. KASHI PRASAD**, 3 O. L. J. 519 313

—, suit to enforce, against mortgagor and purchaser of equity of redemption—Mortgagor, power of, to transfer interest, whether can be gone into—Procedure.

In a suit to enforce a mortgage brought against the mortgagor and the purchaser of the equity of redemption, the question whether the mortgagor had a transferable interest ought not to be gone into. The sole question in such a suit is, whether the Court should enforce the security as regards the right, title and interest of the mortgagor, the case whether the mortgagor had a good interest to transfer being foreign to such suit. **C. DUDALI UAYAL v. BELO IBI** 806

—, usufructuary—Mortgagee, rights of—Repairs carried out by mortgagee—Rent, enhancement of, benefit of, mortgagee, whether entitled to—Decree based on mortgage—Auction-purchaser, dispossession of—Damages, basis of.

Mortgage—conold.

Where a usufructuary mortgagee of a house carries out repairs and improvements with the object of realizing enhanced rent, he ought to have the benefit of the enhancement which the money spent by him brings about.

Where an auction-purchaser in execution of a decree based on a usufructuary mortgage is dispossessed and claims damages for the period of his dispossession, the purchase-money paid by him is not to be taken into consideration in assessing the amount of damages. He can either get interest on the basis of the mortgage or damages to the extent of the rent of the property of which he has been deprived. **O. WILAYAT HUSAIN v. ZAMANI BEGUM**, 6 O. L. J. 608 112

Mortgage-deed, attestation of, whether must be proved. See CIVIL PROCEDURE CODE, O. VIII. R. 3 107

Muhammadian Law—Divorce, mode of effecting—Presence of wife, whether necessary.

There is no provision of the Muhammadan Law requiring that a divorce should be pronounced in the presence of the wife or that it should be immediately communicated to her. All that is necessary is that the fact of the divorce having been effected should be brought to the notice of the wife. **B. RAJASHEER KASULSHEER, In re**, 21 BOM. L. R. 1035; 44 B. 41 573

—Gift imposing obligation on donee to maintain donor—Hiba bil-ewaz—Resumption, whether permissible.

A gift by a Muhammadan widow imposing an obligation, without making it a condition precedent, on the donee to nurse and maintain her for the rest of her life cannot, on the donee ceasing to maintain her, be avoided by her on the ground that the obligation was a condition precedent to the gift; nor can such gift be resumed under the Muhammadan Law, as the obligation placed on the donee deprives the gift of being one purely voluntary and makes it a hiba-bil-ewaz. **C. ABIRJAN BEWA v. SHEIKH KABIL** 542

—Gift subject to condition which derogates from grant, validity of—Condition to maintain donor, whether makes gift inoperative—Nusha, doctrine of, applicability of.

Under the Muhammadan Law where a gift is made subject to a condition which derogates completely from the grant, the condition is void and the gift takes effect as if no condition is attached to it.

A hebanona containing a condition in the nature of a trust to maintain the donor during her life does not make the gift inoperative.

Where a hebanama purports to give one-half of certain plots of land, there is no likelihood of any confusion being created, and the gift does not come within the mischief of the rule of nusha. **C. AGIRIRAMANIK v. SUBID MALLA** 378

—Will—Assent of heirs, effect of—Testator, whether can make gift over after absolute estate.

A testator cannot, under the Muhammadan Law, make a gift over after a vested bequest of an absolute estate.

Where a Will made by a Muhammadan is assented to by his heirs after his death, the assent

Muhammadan Law—conold.

merely validates the document, which must, however, be construed according to the ordinary rules of Muhammadan law governing Wills. **L. NASIR ALI SHAH v. SUGRA BIBI**, 2 U. P. L. R. (L.) 61 **853**

Native State, previous conviction in, effect of. See **PENAL CODE**, s. 75 **624**

Negotiable Instruments Act (XXVI of 1881), s. 20, applicability of—Hundi paper, signed but left blank, delivery of, effect of—Attachment of unsigned stamp, without authority, effect of—*Estoppel*.

The estoppel arising from section 20 of the Negotiable Instruments Act can only be applied to the paper or papers which the signature covers. The delivery of a hundi paper signed but left blank cannot be taken to give *prima facie* authority to make thereon a negotiable instrument outside the maximum value covered by the stamp by attaching thereto other unsigned stamps.

The delivery of several signed stamps separately does not give *prima facie* authority to stick them together for the purpose of a single instrument. It is only when the signature is across two or more stamp papers pasted together showing thereby that the several stamps have been united with the sanction of the person making the signature, that section 20 will govern as one transaction an instrument engrossed upon the joined papers. **N. GOKULDAS NAINSEKHIDAS v. RADHAKISAN** **3**

Opium Act (I of 1878), ss. 4, 9, r. 48
—Sale of opium in contravention of conditions of license—*Offence*.

A sale of opium in contravention of the conditions of a license is a breach of rule 48 and is punishable under section 9 of the Opium Act. **L. DAULAT RAM v. EMPEROR**, 33 P. R. 1919 CR.; 21 CR. L. J. 180 **884**

Oudh Laws Act (XVIII of 1876), ss. 9, 10—*Pre-emption*—Taluqdari mahal, whether mahal—*Notice, failure to give, effect of*—Mortgagee pre-emptor—Vendee whether entitled to costs of redemption suit—Vendee becoming co-sharer after sale but before suit, effect of.

A taluqdari mahal, i. e., a mahal comprising many villages separately assessed to revenue, but carrying a joint liability for revenue extending over all the villages in the mahal, is a mahal within the meaning of section 9 of the Oudh Laws Act, irrespective of the fact that no separate Record of Rights is prepared for the whole mahal but only for each of the villages comprising that mahal.

Where a pre-emptor happens to be the mortgagee of the property sought to be pre-empted, the condition in the sale-deed as to redemption of the mortgage as economically as possible does not affect the nature of the transaction as it appears from the deed, so as to debar the pre-emptor from claiming pre-emption of the property sold.

If a vendee fails to see that the vendor complies with the provisions of section 10 of the Oudh Laws Act and files a redemption suit against the mortgagee of the vendee property, who files a simultaneous pre-emption suit, the vendee cannot recover from the pre-emptor mortgagee the costs incurred by him in the redemption suit.

A pre-emptor does not lose his right of pre-emption by reason of the vendee becoming a co-

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sharer after the date of the sale in question but before the date of the pre-emption suit.

The provisions of Chapter II of the Oudh Law Act mean that the persons, who in section 9 are described in a proleptic or anticipatory sense as having a right of pre-emption, are invested with an actual right to pre-empt as soon as a sale to a stranger takes place. In other words, up to the date of sale the pre-emptor has merely the right to be preferred, which is a potential or imperfect right. This potential right gives place, on the happening of the sale to a stranger, to an actual or perfect right to be substituted for the vendee, and such right cannot be defeated by any act of the vendee after he right has accrued.

It is a fundamental principle of law that a person cannot take advantage of his own wrong-doing. A purchaser who purchases property, without ascertaining that it has been offered first to a person having a preferential right of purchase, is assisting the vendor in evading his obligation to give notice under section 10 of the Oudh Laws Act. **O. LAL RAGOINDRA PRATAB SAHI v. ABU JAFAR**, 6 O. L. J. 618; 22 O. C. 353; 2 U. P. L. R. (J. C.) 66 **371**

S. 13—*Pre-emption*—Price, whether entered in good faith—Fancy price. See **DEBTOR AND CREDITOR** **95**

S. 13—*Pre-emption, suit for, by mortgagee*—Amount payable to vendee—Amendment of decree—Market value, determination of—Fancy price, whether fictitious.

A vendor of certain property left with the vendee a portion of the sale money to be paid to the mortgagee of the property and the pre-emptor, who was the mortgagee, applied under section 151 of the Code of Civil Procedure for amendment of the decree to the effect that the defendant vendee was entitled to receive from him only such sums as the latter had paid to the vendor, and the Court amended the decree accordingly.

Held, that the Court was right in applying section 151 and in amending the decree as prayed for.

In the absence of any special reason for paying a fancy price for property, the fact that such a fancy price has been entered in the sale-deed is in itself evidence of the price being fictitious.

Under section 13 of the Oudh Laws Act if any single item forming part of the price mentioned in the sale-deed is found to be fictitious, the Court must fix such price as appears to it to be the fair market value of the property sold. **O. ZAHUR AHMAD v. MOHARRAM ALI**, U. P. L. R. (J. C.) 54 **34**

Ch. II—Good faith of pre-emptor, whether can be inquired into. See **PRE-EMPTION SUIT** **520**

Oudh Rent Act (XXII of 1886), s. 38 (2)—*Nazrana, whether illegal*—Co-sharers—Suit for profits—*Nazrana, whether can be included in account*—Co-sharer, liability of.

In a suit for profits brought by one co-sharer against another, the *nazrana* realised by the latter can be included in the account, provided the *nazrana* and the enhanced rent taken together do not offend against the provisions of section 38 (2) of the Oudh Rent Act.

A co-sharer is liable to account for whatever profit he receives on account of the joint land to his co-

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sharers, whether he receives it in the shape of *nazrana* or in the shape of rent. **O NAROTAM DAS v. NARAIN DAS**, 22 O. C. 264 **232**

Oudh Sub-Settlement Act (XXVI of 1866)—Subordinate proprietors in Oudh, position and rights of—Family arrangement, what is—Test to be applied—Reversioners, right of, to challenge alienation.

The Oudh Sub-Settlement Act of 1866, which was enacted for the purpose of securing a better determination of certain claims by subordinate proprietors in Oudh, emphasised that the rights of subordinate proprietors which were to be enforced were those which they held on or before the 13th February 1856 and that the settlement was not intended to enlarge the rights which the holders of subordinate tenures possessed.

The true test to be applied to a transaction challenged by the reversioners as an alienation not binding upon them, but which is alleged to be a family settlement, is whether the alienee derives title from the holder of the limited interest or life-tenant. There may be a family arrangement between heirs or possible claimants by inheritance, but there can be no family arrangement as between legatees or alienees to which the reversionary heirs are not parties. **O BHUSHAN v. DEO NARAIN** **82**

Partition—Partition decree, effect of—Mortgage, whether affected—Mortgagee purchasing proprietary rights—Proprietary rights loss of, effect of—Mortgage whether revived.

A decree for partition between proprietors purports to divide the proprietary rights of the persons seeking partition as against the other co-owners of the property, and does not affect the rights of mortgagees in the property partitioned, even when the mortgagees are parties to the partition, unless the rights of the mortgagees as such are attacked and a relief is granted in respect of the same by the decree allowing the partition.

Where the proprietary rights acquired by a mortgagee in the mortgaged property at an auction-sale in execution of a decree obtained by a subsequent mortgagee are wiped out, the mortgage is revived. **O JAI KISHORI BIBI v. AFZAL KHANAM**, 22 O. C. 349; 2 U. P. L. R. (J. C.) 17 **544**

Partition suit—Costs of preliminary decree—Practice.

In a partition suit instituted for the purpose of effecting a partition between the members of a family, where neither party has been guilty of any unfair contention, the costs till the preliminary decree should, as in the case of administration suits, be ordered to come out of the estate. **M NEELATOORU VENKATARAMACHARLU v. NEELATOORU SAMPATH KUMARA AYYANGAR**, 11 L. W. 5 **382**

Decree, form of—Share of each party, extent of, definition of—Decree, whether binding on defendants inter se—Registration Act (XVI of 1908), s. 17 (2) (ii)—Compromise—Award based on compromise, whether requires registration—Hindu Law—Joint family—Compromise entered into by father to avoid dispute, whether binding on sons—Family arrangement.

Partition suit—conold.

Where in a suit for partition of a joint property the decree declares the shares of every one of the parties interested in the property, the declaration as to the extent of the shares of the defendants is as binding between the co-defendants themselves as between the defendants and the plaintiffs.

Where an award given by arbitrators is in accordance with a compromise made by the parties to a suit and not going beyond the scope of the suit, and the award is made a decree of Court, registration of the award is not necessary under section 17 (2) (vi) of the Registration Act.

A compromise, which is entered into by a Hindu father with regard to ancestral property for the purpose of avoiding an existing or even possible litigation and which is in the nature of a family settlement, is in the absence of fraud, collusion, undue influence or other like reason binding on his sons. **O GANDHARP SINGH v. NIRMAL SINGH**, 6 O. L. J. 29; 22 O. C. 300 **325**

Partnership—Debt due to firm—Payment to one partner, whether dissolves liability.

Defendant bought goods from a firm jointly owned by plaintiff and one S and paid the purchase-money to S. Plaintiff sued for recovery of the money:

Held, that the defendant's liability had been discharged by payment of the debt to S. and that the plaintiff was not entitled to recover the amount. **L HODI v. NIDHA**, 10 P. W. R. 1920 **273**

Patents and Designs Act (II of 1911), ss. 1(2), 2(3), 81—Berar, whether included in British India—Patent granted in British India, whether can be recognised in Berar.

G obtained the exclusive privilege in respect of an invention under the Inventions and Designs Act, 1888. Under the Patent and Designs Act, 1911, which repealed the Act of 1888, his exclusive privilege was converted into a patent and extended throughout British India, including British Baluchistan and the Santhal Parganas. The Act of 1888 was never applied to Berar, but by a Notification of the Government of India issued under the Act of 1911, Berar was included in the term British India. No Controller of Patents was appointed for Berar nor was a Patent Office established there and in an action for infringement of the patent it was contended that the patent was not operative in Berar:

Held, that the patent was operative in Berar and an infringement thereof was actionable; that although a separate Controller of Patents was not expressly appointed for Berar, the officer appointed to this office for British India was the Controller for Berar; and that though the patent was granted on a date anterior to the date of the Notification of the Government of India, that Notification had the effect of making it valid in Berar from the date on which it was granted. **N SHEOPRASAD v. GOVIND** **417**

Patna High Court, whether bound to follow practice of Calcutta High Court. See **CRIMINAL PROCEDURE CODE**, s. 195 **673**

Penal Code (Act XLV of 1860), ss.

23, 24, 380—*Theft*—*Constituents of offence*—*Dishonest taking, what amounts to*—*Claim of right, bona fide, investigation into.*

In order to constitute the offence of theft the prosecution must establish a that there was dishonest intention to take property b) that the property was moveable property, c that it was taken out of the possession of another, d that it was taken without the consent of that other, and (e that there was removal of the property in order to accomplish the taking of it.

A person is said to take dishonestly when he takes with the intention to cause wrongful loss to another person, that is to say, with the intention that such person should be wrongfully kept out of the property.

In prosecutions for theft, whenever there is an assertion of a claim of right, it is the bounden duty of the Court to enquire into the question whether that claim is a *bona fide* claim or is a mere pretence. If, when that claim is actually put forward, the Court fails to decide the question whether the claim is a *bona fide* claim or a mere pretence, the conviction cannot be sustained. **Pat** AJODHYA NATH PARHI v EMPEROR, 21 CR. L. J. 98 **992**

s. 40, applicability of. See CALCUTTA MUNICIPAL ACT, s 559 52) **781**

s. 75—*Enhanced sentence, when to be passed*—*Interpretation of Statutes*—*Marginal note, value of.*

Section 75 of the Penal Code enables a court to pass a sentence commensurate with the nature of the offence on the accused person; it does not empower a Court to pass a sentence disproportionate to the nature of the actual offence.

Recourse should not be had to the provisions of section 75 of the Penal Code if the punishment provided for the offence is sufficient.

The marginal note to a section forms no part of the Statute itself and is not binding as an explanation or construction of the section. **Pat** SHEIKH CHAMMAN v EMPEROR, (1919) PAT. 43; 1 P. L. T. 2 U. P. L. R. (PAT) 24; 21 CR. L. J. 143 **623**

s. 75—*Previous conviction in Native State, effect of*—*Enhanced punishment, whether can be inflicted.*

A previous conviction in a Native State is outside the scope of section 75 of the Penal Code. Where, therefore, a person admits such a previous conviction, it ought not to be considered. **A** BHANWAR v EMPEROR, 1 U. P. L. R. (A.) 172; 18 A. L. J. 58, 21 CR. L. J. 144; 47 A. 138 **624**

ss. 79, 107 (1)—*Act done in good faith*—*Mistake of fact, subsequent, whether protected*—*Instigation, advice, whether amounts to*

Where a person does a thing in good faith but subsequently commits a mistake of fact, he is entitled to the protection afforded by section 79 of the Penal Code.

Instigation necessarily indicates some active suggestion, or support or stimulation to the commission of the act itself, and advice can become an instigation only if it is found that it was an advice which was meant actively to suggest or stimulate the commission of an offence.

The fact that a person advises another to do a thing, does not necessarily mean that he "instigates" that other to do that thing within the meaning of section 107 (1) of the Penal Code. **Pat** RAGHUNATH

Penal Code—contd.

DARE v EMPEROR, 1 P. L. T. 67; (1920) PAT 76; 5 P. L. J. 170; 21 CR. L. J. 213; 2 U. P. L. R. Pat 70 **997**

ss. 92, 332, 333—*Criminal Procedure Code (Act V of 188), s 46 (3)*—*Arrest of offender*—*Use of more force than is necessary*—*Right of private defence, extent of*—*Causing grievous hurt to public servant in discharge of duty*

Accused, who was in illegal possession of opium, was ordered by an Excise Inspector to stop, and the latter fired two shots to frighten him. The accused thereupon turned round and wounded the Excise Inspector with his sword. He was then caught and while a peon was proceeding to disarm him, the accused wounded the peon also with his sword.

Held, (1) that the Excise Inspector was entitled to arrest the accused and for that purpose to use all necessary means.

2 that he was not, however, justified in causing death in effecting the arrest under section 46 (3) of the Criminal Procedure Code;

3 that inasmuch as apprehension of death had been caused to the accused, he had a right of private defence against the Inspector which had not been exceeded;

4 that the accused had no right of private defence against the peon after he had been caught and that, therefore, he was guilty of causing grievous hurt to a public servant in the discharge of his duty. **U B** NGA DAN DA v EMPEROR, 3 U. B. R. (199) 178 **577**

s. 147—*Rioting*—*Unlawful assembly, finding as to, whether necessary*—*Conviction, whether maintainable.*

In the absence of a finding as to the existence of an unlawful assembly, a conviction under section 147 of the Penal Code cannot be maintained. **Pat** MAHAR DUTT SINGH v EMPEROR, 1920, PAT. 127; 21 CR. L. J. 165 **773**

s. 186—*Warrant, resistance to execution of*—*Warrant addressed to nazir personally*—*Nazir, whether can delegate execution to naib-nazir.*

Although it is improper for a nazir to depute one of his assistants to execute a warrant for the delivery of possession which is directed to the nazir himself, yet the assistant is sufficiently clothed with authority to execute the warrant, and any person offering resistance or obstruction to its execution is guilty of an offence under section 186, Penal Code. **Pat** DOMAN MAHTO v EMPEROR, 21 CR. L. J. 193 **977**

s. 187—*Failure to assist Salt Inspector in making search*—*Offence*—*Criminal Procedure Code (Act V of 1898), s. 103, cl. (2), scope of*

Clause (2) of section 103, Criminal Procedure Code, suggests that while the rendering of assistance to a public servant in making a search is imperative on the persons called upon to assist, they are not compellable to attend court to give evidence without a summons in that behalf.

Failure, therefore, to assist a Salt Inspector in making a search, after being requisitioned by the latter to do so is an offence punishable under section 187 of the Penal Code. **M** IPPILI MAGATHA v EMPEROR, 35 M. L. J. 27; 11 L. W. 58; (1900) M. W. N. 10; 1 CR. L. J. 33 **241**

s. 193—*Perjury*—*Proof, quantum of*—*Circumstantial evidence, value of.*

Penal Code—contd.

To justify a conviction for perjury, it is sufficient if the statement of the accused is proved to be incredible it is not necessary to prove that it is impossible.

To justify a conviction for perjury on circumstantial evidence, it must be shown that the evidence cannot be explained on any other reasonable hypothesis. **O MOHAMMAD ISMAIL KHAN v. EMPEROR**, 22 O. C. 236; 21 Cr. L. J. 12 **60**

s. 203—Criminal Procedure Code (Act V of 1878), s. 476—Order directing prosecution—Preferring false claim—Accused, whether must be given opportunity to show cause.

The mere dismissal of a suit in the absence of a clear finding that the suit was false and was brought with intent to injure the defendant, is not a justification for directing the prosecution of the plaintiff under section 209 of the Penal Code.

Where a plaintiff is called upon to show cause why he should not be prosecuted under section 203, Penal Code, he should be afforded every opportunity of adducing evidence in support of his claim and to remove any doubt in the mind of the Court as to the falsity of the case. **PAT CHAKAURI RAI v. EMPEROR**, 21 Cr. L. J. 8 **636**

ss. 302, 304, 323, 325—Death of child caused accidentally in scuffle—Offence.

A woman who was holding a child in her arms intervened unexpectedly in a scuffle between the accused and her husband on a dark night. The accused aimed a blow at the husband with his stick, but it accidentally struck the child and caused his death.

Held, that the accused was guilty only of the offence of causing simple hurt, inasmuch as he could not have intended to cause or to have known that he was likely to cause either death or grievous hurt. **B CHATUR NATHA v. EMPEROR**, 21 Bom. L. R. 1101; 21 Cr. L. J. 85 **485**

ss. 304, 325—Unpremeditated attack—Provocation—Offence, nature of.

Where two persons on receiving provocation delivered an unpremeditated attack on the deceased but it was not known who struck the fatal blow:

Held, that both were guilty of an offence under section 304 of the Penal Code. **L DAMZAY v. EMPEROR**, 21 Cr. L. J. 2; 2 P. W. R. 1920 Cr.; 2 U. P. L. R. (L.) 2; 1 P. L. R. 1920 **51**

s. 361—Lawful guardian, who is—Person in temporary charge, whether lawful guardian—Hindu Law—Minor—Nearest male, whether entitled to custody of minor girl.

For the purposes of the First Explanation to section 361 of the Penal Code, a person in temporary charge of a minor cannot be regarded as the lawful guardian, as against the guardian at civil law.

The fact that a person happens to be the nearest major male relative of a minor girl does not, under the Hindu law, give him an absolute right to the custody of the girl. **A SITAL PRASAD v. EMPEROR**, 18 A. L. J. 64; 2 U. P. L. R. (A) 76; 21 Cr. L. J. 50; 42 A. 146 **402**

s. 406—Criminal breach of trust—Offence, what constitutes. See CRIMINAL PROCEDURE CODE, s. 179 **7**

s. 411—Property found in house occupied by several persons—Possession, determination of—Offence.

Penal Code—contd.

The mere fact that stolen property is found in a house in which the accused lived with his brothers, is not sufficient to establish that he retained such property in his possession or custody or to justify his conviction under section 4 of the Penal Code.

Where stolen property is found in a house occupied by several persons, it is not enough to show that the property was found in the house to convict a member of the family who may have had nothing to do with bringing or keeping it there. **O BASHIR AHMAD KHAN v. EMPEROR**, 22 O. C. 254; 21 Cr. L. J. 41 **248**

ss. 425, 430—Mischief, what constitutes—Cutting bund and causing diminution of water supply—Offence—Bona fide belief of right, effect of.

To constitute the offence of mischief under section 425 of the Penal Code it is the destroyed property that must have lost its utility or value.

The accused was charged with causing diminution of water supply to the complainant by destroying a bund at a particular place. It was not proved that the bund belonged to the complainant or that its destruction caused any diminution in its utility or value. It was proved, however, that the accused was in the habit of taking the water from this opening to his fields under a permit and that on this occasion, he cut open the bund anticipating the grant of the permit.

Held, that accused could not be convicted of mischief, inasmuch as (1) he acted in the bona fide belief that he would get the permit;

(2) by the mere diminution of water supply there was no destruction or diminution in value or utility of the property on which the injurious act was committed. **M KULLAPPA NAICKER v. PALANIAMMALL**, 1 L. W. 148; 14 O. M. W. N. 131; 21 Cr. L. J. 37 **617**

s. 441—Criminal trespass—Intent of accused, proof of—Criminal Procedure Code (Act V of 1898), ss. 367, 434—Judgment of Criminal Court, contents of—Failure to examine prosecution evidence, effect of—Revision—High Court, interference by.

An unlawful entry upon property does not amount to criminal trespass unless one of the intents mentioned in section 441, Penal Code, is made out by the prosecution or found by the Magistrate.

Where the judgment of a Magistrate makes no attempt to scrutinise the oral evidence of the complainant but summarily accepts that evidence, the judgment cannot be upheld in revision. **N PIRBAX v. MUSAMMAT BAJI**, 1 Cr. L. J. 140 **620**

s. 477A—Tampering with Court-fee stamps on documents—Offence.

Accused was charged under section 477A, Penal Code, with tampering with requisitions and vakalat-namas presented under the Public Demands Recovery Act by removing the court-fee stamps affixed to them and affixing in their stead stamps removed from other documents. On a reference to the High Court:

Held, that the acts alleged against the accused could not be brought within the scope of section 477A of the Penal Code. **C EMPEROR v. BIBHUDANANDA CHAKRAVARTI**, 23 O. W. N. 925; 30 C. L. J. 258; 47 C. 71; 21 R. L. J. 88 **892**

s. 498—Enticing away married woman—Connivance of husband, effect of—Criminal Procedure Code (Act V of 1898), s. 421—Appeal, summary.

Penal Code—concl'd.

dismissal of—Judgment, contents of—Appellate Court, duty of.

A conviction under section 493, Penal Code, is not bad merely because the husband connived at the taking away or concealing of the wife.

It is the duty of an Appellate Court in dealing with an appeal under section 421, Criminal Procedure Code, to record reasons for dismissing it summarily, and its judgment should show that the evidence and arguments advanced have been considered. **PAT GANESH RAM v. GYAN CHAND**, 21 CR. L. J. 139 **619**

s. 500—Defamation—Privilege—Witness, answer given by, to Court, whether privileged. See EVIDENCE ACT, s. 132 **890**

Pensions Act (XXIII of 1871), s. 11—Grant of land revenue, whether pension.

A grant of land revenue is not a pension for the purposes of section 11 of the Pensions Act, and is liable to attachment in execution of a decree. **M RAMA RAO v. KOTTIPATI THIMMA REDDI**, 11 L. W. 398 **331**

Plaint, amendment of, when to be permitted.

See CIVIL PROCEDURE CODE, s. 66 **726**
giving wrong date of execution of instrument sued on, effect of. *See EXECUTION OF DOCUMENT* **877**

—, return of, when can be ordered. *See CIVIL PROCEDURE CODE, s. 15* **655**

Pleaders—Court, whether bound to wait for. See CIVIL PROCEDURE CODE, O. XLI, R. 17 **715**

—'s fees in suit for injunction, scale of. *See PUNJAB CHIEF COURT RULES* **905**

Pleadings and proof—Case set up in trial Court, failure of—Appeal, fresh case, whether can be advanced in—Remand, order of, whether justified—Possession, suit for, on proof of title—Burden of proof.

A party, who in the trial Court fails to establish the case which he set up, is not entitled to advance a new case in appeal, nor is he entitled to a remand to enable him to establish his claim on the new case so set up.

In every case where the plaintiff sues for recovery of possession of land on establishment of his title, the onus is primarily on him to prove his title. But when he makes out a *prima facie* case for establishment of his title and the defendant seeks to contradict his case by establishing title of his own, it is for the defendant to prove the title he sets up, whether it be *lakheraj* or whether it be any other kind of title. **C DURGA CHARAN BISWAS v. KAILASH CHANDRA DAS** **645**

— *Plaint based on specific allegation—Court, whether can find in favour of plaintiff on different allegation—Procedure—Bengal Tenancy Act (VIII B. C. of 1885), s. 167—Annulment of interest—Notice, proof of service of.*

Where a plaintiff comes to trial with a specific allegation on which he asks the Court to adjudicate in his favour, it is not open to the Court to arrive at a finding in his favour contrary to the allegation set up.

Before the interest of a party can be terminated under the provisions of section 167 of the Bengal Tenancy Act, it is necessary that the service of notice in accordance with the statutory procedure laid down in the section should be proved. **C BADAR-UD-BIN v. HERAJTULLA** **797**

Pleadings, inconsistent, when permissible. See APPEAL **700**

— *Practice—Rule of law—Plaintiff, whether to be limited to his plaint—Alternative claim, whether can be put forward—Court, whether can make out new case.*

The rule of law is perfectly clear that a plaintiff must be limited to the case which he puts forward in his plaint, but he may put forward an alternative case in his plaint in the commencement, so that the defendant may know if he has more than one case to meet and may not be taken by surprise.

It is not open to a Court to make out a new case for the plaintiff which the defendant has had no opportunity to meet.

Where, therefore, plaintiffs sued for joint possession with the defendants on the ground of ownership and the Court decreed their claim in respect of a portion of the area in dispute for the purpose of grazing cattle:

Held, that since the plaintiffs had not asked for any relief on the strength of their grazing rights, such relief could not be granted to them. **L MAHAMUD SHAH v. FATTA**, 4 P. W. R. 1920; 2 U. P. L. R. (L.) 17; 15 P. L. R. 1920 **43**

Possession and dispossession, suit on basis of—Burden of proof—Limitation—"Confession and avoidance," defence of, nature of.

In a suit for possession upon a dispossession the plaintiff is bound to establish a subsisting title and possession within 12 years immediately preceding the commencement of the suit.

A defence of confession and avoidance can be said to have been raised only when the defendant completely admits the basis of the plaintiff's claim but seeks to avoid the effect of that admission by pleading, for example in the case of a suit on a contract, performance, fraud, release, limitation or otherwise. **N EKOJI KUNBI v. AKAJI KUNBI** **131**
—, title by, nature of—Possessory title, whether heritable.

A person in possession of property, however, imperfect his title may be, has good title as against the whole world, except the true owner, and such title is capable of descending by inheritance to his heirs. Until the true owner comes forward to assert a claim to the property, such heirs are entitled to continue in possession. **A BAZMIR KHAN v. RUSTAM KHAN** **398**

Practice—Procedure—Evidence closed by both parties—Fresh witness, whether can be summoned—Landlord and tenant—Licensee, position of—Adverse possession—Improvement of buildings by licensee, effect of.

When both parties to a suit have closed their evidence, permission ought not to be granted to call any further witness.

Where a *riaya* of a village obtains possession of land as a licensee, the terms of the license being that so long as he is a cultivator and resides in the village he has a right to occupy the land for his own use, to construct buildings upon it, to dwell therein, and to enjoy the user but with no right in the soil, there can be no question of adverse possession on his behalf as against the licensor. The fact that he has improved buildings on the land or has replaced erections would not confer such a title upon him. **O BAMESHWAR BAKSH SINGH v. DWARKA**, 1 U. P. L. R. (J. C.) 60 **261**

Pre-emption suit—Decree directing payment of certain amount and awarding costs—Plaintiff, whether entitled to deduct costs.

Where a pre-emptor is directed to pay into Court a specific sum of money and is awarded costs, he is entitled to deduct the amount of the costs so awarded from the sum he is directed to pay into Court. **A RAM LAGAN PANDE v. MUHAMMAD ISHAQ KHAN**, 1 U. P. L. R. (A.) 18; 18 A. L. J. 162 **395**

Decree fixing time for payment—Appeal—Payment not made—Appellant, whether entitled to hearing on merits.

Where in a pre-emption decree the plaintiff is directed to pay the pre-emption price within a specified time, but, without doing so, he prefers an appeal against the amount fixed, the fact that he has not complied with the terms of the decree as to payment, is no ground for dismissing the appeal without going into the merits. **A JHANDI LAL v. SHIAM LAL** **756**

Estoppel by acquiescence, proof of—Formal offer to pre-emptor, whether necessary—Good faith of pre-emptor, whether can be enquired into—Oudh Laws Act (XVIII of 1876), Ch. II.

Where in a pre-emption suit estoppel by acquiescence, as distinct from estoppel by the prescribed notice, is pleaded, it is necessary to show that the pre-emptor had full knowledge of what was going on and not merely the knowledge that there was a proposal to sell the property to some one or another for a certain price.

A formal offer to the pre-emptor, however, is not necessary where it is obvious from the attendant circumstances that the pre-emptor is neither willing nor able to pay the purchase-money.

Chapter II of the Oudh Laws Act does not allow any discretion to a Court in a pre-emption suit to go into the question of the good faith of the plaintiff in asking for pre-emption. **O HANUMAN SINGH v. ADIYA PRASAD**, 22 O. C. 323 **520**

Vendee co-sharer in shamilat but not in patti, effect of—Shamilat land, nature of.

A vendee, who is not a co-sharer in the subdivision in which the share sought to be pre-empted is situated, does not become a co-sharer in the subdivision because some of the land appertaining to the village has been lumped together as belonging to all the pattis instead of being imperfectly divided. Within the shamilat patti itself each patti, to which the shamilat land appertains, exists as if it were in miniature and no right of pre-emption can be claimed in respect of such shamilat land. In the eyes of the law, the position of the shamilat land appertaining to each patti follows or forms a part of the patti to which it appertains. **O KANIZ ZOHRA v. NEPAL**, 22 O. C. 297 **632**

Presidency Towns Insolvency Act (III of 1909), s. 36—Evidence Act (I of 1872), s. 21—Deposition of insolvent under s. 36, Presidency Towns Insolvency Act, admissibility of, against insolvent in criminal proceedings.

The deposition of an insolvent reduced into writing taken under section 36 of the Presidency Towns Insolvency Act may be put in evidence against him in a criminal proceeding.

The general principle of law is that any statement made by a man on oath may be used as evidence against him as an admission. The only principle on which an exception can really be

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founded, is the principle that a man is not to incriminate himself. But this is a principle which is not open to an insolvent who, once he has been adjudicated, is bound, because he has been adjudicated, to give information touching his conduct, dealings and affairs, even though he incriminate himself thereby. **C JOSEPH PERRY**, *In re*, 46 C. 996; 21 Cr. L. J. 78 **478**

Press Act (I of 1910), ss. 4, 17, 22—

Forfeiture of security—Application to set aside forfeiture—High Court, duty of—Construction of documents—Intention of author, whether material—Object of Act.

In dealing with an application under section 17 of the Press Act to set aside an order directing the forfeiture of security, the Court has to see that the matter which is the subject of the order is not obnoxious to the provisions of section 4(1) of the Act, as if it contains words of the nature described in sub-section (1) of the section, the Court cannot, under section 22, set aside the forfeiture.

In considering whether a document offends against clauses (a) to (f) of section 4(1) of the Press Act, the Court has nothing to do with the intention of the author: it has to look at the document and after a fair reading ascertain what is its meaning and then say whether the words were of the nature or tendency mentioned in the clauses.

The intention of the author is material only where the Court has to deal with comments on the measures or actions of Government, or the administration of justice: such comments are protected if they are made with a view to obtain an alteration by lawful means of the measures of Government, or if they are made on the actions of Government or administration of justice, and there is no attempt to excite hatred, contempt or disaffection.

The Press Act is essentially a preventive measure with a view to prevent crime, that is, crime imperilling the existence of the State, the safety of its officers, public order and the like.

In distinguishing between the meaning of an article and the intention of its author, the article must be construed by grammar and logic, the primary organs of interpretation, and, when necessary, by evidence to make the words which are used fit the external things to which the words are appropriate. **C AMRITA BAZAR PATRIKA**, *In the matter of*, 23 C. W. N. 1057; 30 C. L. J. 289; 21 Cr. L. J. 98; 47 C. 190 **578**

Prevention of Cruelty to Animals Act (XI of 1890), s. 3(a)—Abandonment of animal, whether ill-treatment.

An owner who abandons an animal, with the result that the animal is left to starve in the streets, is not guilty of an offence under section 3(a) of the Prevention of Cruelty to Animals Act. Such abandonment does not amount to "ill-treatment" within the meaning of the section. **B NASIR WAZIR v. EMPEROR**, 21 Bom. L. R. 1096; 21 Cr. L. J. 81; 44 B. 159 **481**

Principal and agent—*Notice*—Principal, whether affected with knowledge of agent—Payment made by agent to principal—Principal acting in good faith—Money, whether can be followed in hands of principal where agent has committed fraud.

If a communication be made to an agent which it would be his duty to hand on to his principals, and if the agent has an interest which would lead him not to disclose to his principals the information which he has thus obtained, and in point of fact he does not communicate it, the knowledge cannot be imputed to the principals.

Where a company wanting payment of a debt from one of its agents asks that payment should be made and obtains a payment of its debt without any knowledge whatever of the sources from which the money has come, it would be straining the doctrine of notice beyond all reasonable limits to hold that in such circumstances moneys received in absolute good faith should be earmarked with some independent ownership, because the debtor, who was also a servant of the company, committed a fraud in order to discharge his obligations. **P C TEXAS COMPANY v. BOMBAY BANKING COMPANY, LD.**, 24 M. L. T. 370; 50 C. L. J. 446; (1920) M. W. N. 70; 2 U. P. L. R. (P. C.) 21; 11 L. W. 350; 24 C. W. N. 469; 46 I. A. 250; 44 B. 139

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Principal and surety—*Appeal, abatement of, as against principal*—Surety, whether discharged.

The abatement of an appeal as against the principal debtor does not necessarily imply that the debt payable by him is extinguished or discharged, and in such a case the liability of the surety continues in spite of the abatement. **O RAM SARAN v. BINDESHRI**, 6 O. L. J. 593

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Probate and Administration Act (V of 1881), ss. 4, 23, 6, 69, 70, 73

—*Letters of Administration, application for grant of*—Caveator setting up paramount title—Court, whether can go into question of paramount title—Caveator not applying for grant, effect of.

A Court of Probate is not only entitled but even bound to enter into questions of title, if it is necessary to decide that question, in order to determine which of the two contesting parties is entitled to the grant of Letters of Administration. But where a caveator does not himself apply for Letters of Administration, but merely sets up a paramount title, e. g., that he being an adopted son is entitled to the whole estate, not by inheritance but by survivorship, the Probate Court is not entitled to go into the merits of the title set up by the caveator and the nature of the estate left by the deceased.

Sections 64, 69 and 70 of the Probate and Administration Act do not authorise a Probate Court to discuss the question of paramount title set up by a caveator, who puts forward title to the property not for the purpose of having a grant to himself, but for the purpose of preventing a grant to others.

Under section 23 of the Probate and Administration Act if the person making the application is, according to the law of inheritance, entitled to the whole or a part of the property and alleges the fact that there is property of that nature, and there is no other applicant for Letters of Administration,

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the applicant is entitled to the grant. **PAT DEBENDRA PRASAD v. SURENDRA PRASAD**, 1 P. L. T. 19; 5 P. L. J. 107; (1920) PAT. 83

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ss. 82, 92—*Executor, suit for rent by—Co-executors, whether must be joined as plaintiffs.*

Probate of a Will was granted to the two executors named therein. One of them instituted a suit for rent and joined his co-executor, who resided out of the jurisdiction of the Court in which the suit was brought, as defendant.

Held, that there was no flaw in the frame of the suit on the ground that the two executors did not both join as plaintiffs. **C SOUDAMINI GHOSE v. TENIRAM MAHALDAR**

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s. 90—*Letters of Administration granted to Hindu widow—Mortgage by widow with sanction of Court, validity of—Legal necessity, proof of, whether necessary—Mortgagee, duty of—Civil Court, whether can set aside grant of Letters of Administration—Pleadings—Fraud, suit based on—Particulars required.*

It is not necessary for a person taking a mortgage from a Hindu widow, who has obtained Letters of Administration to the estate of her deceased husband and has also obtained the sanction of the Probate Court to effect the mortgage, to enquire about the necessity for the loan. If he bona fide relies upon the order of the Probate Court and makes the advance, there is no onus upon him to go and enquire about the truth of the allegations upon which the sanction to mortgage was granted to the widow. A reversioner challenging the transaction must show that the mortgagee knew that the facts on the basis of which the sanction was obtained were false, or that he was instrumental in getting the order from the Court on false representations.

The proper Court to set aside a grant of Letters of Administration is the Probate Court and a Civil Court has no jurisdiction to declare an order granting Letters of Administration as null and void.

When a transaction is assailed on the ground of fraud, allegations of fraud must be particularised in the plaint. **C ANNODA CHARAN MONDAL v. ATUL CHANDRA MALIK**, 23 C. W. N. 1045; 31 C. L. J. 3

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ss. 130 to 134, applicability of. See **SUCCESSION ACT, s. 160**

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Prosecution, duty of, to call all material witnesses—Evidence Act (I of 1872), s. 134—Witnesses, number of—Proof, quantum of—Evidence, duty of Court to test.

It is the duty of the prosecution to call all witnesses who can throw any light on the enquiry, whether they support the prosecution theory or the defence theory. It is for the Court to choose which theory is correct, not for the prosecution.

A criminal trial ought not to be reduced into a battle between the prosecution and the defence.

The direct evidence of witnesses must be tested and weighed in the same manner, whatever the numerical strength of the witnesses may be, and the conscience of the Court must be satisfied as to the guilt of the accused persons before they can be convicted of any crime. It can by no means be laid down as a general maxim that the assertion of two witnesses is more convincing to the mind than the assertion of

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one witness. The story told by one witness may be in itself probable, the story told by two witnesses may be extravagant. The story told by one witness may be uncontradicted, the story told by two witnesses may be contradicted by four witnesses. The story told by one witness may be corroborated by a crowd of circumstances, the story told by two witnesses may have no such corroboration. The one witness may be Tillotson or Ken, the two witnesses may be Oates and Bedloe.

Remarks of Lord Macaulay quoted in Wills on Circumstantial Evidence, 6th Edition, page 34, approved. **Pat** BRAHAMDEO SINGHA v. EMPEROR, (1920) 1 PAT. 24; 21 CR. L. J. 33

Provident Fund Act (IX of 1897), s. 4

—*Provident fund deposit, whether can be attached in execution of decree—Civil Procedure Code Act V of 1908*, s. 115—*Revision—“Acting illegally,” meaning of—Execution of decree—Order directing attachment of property not liable to attachment, legality of.*

Whether an employee is in service or out of service, whether he be alive or dead, his share of the provident fund is unattachable in the hands of the provident institution under the provisions of section 4 of the Provident Fund Act.

Sub-section (2) of section 4 of the Provident Fund Act does not in any way cut down sub-section (1) of the Act. It ensures that money payable to a widow or child as such directly shall not, even in their hands, be treated as assets of the deceased depositor's estate. The only light thrown by the second sub-section upon the first is that the first did not go far enough.

Where in spite of statutory provision to the contrary, a certain sum of money held in deposit by a provident institution was attached in execution of a decree:

Held, that in passing the order of attachment the execution Court had “acted illegally” within the meaning of section 115 clause (c) of the Code of Civil Procedure.

All cases of acting illegally are cases of error in law, though the converse is not always true. Any error in law which amounts to a usurpation of authority in the act done by a Court comes within clause (c) if it is not already within clause (a) of section 115 of the Code of Civil Procedure. In the broad sense of the word no Court ever has jurisdiction to act illegally, though it may have jurisdiction to make an order which in fact or in law is wrong. **C** HINDLEY, C. D. M. v. JOYNARAIN MARWARI, 46 C. 952; 21 C. W. N. 288

Provincial Insolvency Act (III of 1907), ss. 2 (e), 16, 18

—*Hindu Law—Joint family—Father adjudicated insolvent—Son's interest in joint family property, whether vests in Receiver—Debts incurred by father—Legal necessity—Burden of proof.*

Under the Mitakshara Law a father has the right to dispose of his son's interest in ancestral immovable estate for the payment of his own debts not contracted for immoral purposes and such interest, therefore, is “property” belonging to the father within the meaning of section 2 (e) of the Provincial Insolvency Act and on the father being adjudged insolvent, it vests in the Receiver.

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In such a case the burden of proving that the debts were incurred for immoral purposes is on the son. **L** HARMUKH RAI-MUNNA LAL v. RADHA MOHAN, 158 P. R. 1919

s. 20 (d)—Insolvent, suit by, to recover deferred dower of daughter, maintainability of.

A person who has been declared an insolvent cannot, while his estate is in the hands of the Receiver, maintain a suit in his own name for the deferred dower of his daughter, even though the Receiver has refused to bring such suit. **Pat** KHE-LAFAT HUSSIAN v. AZMAT HUSSAIN

ss. 43, 46, 93—Inventory, failure to file—Creditor who sets Court in motion, whether ‘person aggrieved’—Right of creditor to ask for commitment.

The duties imposed by the provisions contained in section 43 of the Provincial Insolvency Act are of a disciplinary character, and if a debtor fails to carry them out, the person, if any, who is really aggrieved is the Court to which proper assistance has not been rendered by the debtor and not any person who sets the Court in motion.

A creditor, therefore, has no right to ask for the committal of the debtor for the latter's failure to file an inventory. **M** PALANIAPPA CHETTY v. SUB-RAMANIAN CHETTY, 11 L. W. 145; (1920) M. W. N. 185; 38 M. L. J. 338

Provincial Small Cause Courts Act (IX of 1887), s. 17

—*Ex parte decree, application to set aside—Security or deposit, whether condition precedent.*

Under section 17 of the Provincial Small Cause Courts Act it is a condition precedent to the granting of a new trial that the applicant should, at the time of presenting his application, deposit in Court the decretal amount or tender security for payment of the same. **Pat** KHANTAR POTDAR v. PUNNI NADDAF

s. 25—Revision—High Court, power of interference of, extent of. See CONTRACT ACT, s. 25 (2)**ss. 27, 32 (2)—Suit instituted before Munsif not invested with Small Cause Court powers—Decision by Munsif having Small Cause Court powers—Trial on ordinary side—Decree, whether final—Appeal, whether lies.**

A suit in the nature of a Small Cause instituted in the Court of a Munsif not invested with Small Cause Court powers and registered as an ordinary suit was tried as an ordinary suit by a Munsif who possessed Small Cause Court powers. On revision before the High Court it was contended that the decision of the Munsif ought to be regarded as a decision of a Small Cause Court and that it was not open to appeal.

Held, that under section 32 (2) of the Provincial Small Cause Courts Act, the Munsif who finally dealt with the case was bound to try it as a regular suit and the procedure adopted by him was perfectly correct, and that, consequently, his decree was not a final decree. **A** BINDSRI v. GANGA PRASAD, 1 U. P. L. R. (A.) 170; 18 A. L. J. 89

Sch. II, Art. 31—Suit to recover profits of mortgaged land and value of trees cut down by mortgagee—Jurisdiction of Small Cause Court. See REGISTRATION ACT, s. 17

Public Gambling Act (III of 1867), ss. 3, 4, conviction under—Money found on persons of accused, whether can be confiscated.

The law does not contemplate the confiscation of money found on the persons of the accused in a case under sections 3 and 4 of the Public Gambling Act. **A TULLA v. EMPEROR**, 17 A. L. J. 368; 41 A. 266; 1 U. P. L. R. (A.) 161; 21 Cr. L. J. 42. **250**

Punjab Alienation of Land Act (XIII of 1900), ss. 2 (3), 16—"Land", meaning of—Trees growing on land whether exempt from attachment.

The definition of "land" given in section 2 (3) of the Punjab Alienation of Land Act is not intended to be exhaustive.

Although the maxim *quicquid plantatur solo, solo cedit* cannot be accepted in India as having the wide meaning attached to it in England, it does cover the case of trees growing on the land.

It was not the intention of the Legislature to exclude standing trees from the definition of land given in section 2 (3) of the Punjab Alienation of Land Act and consequently such trees are exempt from attachment and sale under the provisions of section 16 of the Act. **P. RULIA RAM v. SULTAN KHAN**. **38**

s. 2 (3) (b)—Trees standing on land belonging to agriculturist, whether liable to attachment.

The protection afforded by clause (b) of sub-section (3) of section 2 of the Punjab Alienation of Land Act does not apply to things material, such as standing trees, but to incorporeal rights. Therefore, trees standing on land belonging to a member of an agricultural tribe are liable to attachment in execution of a decree. **L. AHMAD KHAN v. JHANDA RAM**, 68 P. L. R. 1919. **262**

Punjab Chief Court Rules and Orders, Vol. III, p. 81, rr. 3, 4—Injunction, suit for—Pleader's fees, scale of—Practice.

Pleader's fees should in all cases be fixed in accordance with the rules framed by the Chief Court.

In a suit for injunction the Pleader's fee should be calculated according to the valuation of the suit, or according to such a sum, not exceeding the valuation, as the Court shall think reasonable. **P. GURDIT SINGH v. ISHAR DAS**, 165 P. R. 1919. **905**

Punjab Limitation (Ancestral Land Alienation) Act (I of 1900), applicability of—Alienor, death of, leaving widow, effect of.

The Punjab Limitation (Ancestral Land Alienation) Act contemplates only those cases in which the reversioner can obtain possession of the estate immediately upon the death of the alienor, and does not apply to a case in which the alienor died leaving a widow during whose lifetime the reversioner could not obtain possession of the property alienated by the male proprietor. **L. HIRU v. SOHNUN**, 139 P. R. 1919. **964**

Punjab Pre-emption Act (I of 1913), s. 3 (3)—Taunsa, whether town or village—Census report, entry in, value of.

Taunsa is a town for the purposes of the Punjab Pre-emption Act.

In deciding whether a place is a town or a village the fact that it is described as a town in the Census report is of great importance. **P. ALLAH BAKHSI v. TOPAN RAM**, 28 P. R. 1919 (note); 18 P. L. R. 1920. **642**

Punjab Pre-emption Act—conold.

ss. 3 (3), 5 (a)—Taunsa, whether town or village—House, part of, used as shop, whether subject to pre-emption—Appeal, second—Place, whether town or village—Question of fact.

Taunsa is a town for the purposes of the Punjab Pre-emption Act.

Where it is found that a building is for all practical purposes a residential one, the mere fact that a small part of it is used as a shop does not in any way alter its character.

Seemingly that the question whether a place is a town or a village is one of fact and cannot be raised in second appeal. **P. MAHMUD v. JUMMA**, 28 P. R. 1919; 16 P. L. R. 1920. **646**

s. 22 (5) (a)—Pre-emption suit—Withdrawal of deposit money, effect of—Dismissal of suit.

Where in a pre-emption suit the money deposited by the plaintiff is withdrawn, the suit is liable to be dismissed. **L. PARAS RAM v. DALPAT RAI**, 7 P. W. R. 1920. **268**

Punjab Tenancy Act (XVI of 1887), ss. 5 (1) (c), 111, 112—Occupancy rights, acquisition of—Construction of clause (1) (c) of s. 5—Record of Rights, entry in, whether agreement—Admission, erroneous effect of.

Clause (c) of sub-section (1) of section 5 of the Punjab Tenancy Act provides that a tenant who is at the date of the passing of the Act the representative of a person who settled as a cultivator in the village, in which the land occupied by such tenant is situate, along with the founders of the village, is to be deemed to have a right of occupancy in the land so occupied: whether the land was occupied from the time of first settlement or from a later date.

A mere entry in the Record of Rights does not necessarily amount to an agreement.

An erroneous admission by a tenant that he is a non-occupancy tenant, even though recorded in the Record of Rights, will not operate to deprive him of his right. **F. C. P. JIWAN v. MOHAMMAD HAYAT**, 3 P. R. 1919 Rev. **569**

s. 38—Abandonment of occupancy tenancy, what constitutes. See APPEAL, SECOND. **873**

s. 50—Wrongful dispossession of tenant—Suit for recovery of possession—Limitation.

A person wrongfully dispossessed of his tenancy is bound to bring his suit for recovery of possession in a Revenue Court within one year from the date of his dispossession. **P. LOCHANGIR v. SADA**, 23 P. W. R. 1920. **832**

s. 77 (3) (d)—Jurisdiction of Civil and Revenue Courts—Occupancy rights, claim to establish, cognisance of.

A claim to establish a right of occupancy by adverse possession falls within the purview of section 77 (3) (d) of the Punjab Tenancy Act and no enquiry can be made into this question by the Civil Courts. **L. BISHEN SINGH v. JAFFAR**, 159 P. R. 1919. **911**

Railways Act (IX of 1890), ss. 47, 101 (c)—Rules under s. 47, rr. 47, 87 (a)—Accident—Message by guard for assistance—Driver, duty of, to ascertain nature of message—Endangering safety of persons by rash and negligent act.

Where, under rules 87 and 87 (a) of the rules framed

Railways Act—concl'd.

under the Railways Act, the guard of a train sends a message asking for assistance, it is the duty of the driver to ascertain the terms of the message; and his omission to do so would make him liable under section 101 (c) of the Act, if such omission results in endangering the safety of any person. **N** LOCAL GOVERNMENT v KHAIRAT ALI, 21 CR. L. J. 204

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s. 121—Station master, power of, to assign duties temporarily to station staff—Signaller delegated to collect tickets, obstruction to—Offence—"Service of railway," meaning of—Railway Board Act (IV of 1905), rules under, rr. 229, 231, 244, effect of.

The expression "service" of a railway in section 121 of the Railways Act includes collecting tickets and fares from passengers.

Rules 229, 231 and 244 of the rules framed under the Indian Railway Board Act give sufficient authority to a station master to appoint one of the station staff temporarily to do the duties of a particular post in the station and when the person so appointed temporarily performs that duty, he is a railway servant acting in the discharge of his duty, and obstruction to him is punishable under section 121 of the Railways Act. **M** CHITRALA BHEEMANNA, *In re*, 37 M. L. J. 656; 10 L. W. 669; (1920) M. W. N. 156; 21 CR. L. J. 62; 43 M. 348

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Railway Board Act (IV of 1905), rules under, effect of See RAILWAYS ACT, s. 121

414

Receiver—Appeal—Order directing. See CIVIL PROCEDURE CODE, s. 115

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Record of Rights, entry in—Presumption as to correctness See BERAR LAND REVENUE CODE, s. 96

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—, entry in—Presumption of correctness. See BOMBAY LAND REVENUE CODE, s. 135

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Registration Act (XVI of 1908), ss.

2 (7), 17—Agreement to grant lease, whether compulsorily registrable—Construction of document—Intention of parties.

Agreements to lease which are compulsorily registrable under the combined operation of section 2, sub section (7), and section 17 of the Registration Act are those agreements which import a present demise or the creation of an immediate interest.

In order to determine whether an agreement is compulsorily registrable, the intention of the parties as declared by the words of the instrument must govern the construction.

An agreement between the parties that at a future time one of them shall become the tenant, provided certain things are intermediately done by the landlord or his agent so as to put the premises into a certain state which the agreement describes, is not an agreement of demise but an agreement to demise at a future date on the performance of certain conditions and is not, therefore, required to be registered. **B** SECRETARY OF STATE FOR INDIA v. MAHOMED YUSUF ISMAIL, 21 BOM. L. R. 1130

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s. 17 (2) (vi)—Compromise amounting to conveyance, whether requires registration—Civil Procedure Code (Act V of 1908), O. XXIII, r. 1.

A compromise which contains matter relating to a suit or covered by its subject-matter, and which is embodied in a decree, does not need registration, even though the transaction amounts to a conveyance

Registration Act—cont'd.

the consideration for which is Rs. 100. **C** JACHMI MONDAL v CHENINISSA BIBI, 24 C. W. N. 328

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s. 17 (2) (ii)—Compromise—Award based on compromise, whether requires registration. See PARTITION SUIT

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s. 17 (1) (b)—Compromise deed giving effect to arrangement arrived at between parties, whether compulsorily registrable—Document effecting division of property, whether requires registration

A deed of compromise which gives effect to an arrangement arrived at between the parties about some estate is compulsorily registrable. Though a document containing a mere recital of past acts and of a past partition or merely declaring the divided status of the parties need not be registered; yet when the document itself is a record of property subjected to a division which took place on the date on which it was written and which declares that in certain immovable properties certain parties had shares and that their former rights in certain immovable properties are extinguished, the document falls within the provisions of section 17 (1) (b) of the Registration Act and is compulsorily registrable. **N** RAMBHAROSA v SUKH DAS

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ss. 17, 49—Mortgage—Redemption, proof of—Receipt, unregistered, admissibility of—Possession given to mortgagor, effect of—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 31—Jurisdiction of Small Cause Court—Suit to recover profits of mortgaged land and value of trees cut down by mortgagee, whether cognizable by Civil Court.

No particular form of document is required to redeem a mortgage.

An unregistered receipt cannot in itself be used as evidence of redemption of a mortgage, but the Court is entitled to take it into consideration as evidence of the fact that on a particular date a particular sum was paid by the mortgagor to the mortgagee, and this, coupled with the fact that the mortgagor was put into possession of the property and has continued in possession of it, is good evidence upon which the Court might base its finding that the mortgage has been redeemed.

A suit by a mortgagor, after redemption, to recover from the mortgagee the profits of the mortgaged property and the value of certain trees alleged to have been cut down by the defendant, is exempted from the cognisance of a Small Cause Court by Article 31 of Schedule II to the Small Cause Courts Act and is, therefore, cognisable by a Civil Court. **A** EASDEO v. BEHARI LAL

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ss. 72, 76, 77—Refusal to register document by Sub-Registrar—Appeal to Registrar, dismissal of—Suit to enforce registration, maintainability of.

Where an appeal from the order of a Sub-Registrar refusing to admit a document for registration is rejected by the Registrar, such rejection is tantamount to refusing to order the document to be registered under section 72 or section 76 of the Registration Act, and a suit under section 77 of that Act to enforce registration of the document is maintainable. **C** UMESH CHANDRA GHOSH v. NISTARINI BESU, 24 C. W. N. 304

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s. 77—Limitation Act (IX of 1908), ss. 14, 29 (1) (b)—Suit to enforce registration of document—Presentation of plaint in wrong Court—Limitation, extension of, whether permissible.

Registration Act—contd.

The period prescribed by section 77 of the Registration Act for bringing a suit for the registration of a document cannot be extended by invoking the aid of section 14 of the Limitation Act. Section 29 (1) (b) of the latter Act specially excludes the application of the provisions of that Act to any special or local law which prescribes a special period of limitation for any suit, appeal or application. **C** KHAJENDRANARAYAN ROY v. BAMNI BARMANI, 24 C. W. N. 29 **228**

— **S. 77**—Registration of document—Application for registration, dismissal of, whether amounts to refusal to register—Suit to enforce registration, maintainability of.

The dismissal of an application for registration owing to the failure of the applicants to appear before the Sub-Registrar is, under the Registration Act, in the practice of the Court, equivalent to a refusal to register. Such dismissal does not take away the right of suit under section 77 of the Registration Act, to enforce registration. **C** ABIRJAN BIBI v. GOLE MAHAMED **570**

— **S. 77**—Suit to enforce registration of document—Limitation, whether can be extended. See. LIMITATION ACT, s. 14 **705**

Religious Endowments Act (XX of 1863), ss. 12, 13—Temple committee and trustee, nature of relations between—Archaka, duty of, to obey trustee in preference to committee—Archaka, rights and duties of—Trustee, power of, to dismiss archaka.

A temple committee constituted under the Religious Endowments Act has no business to interfere in the internal management of the temple or in mere matters of ritual or ceremonial. They should not interfere with the trustee, except where interference is necessary in discharge of the secular duties which the Act imposes on the committee. The committee's functions are primarily to see that the funds of the endowment are preserved and not wasted.

An archaka is bound to obey the trustee in preference to the committee in the matter of the distribution of honours and the trustee has power to dismiss even a hereditary archaka.

An archaka cannot withhold the honours due to the ubayakars of the temple on the ground that his perquisites have been withheld and such conduct would entail his dismissal. **M** NILI RANGASAMI MUDALIAR v. KARI KRISHNA BATTACHARIAR, 10 L. W. 616 **281**

Remand, order of, whether open to second appeal. See CIVIL PROCEDURE CODE, s. 102 **432**

Res judicata—Partition case—Interpretation of judgment—Partition not carried through—Decision, whether res judicata.

The interpretation of a judgment in a previous partition case by a Court competent to try the subsequent case between the same parties and on the same subject-matter operates as res judicata.

A decision constituting res judicata passed in a partition case does not lose its force as res judicata because the partition was not ultimately carried through. **U P B R** MUBARIK FATIMA v. MUHAMMAD QULI KHAN, 1 U. P. L. R. (B. R.) 59 **303**

Restitution of conjugal rights—

Refusal of wife to live with her husband—Legal ground—Danger to health or safety of wife.

A husband is undoubtedly entitled to the society and companionship of his wife just as a wife is entitled to the society and protection of her husband. But before a Court can be asked to compel a reluctant wife to return to her husband's custody, it must be shown that there is no legal ground to justify the wife's refusal to live with her husband. One such ground is that the health or safety of the wife is likely to be endangered if she is forced to return to her husband's house. **L** GANGA SINGH v. DHANIO, 15 P. W. R. 1920; 7 P. L. R. 1920 **383**

—, suit for—Place of suing. See CIVIL PROCEDURE CODE, s. 20 (c) **120**

Revision—High Court, power of, extent of. See CRIMINAL PROCEDURE CODE, s. 87 **994**

— High Court, power of interference of. See CIVIL PROCEDURE CODE, s. 115 **965**

— High Court, power of interference of. See CRIMINAL PROCEDURE CODE, s. 145 **169**

Sale of goods—Construction of contract—Agreement to sell goods of particular description out of goods to be received by seller—Goods received by seller not of that description—Breach of contract—Buyer, whether entitled to damages.

In September 1917 plaintiffs agreed to buy and defendants agreed to sell certain goods and entered into a contract. The material clause of the contract was as follows: "Ghaghrapat (cloth) cases or bales 19 'Gin' at Re. 0-10-3 inches 31. The above-mentioned goods which are to arrive are sold (to you). Those purchased by us from Graham & Co. are sold to you. Shipment thereof January or February. And there are (to be) two to three months in addition To be delivered early if arrive early. To be delivered as and when the same may be received. To be delivered on the safe arrival of the steamer. Interest (at) eight annas. 'Sai' (allowance) at Rs. 2 per case. If the goods, to arrive come 'late' the purchaser is to take (delivery of the same)." The goods which were eventually received by the defendants from Graham & Co. were not of the description which the plaintiffs had agreed to buy. The plaintiffs refused to accept the goods and sued the defendants for damages:

Held, per *Heaton, J.*—That having regard to the commercial situation in September 1917, it must be presumed that the parties intended that the defendants should offer to the plaintiffs nineteen bales out of those which Graham & Co. were sending to them; and that the bales should be as near the description stated in the contract as possible; that the contract might also have contemplated that if the plaintiffs were quite justly dissatisfied with a tender of goods on the ground that the goods were nowhere near the description contained in the contract, then they might repudiate the bargain altogether, but that neither of the parties could have contemplated that there should follow, on a repudiation of that kind, any right on the part of the plaintiffs to recover damages

Per *Marten, J.*—What was sold were ginned goods, what arrived were unginned goods and therefore, the condition precedent of the contract

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viz, the arrival of ginned goods, not having been fulfilled, neither party was bound by the contract.

Per *Curiam*, that the plaintiffs' suit must therefore, be dismissed. **B** TRIBHOVANDAS NAROTTAMDAS v. NAGINDAS VIJBHUKANDAS, 21 Bom. L. R. 1137 **233**

Satyagraha pledge, signing of, by lawyer, whether unprofessional. See **LETTERS PATENT** (Bom. CL. 10) **679**

Shamlat land, nature of. See **PRE-EMPTION** **632**

Stamp Act (II of 1899), s. 12—Cancellation of stamp, what constitutes—Negotiable Instruments Act (XXVI of 1881), s. 4—Promissory note payable through another person, validity of.

The question whether or not a stamp has been effectually cancelled is one purely of fact to be decided by an examination of the stamp itself.

The cancellation of a stamp by drawing diagonal lines across its face is sufficient within the meaning of section 12 of the Stamp Act.

The undertaking in a promissory note to pay the money through another person does not make the promise conditional and does not take the document out of the purview of section 4 of the Negotiable Instruments Act. **P** MELA RAM v. BRIJ LAL, 148 P. R. 1919 **976**

S. 62—Dishonest intention to evade payment of stamp duty—Offence—Intention, proof of.

In order to secure a conviction under section 62 of the Stamp Act there must be a dishonest intention to evade the payment of stamp duty. Where the facts and circumstances of a case show that there was no such intention, a conviction under that section is bad in law. **A** KANHAIYA LAL v. EMPEROR, 1 U. P. L. R. (A.) 186; 21 Cr. L. J. 54 **406**

Succession Act (X of 1865), s. 160, applicability of—Probate and Administration Act (V of 1881), ss. 130 to 134, applicability of—Hindu Law—Will, construction of—Gift of specific amount to be paid out of profits of immovable property, nature of—Gift, whether annuity or gift of corpus—Intention of testator—Interest, whether payable on annuity.

A testator by his Will devised his movable and immovable properties to his sons and gave certain legacies to his daughters and other persons with the following direction—"My eldest son Narindra shall, year after year, go on paying to my third son Nagendra the sum of Rs. 500 per annum out of the income from the *mahals* that he (Narindra) shall obtain as per schedule No. 1 and comprised within Lot Dawarbashini, etc."

Held, that in determining whether the devise of Rs. 500 per annum to Nagendra was in the nature of an annuity or was in fact a gift of the corpus, it was unnecessary to consider whether the provisions of section 60 of the Succession Act were more favourable to the annuitant than the provisions of English law, inasmuch as under both the question was one of intention.

Although the segregation of any particular property is the common mode of indicating an intention of the testator to make an annuity perpetual, yet that is not the only mode and the Will may indicate an intention in other ways that the sum payable is really not an annuity or at any rate is intended to be perpetual.

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The intention of a testator must be gathered by reading the Will as a whole.

Where words of inheritance are not used by a testator with regard to any of the gifts which are admittedly absolute, the absence of such words with regard to a particular gift does not make it limited to the life of the donee, if the Will in other respects contains a clear intention of the testator that the gift is not so limited but is absolute and perpetual.

The provisions of sections 130 to 134 of the Probate and Administration Act relate to interest on annuities or legacies payable by the executor, and cannot apply to a sum to be paid out of the profits of immovable property which a legatee was entitled to as part of the properties obtained by him under a Will, and which was in his enjoyment for several years before his death, and which devolved upon his heirs. **C** PANCHAGOPAL MOOKERJEE v. KALI DAS MUKHERJEE, 24 C. W. N. 592 **140**

S. 269—Executor, power of, to mortgage assets—Will restricting power, effect of—Mortgage, renewal of, validity of.

An executor who has obtained Probate has absolute authority under section 269 of the Succession Act to mortgage the testator's assets, and his authority is in no way fettered by reason of a stipulation in the Will that he is not to sell or mortgage the property, and he would be acting within that authority if he renewed a mortgage effected by the testator to satisfy the debt created by that mortgage. **O** TWAKKUL HUSAIN v. AJODHYA BANK, LTD., FYZABAD, 6 O. L. J. 526; 2 U. P. L. R. (J. C.) 75 **321**

Transfer of Property Act (IV of 1882), s. 53—Civil Procedure Code (Act V of 1908), O. XXI, rr. 58, 63—Claim proceedings—Objection dismissed—Suit to establish title by objector—Transfer intended to defeat and delay creditors—Attaching creditor, whether can object to validity of transfer in defence—Suit to set aside transfer in representative capacity, whether necessary—Fraudulent transaction, whether can be avoided apart from s. 53, Transfer of Property Act.

In a suit for declaration of title by a purchaser from a judgment-debtor after the dismissal of his objection under Order XXI, rule 63 of the Civil Procedure Code, the attaching decree-holder is entitled to set up a defence that the sale in favour of the plaintiff was a sham transaction and was intended to defraud the creditors of the judgment-debtor.

A suit under section 53 of the Transfer of Property Act to avoid a transfer alleged to have been made with intent to defraud the creditors of the transferor need not necessarily be brought by one of several creditors in a representative capacity and a single creditor as a defendant in a suit to declare the transfer valid is entitled to avoid the plaintiff's transaction.

A defendant may use in defence a plea which would furnish him with ground for a suit, as this procedure would avoid multiplicity of suits.

A fraudulent and colourable transfer may be challenged otherwise than under section 53 of the Transfer of Property Act, for instance as being a sham transaction not intended to have any effect whatever. **N** DHANSUKHDAS v. ZANGOO, 16 N. L. R. 3 **798**

Transfer of Property Act—concl'd.

— **s. 53**—Manner of construing. See **HINDU LAW—JOINT FAMILY** 145

— **s. 55 (4) (b)**—Vendor and purchaser—Consideration, application of, towards payment to vendor's creditor—Agreement between purchaser and creditor for substitution of liability, absence of—Vendor's lien, enforceability of.

Where by an agreement between a vendor and purchaser, the purchase-money is to be applied by the purchaser in payment of the vendor's debts, and there is no completed agreement between the vendor's creditor and the purchaser for substituting the latter's liability for that of the vendor, the vendor is entitled to enforce his lien against the purchaser for the unpaid sale consideration. **M** THYGARAJA MUDALIAR v. SESHAPPIER, 10 L. W. 51^c; 27 M. L. T. 94 458

— **s. 55 (4)**—Vendor and purchaser—Mortgage bond, unregistered, executed to secure unpaid purchase-money, effect of—Vendor's lien, whether extinguished—"Contract to the contrary," what is—Suit on mortgage bond as simple money bond, whether maintainable.

Where an unpaid vendor takes an unregistered mortgage bond from the vendee to secure the payment of the purchase-money, the bond, being inadmissible in evidence as affecting the property sold, is not a contract to the contrary within the meaning of section 55 (4) of the Transfer of Property Act and does not operate to extinguish the vendor's lien.

Such a bond may be treated as a simple money bond and a suit would be maintainable on its basis as such bond. **M** RANGANAYAKI AMMAL v. PARTHASARATHY AYYANGAR, 10 L. W. 550 503

— **ss. 65, 68**—Contract Act (IX of 1872)—ss. 15, 16—Mortgage—Mortgagee deprived of part of security—Right to sue for mortgage money—Interest, high rate of—Coercion or undue influence, absence of—Hard and unconscionable transaction—Court, duty of—Equitable considerations, applicability of.

Where a mortgagee is deprived of a part of the mortgaged property by the act of the mortgagor, he is entitled to recover the mortgage money from the mortgagor.

Where in a contract of mortgage, interest is stipulated to be paid at the rate of 24 per cent. per annum, in the absence of coercion or undue influence there is no reason why the rate of interest stipulated should not be allowed.

The law relating to hard and unconscionable transactions has been codified in the Contract Act and a Court cannot go outside the statutory provision and follow some rules or supposed rules that have been applied in certain cases by the Courts of Equity in England. **C** HARIS CHANDRA NANDI v. KESHAB CHANDRA 785

— **s. 72**—"Contract to the contrary", what is. See EVIDENCE ACT, s. 96 264

— **s. 76 (c)**, obligation imposed by, on mortgagee, See EVIDENCE ACT, s. 96 264

Trust, private—Debutter estate—Shebait, failure of line of—Founder, right of, to appoint shebait—Removal of shebait, suit for, maintainability of—Administration of trust—Misconduct of trustee—Discretion of Court—Trustee, whether can purchase trust property—Civil Procedure Code (Act V of 1908), s. 92, applicability of, to private trust.

The rule embodied in section 92 of the Civil Procedure Code cannot be extended to private trusts.

Where the line originally indicated by the founder fails the founder or his heir has the right to nominate the shebait, and this principle applies equally to private and public trusts.

The founder or his heirs may also sue for the enforcement of the trust, for the removal of the old trustee, for the appointment of a new one and may thereby secure the proper administration of the trust and its properties. Whatever restrictions may have been prescribed by the Legislature as to the mode of institution of such suits in respect of public trusts, the rights of the founder of a private trust and his heirs remain unimpaired.

On the analogy of the well settled principle of English Law the view may be maintained that in respect of a debutter in India the founder or his heirs may invoke the assistance of a judicial tribunal for the proper administration thereof on the allegation that the trusts are not properly performed, and the case is strengthened when the management would under the terms of the trust vest in the plaintiff as the founder's heir, on a vacancy caused by the removal of the actual incumbent for misconduct.

A trustee cannot purchase trust property directly or indirectly from himself or at his own sale. The rule is universal that, however, fair the transaction, the *cestui que trust* is at liberty to set aside the sale and take back the property. The law does not stop to enquire into the fairness of the sale or the adequacy of the price but stamps its disapproval upon a transaction which creates a conflict between the self-interest and the integrity of the trustee and this principle is equally applicable to the case of a purchase made by the shebait at a sale publicly held or held at the instance of a Court in execution of a decree against the debutter estate.

The question as to whether there are sufficient grounds for the removal of a shebait is within the sound judicial discretion of the Court. In such a case the Court is guided by considerations of the welfare of the beneficiaries and of the trust estate, and also of a clear necessity for interference to save the trust property. **C** MANOHAR MOOKERJEE v. PEARY MOHAN MOOKERJEE, 30 C. L. J. 177; 24 C. W. N. 478 6

Trustees Act (XXVII of 1866), ss. 3, 6, 35, 40—Public charitable trust—High Court, power of, to appoint new trustee—Hindu institution—Bombay High Court Rules, r. 75 (z)—Application for appointment of new trustee—Procedure—Practice.

The High Court has power, under section 35 of the Trustees Act read with section 6 of the Act, in the case of a Hindu charitable trust to appoint a new trustee in place of one who has become incapable of acting in the trust.

Applications for the appointment of new trustees should normally be made by petition or summons to be heard in Chambers and the particular Act and

Trustees Act—concl'd.

section relied on must be specified in the application.

B LANG v. MOOLJI KARSONJI, 21 Bom. L. R. 1111
455

U. P. Honorary Munsifs Act (II of 1896), s. 8 (2), proviso—*Civil Procedure Code (Act V of 1908), s. 24 (4)—Small cause transferred to Court of Honorary Munsif—Decree, whether appealable.*

Where an Honorary Munsif acting under the U. P. Honorary Munsifs Act decides a suit transferred to him from a Court of Small Causes, he cannot be deemed to be a Court of Small Causes and his decree is appealable. **A IKHLAQ ALI v. BUDH SEN**
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U. P. Land Revenue Act (III of 1901),

s. 110—*Partition proceedings—"Date of issue of proclamation" what is—Objection filed beyond time—Court, discretion of, to entertain objection.*

Where there is a direction to fix a date as a matter of procedure, a Court is still at liberty, after expiration of that date, to entertain an objection and do justice between the parties if sufficient reason is shown for the delay.

The date of "issue" of a proclamation under section 110 of the U. P. Land Revenue Act is the day on which it is published in such a manner that the persons likely to be affected thereby can, with the exercise of reasonable prudence, obtain knowledge of its contents.

Where such a proclamation assumes the shape of a notice to be served personally on the co-sharer, the date on which personal service is effected is the date of "issue" of the proclamation, and it is from this day that the period of thirty days for preferring objections must be reckoned. **O SHEO RATAN SINGH v. ROHAN SINGH**, 1 U. P. L. R. (J. C.) 62
258

s. 110—*Time for filing objections, extension of—Jurisdiction of Revenue Court to direct party to get his title determined by Civil Court—Declaration of title, suit for—Khewat, entry in, effect of—Limitation—Adverse possession.*

The date originally fixed by the partition officer for filing objections under section 110 of the U. P. Land Revenue Act may from time to time be extended either on account of non-service of the notices or at the request of any of the parties; and the jurisdiction of the Revenue Court to direct a party to get his title determined by the Civil Court within a certain period is not ousted so long as an objection is filed within such extended period and no order is passed by the partition officer determining the shares of the parties and directing the method in which the partition is to be effected.

Where a person continues in possession of his property in spite of a contrary entry appearing in the *khewat*, no question of limitation or adverse possession can arise in a suit filed by him for declaration of his title. **O BHAGWAN BAKHSH SINGH v. SANT PRASAD**, 6 O. L. J. 523; 22 O. C. 369; 2 U. P. L. (J. C.) 64
317

U. P. Municipalities Act (II of 1916),

s. 323, applicability of—*Suit to recover refund of octroi duty, nature of—Limitation applicable.*

Plaintiff instituted a suit against the Municipal Board of Agra to recover a sum of money, to which he was entitled under the rules, as refund of octroi

U. P. Municipalities Act—concl'd.

duty on goods exported by him from Agra. The suit was dismissed as having been brought beyond the period of six months prescribed by sub-section (3) of section 326 of the U. P. Municipalities Act. The High Court was moved in revision against the order of dismissal, and it was contended that the provisions of the foregoing sub-section referred only to suits arising out of acts done inadvertently or illegally for which a suit for damages would lie, and that that sub-section did not apply to suits for money demandable from a Municipal Board in consequence of a breach of contract or of a legal relation resembling a contract:

Held, that inasmuch as the plaintiff's cause of action had its origin in the refusal of the Municipal Board to pay a sum which it was legally bound to pay, the suit as framed was a suit for compensation within the description of suits in sub-section (1) of section 326 and was not founded upon a breach of contract or the breach of some relation resembling a contract and that, therefore, the rule of limitation contained in sub-section (3) of the section was applicable to it. **A MAKHAN LAL v. MUNICIPAL BOARD OF AGRA**, 1 U. P. L. R. (A.) 178; 18 A. L. J. 180
459

Valuation of suit—*Suit for declaration that attachment does not affect plaintiff's mortgage—Subsistence of mortgage not disputed—Valuation for purpose of jurisdiction.*

In a suit for a declaration that an attachment in execution of a decree against the judgment-debtor does not affect a mortgage of the property in plaintiff's favour, where the subsistence of the mortgage is not in dispute, the proper valuation for the purpose of jurisdiction is not the value of the property but the amount for which execution is sought. **M MADUKURI ANKAMMA v. MUVVALA SUBBAYYA**, 37 M. L. J. 611
543

Village temples—*Control and management vested in villagers—Decision of majority, whether binds minority—Civil Procedure Code (Act V of 1908), s. 11—Res judicata, determination of, by reference to pleadings, issues and judgment—Question of law, when res judicata.*

The relationship of the inhabitants of a village in respect of a temple and its properties owned and managed by them in common partakes more of the character of a corporation than that which exists among the members of a club or trustees, public or private, and the law regulating the latter does not apply to them.

In matters relating to the management of village temples the decision of the majority in meetings duly convened binds the minority.

To constitute a matter *res judicata* the matter directly and substantially in issue in the subsequent suit must be the matter which was directly and substantially in issue, either actually or constructively, in the former suit. Whether a matter has been dealt with and adjudicated on is to be determined by a reference to the plaint, the written statement, the issues and the judgment. An issue of law may be *res judicata* if the cause of action in the subsequent suit is the same as that in the former suit. The operation of a decree as *res judicata*, so far at any rate as the subject-matter of a direct adjudication contained in the decree is concerned,

Village temples—conold.

can in no way be affected, in the absence of fraud or collusion, by the fact that the suit was the result of a mistake of law or that the decree proceeded on such mistake. As between the parties thereto it must be held to be binding and to operate as *res judicata*. **M VENKITASUBBAN PATTAR v. AYYATHURAI**, 37 M. L. J. 554; 26 M. L. T. 364 **202**

Wajib-ul-arz, construction of, See **LAMBARDAR** **634**

_____, entries in, value of. See **CUSTOM—PRE-EMPTION** **875**

_____, entries in, value of. See **CUSTOM—SUCCESSION** **419**

Wajib-ul-arz—conold.

_____, entry in, of wishes of co-sharers, whether proof of custom. See **CUSTOM—PRE-EMPTION** **768**
_____, whether creates right—**Garpagari**, right of, to recover dues from tenants.

A *wajib-ul-arz* is a mere record of custom; it does not create a right.

A *wajib-ul-arz* mentioned a *garpagari*, whose duty it was to ward off hailstorm by means of *mantras*, as one of the village servants, who got a sheaf of corn from the tenants at the time of the crops:

Held, that the entry did not make it obligatory upon the tenants to seek the *garpagari*'s services and to pay for them. **N SITARAM v. RAKHADU** **177**

J. N. Dar
Advocate High Court
Jammu & Kashmir
Srinagar.



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